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# CALIFORNIA REPORTER

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# CALIFORNIA REPORTER

127 PACIFIC REPORTER





163 Cal. 726

## STERN v. JUDSON. (L. A. 2,721.)

(Supreme Court of California. Sept. 23, 1912.)

## 1. JUDGMENT (§ 419\*)—CONSTRUCTIVE SERVICE—AFFIDAVIT—CONCLUSIVENESS.

An affidavit for an order for publication of summons against one not found within the state, reciting use of due diligence to find defendant, requires issuance of the order, if the affidavit is sufficient in form, but neither the affidavit, nor an order for publication based thereon, is conclusive that such diligence was used; the question being open as between the parties on a direct attack on the judgment obtained on such service, on the ground that the service was procured on a false affidavit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 794; Dec. Dig. § 419.\*]

## 2. JUDGMENT (§ 461\*)—PUBLICATION SERVICE—AFFIDAVIT FOR—DILIGENCE—EVIDENCE—SUFFICIENCY.

Evidence *held* to sustain findings that plaintiff, in a former action, did not use bona fide diligence to ascertain the whereabouts or address of defendant therein, notwithstanding the recital of such diligence in an affidavit for publication service.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 892-895; Dec. Dig. § 461.\*]

Department 2. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge. Action by S. Stern against W. B. Judson. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Haas, Garrett & Dunnigan, of Los Angeles, for appellant. Sharp & Rech, of Los Angeles, for respondent.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



LORIGAN, J. On June 29, 1904, the appellant, Judson, commenced an action, entitled W. B. Judson v. C. S. Patrick et al., against this plaintiff and 17 other parties to quiet his alleged title to various parcels of land in Los Angeles county, including lots 15 and 16 of the New York tract, averring in his complaint that he was the owner in fee thereof, and that defendants had no estate or interest therein. Service of summons was by publication; the order of the court therefor being based on the verified complaint in said action and an affidavit of plaintiff, made and filed therein, in which he stated that he had examined "the great register of the city and county of Los Angeles, \* \* \* the tax roll for several years last past, \* \* \* and did not find the addresses therein of any" of 12 of the defendants in said action (mentioning them), including the present plaintiff; that he had made "numerous inquiries as to the residence of each and every of the above-named defendants from \* \* \* Julius Lyons, Esq., A. H. Judson, the county tax collector, auditor, and county recorder, \* \* \* also W. R. Jones, H. A. Greenwald, and A. G. Strain," all of Los Angeles county, "and also numerous other people who would be likely to know the whereabouts of the above-named defendants, and each and every of them replied that they did not know the address or addresses of any of said above-named defendants, \* \* \* wherefore affiant says that after using due diligence and making numerous inquiries and search for the place of the residence of each and every of said defendants \* \* \* that said defendants cannot be found within the state of California, or personally served with process therein;" that summons had been issued, and return thereon made by the sheriff of Los Angeles county that he could not find any of the defendants within the county of Los Angeles. An order for publication was made on this affidavit, publication had, the default of the defendants entered, and judgment thereafter entered on January 25, 1905, in favor of plaintiff, Judson, in that action, as prayed for in his complaint.

In December, 1907, this action was brought by the present plaintiff for a decree setting aside the said judgment of Judson v. Patrick et al., in so far as it affected the title or interest of plaintiff to lots 15 and 16 in the New York tract included in the said judgment, on the ground that said judgment was procured through fraud on the part of appellant, and was void as against this plaintiff. In support of this claim, it was alleged: That since 1888 plaintiff had been and now was the owner of said lots 15 and 16. That the only claim said Judson ever had to said property was under a tax deed issued on a sale of said property for delinquent taxes for the year 1891, which deed was void. That said Judson, as plaintiff in the action of Judson v. Patrick et al., at the

time he filed his complaint therein, had no right, title, or interest in said lots, and that said statement in his verified complaint that he was the owner of said property was false, and known by him at that time to be false. That the statement contained in the affidavit of said Judson for the order of publication of summons, that he, Judson, had inquired of the county tax collector, who replied that he did not know the address of the plaintiff herein, was false, and known to be false by Judson at the time said affidavit was made by him. That said affidavit was false and fraudulent, in that said Judson did not use due diligence in attempting to ascertain the address or whereabouts of plaintiff in this: That he was then well acquainted and had business dealings with his grantor under the tax deed, Julia Rodgers, and her husband, Ralph Rodgers, from whom the present plaintiff had purchased the said real estate, and by the exercise of reasonable diligence could have ascertained by inquiry of them the whereabouts and address of this plaintiff. That plaintiff herein was never served personally with summons in said action, and had no knowledge whatsoever of said action or judgment until about February 1, 1907. In praying that said judgment be set aside, plaintiff offered to pay the defendant, Judson, the amount necessary to redeem the tax sale above referred to.

On the trial of the action the court found: That for more than 20 years last past plaintiff herein had resided continuously in the city and county of San Francisco. That on March 18, 1891, plaintiff was the owner of said lots 15 and 16 of the New York tract, on which date the tax collector of said county sold said property to one J. N. Rodgers (known as Julia A. N. Rodgers) for delinquent state and county taxes for the year ending June 30, 1891, and on June 20, 1904, said tax collector made her tax deeds therefor. That on or about June 1, 1904, said J. N. Rodgers had conveyed said lots to the defendant herein, Judson. That said Rodgers had no title or interest in said property, other than what she acquired under said tax deeds, and that said tax deeds were null and void. That the allegation in the verified complaint of the defendant herein, as plaintiff in said action of Judson v. Patrick et al., that he was the owner of said lots in fee was false and untrue. That he did not have any title or interest therein. That at the time of the filing of said complaint he did not have actual knowledge that he had no right or title therein, and was not guilty of intentional fraud in bringing and prosecuting said action. That the affidavit filed by him for the purpose of procuring an order for the publication of summons and service thereunder was false and untrue in this: That he did not use due, reasonable, or bona fide diligence, or make reasonable efforts, to ascertain the

address or whereabouts of the plaintiff herein at or before the making and filing of said affidavit.

The court further found in several other findings that it was not true, as stated in said affidavit, that Judson had made numerous inquiries and searches for the place of residence of plaintiff; nor was it true that plaintiff could not be found within the state of California; but, on the contrary, if Judson had made due, reasonable, or proper inquiries, or used due diligence, and had made numerous or proper inquiries or search for the place of residence or whereabouts of plaintiff, as was reasonably and properly required of him, he would have learned and ascertained the residence or whereabouts of the plaintiff.

It was specially found by the court that the said lots involved in said judgment had been assessed to the plaintiff for 15 years last past, and, with the exception of the taxes for the year ending June 30, 1891, he had paid all the taxes assessed thereon; that at the time Judson filed his affidavit in the action of Judson v. Patrick et al., and for a long time prior thereto, there was and had been on file in the tax collector's office of the county of Los Angeles a letter from plaintiff herein in reference to taxes assessed against the property involved here; that said letter was open to public inspection upon proper request therefor; and that said letter gave the address of plaintiff herein; that Judson did not make such inquiry of the tax collector as was reasonably and properly required of him, and was guilty of gross negligence amounting to fraud in failing to make such reasonable and proper inquiry of the said tax collector of the address or whereabouts of the plaintiff.

As conclusions of law, the court found that Judson committed and was guilty of fraud against plaintiff herein and the court in making and filing his affidavit in said action of Judson v. Patrick et al., and in securing an order for publication of summons in said action, and through procuring judgment thereon in said action against plaintiff herein based on said publication of summons; that on payment of \$14.12, the amount required to redeem said property from said tax sale, for the use of Judson, the plaintiff have a decree canceling and setting aside the judgment rendered in favor of Judson, in as far as it affected the plaintiff herein, or his title or interest in said lots 15 and 16 of said New York tract. Judgment was entered accordingly, and defendant moved for a new trial, which being denied, he appeals alone therefrom.

No question is made on this appeal but that the findings as made sufficiently sustain the judgment. The sole point presented is as to the sufficiency of the evidence to sustain the findings of the court on the matter of the due diligence exercised by the ap-

pellant to ascertain the whereabouts or address of the respondent when he commenced the action of Judson v. Patrick et al. and made the affidavit for an order for the publication of summons. The claim of appellant is that the finding in this respect is not sustained by the evidence, but that it shows the utmost good faith on his part in trying to ascertain such whereabouts. Whether it does or not is the main point in controversy in this appeal.

It appears therefrom that prior to 1887, and continuously thereafter, respondent resided in the city of San Francisco, where, until the great fire of 1906, he conducted a barber shop, called the Metropolitan Barber Shop. In 1887 one Ralph Rodgers was the owner of a large tract of land in Los Angeles county, near the town of Garvanza, which he plotted into lots and blocks as a subdivision to said town, to be known as the New York tract. In that year he placed the tract on the market, disposing of the lots by auction and lottery, principally the latter, held in the town of Garvanza. An auction was also had in San Francisco, and the respondent acquired his lots thereat in 1887, and procured a written agreement for the sale thereof, signed by Ralph Rodgers. Rodgers thereafter transferred all his interest in the tract to one Newton, who conveyed it to one Childress as trustee, and in 1888 the latter made the deed to respondent. It was understood by the appellant that Childress, while describing himself in the deeds made to respondent and various others simply as "trustee," was in fact, while the conveyances did not disclose it, acting as such for the benefit of Ralph Rodgers. These matters were all known to appellant several years before he acquired the deed from Julia N. Rodgers, wife of Ralph Rodgers, to the lots involved here, and at the time he brought his action against respondent and others, except that he did not know that an auction had been held in San Francisco, or that the contract of sale to respondent had been signed by Ralph Rodgers.

Appellant had acquired a familiarity with the records and matters pertaining to the tax collector, assessor, and recorder's offices, and in 1902 had entered into a contract with Julia N. Rodgers, wife of said Ralph Rodgers, to clear up the title to property in and about Garvanza and in the New York tract, to which she made claim, and with that end in view had made an abstract from the records of the entire town of Garvanza and the New York tract, embracing some thousand titles, including that of respondent. Appellant himself had acquired title to some 30 or 40 lots in the New York tract. The general locality in which respondent's lots were located was unimproved, and there were no houses in the immediate vicinity thereof. While acting for Mrs. Rodgers in endeavoring to clear up her title to the prop-



erty claimed by her, which embraced property acquired by her through tax sales, and with a view of making the necessary affidavits respecting service of notice of application for tax deeds under the tax system then prevailing, the appellant made some search or inquiry as to the address or whereabouts of respondent and other tax delinquents. These were made within two years before bringing the suit to quiet title, though some were made about the time it was brought. As to the nature and character of these inquiries, appellant testified that he examined the great register of Los Angeles county, the index to the tax rolls for several years, and the city directory of the city of Los Angeles, and inquired of people living out in Garvanza—people who had lived there several years, and who might possibly know any of the old-timers who had lived there before appellant's time. As to the old-timers, he only mentioned three, and none of these are mentioned by name in the affidavit for publication. What particular advantage they had of possessing knowledge of the whereabouts of respondent, the evidence of the appellant does not disclose. Nor is it apparent how appellant expected to ascertain the whereabouts of respondent from the great register, tax rolls, or city directory, as he testified that, while making these inquiries, he did not suppose that respondent was a resident of the county. As to the inquiries made by him of the persons actually mentioned in his affidavit, he inquired of W. R. Jones; but all that appears respecting Jones is that he lived in Los Angeles city. There is nothing in the testimony to indicate how he could expect any enlightenment whatever of the whereabouts of respondent from Jones, or why he should inquire of him rather than any other resident of Los Angeles city. He asked H. Greenwald and H. G. Strain. Greenwald was a collector in Los Angeles, and appellant had often heard him speak of old residents of Los Angeles, and for that reason he made the inquiry of him. Strain was likewise an old resident of the same county. He inquired of him for that reason. Whereabouts in the county Greenwald or Strain resided when his inquiries were made, appellant did not know; nor did he know at the time of the trial. A. H. Judson, since deceased, was the father of appellant, and Julius Lyons was the attorney for appellant in the suit to quiet title involved here. How either of these two was in a position to enlighten appellant on the subject of the whereabouts of respondent is not shown; and, while appellant states in his affidavit and testified on the trial that he had made numerous inquiries of other people likely to know the whereabouts of respondent, aside from the persons above referred to, no person was specifically mentioned by name on the trial as embraced within that number.

In addition appellant testified, as he stated in his affidavit, that he inquired of the tax collector the address of the respondent, and was informed by him that he did not know. As far as this inquiry is concerned, it appears that when appellant visited the tax collector's office he had a list of names respecting six or seven pieces of property in the New York tract which he wanted to take out deeds for—apparently deeds under tax sales—and asked the tax collector if he knew any of those parties, or where he could find out about them, or be referred to any one who might know them, and received a negative answer from the tax collector. This was all the inquiry made at that time, and this was the manner of making it. When appellant made his inquiries, he knew of the deed to respondent for these lots, and that thereafter he continued to be the record owner thereof; that they had always been assessed in his name; and that every year, with the exception of the year 1891, the taxes were being paid on them by some one, and, of course, presumably by the respondent, who was the owner, and to whom they were assessed. In making his inquiry of the tax collector, appellant did not inform him that the property was assessed to the respondent, whose whereabouts he was seeking to ascertain, nor call the officer's attention to the assessment to respondent as it stood upon the assessment roll. He merely made the general inquiry as to the several parties on his list, and contented himself with the response he got.

Now it appears that for the years 1902 and 1903, at the time appellant made his visit to the tax collector's office, there appeared upon the assessment of the property to respondent for each of these years, or was written across the face thereof, certain numbers, which had reference to correspondence or letters on file in the tax collector's office in relation to the taxes assessed against this property, and that if the appellant, instead of making a general inquiry directed simply to the whereabouts of respondent, among others, had called the attention of the tax collector to the fact that the property was assessed to the respondent, the tax collector would have referred to the letters indicated by the numbers on the assessment, and endeavored to ascertain therefrom the address of the respondent. The figures indicated the existence of such correspondence at the time appellant was making his general inquiry, and the evidence showed that respondent had always, in the matter of taxes upon these lots, written to the tax collector to ascertain the amount of his taxes, and upon receipt of an answer had forwarded it by letter to him.

Aside from this, it appears that Ralph Rodgers, with whom appellant was well acquainted, had a book containing a record of the sales made by him in the New York tract,

including that to respondent, which would have shown that these lots were sold to the respondent in San Francisco at the auction sale held there, and that he could and would so have informed appellant, had he made an inquiry of him. Appellant understood long before his suit against respondent to quiet title that Ralph Rodgers had subdivided this tract, placed it upon the market, and sold the lots at auction and otherwise, and that in making the deeds to the parties Childress was acting simply as his trustee. Appellant had on several occasions written Childress to ascertain the residence or whereabouts of grantees in deeds made by him, and was told by Childress that he did not know of them, as he was simply a trustee in making the conveyances. Childress did not state for whom he was acting as trustee; but it appears to have been generally understood in the neighborhood, where a great many controversies existed between Rodgers, his wife, and his creditors, respecting the lands located in the New York tract and in Garvanza, that he was trustee for Rodgers, and appellant so understood. Possessing this information, in the exercise of the most ordinary diligence, he should have made inquiry of Rodgers. The only reason assigned by him for failing to do so in this instance was that, owing to some litigation, there existed an ill feeling between them. While this might have been an excuse for failure to make a personal inquiry, it afforded no reasonable excuse on the part of the appellant for failing to make the inquiry at all. He could readily have sent some third party to have made it, just as he had done in other instances he mentioned; and if he had done so he would have received the information which Rodgers possessed.

Again, it further appears that the deed of these lots to respondent was filed at the request of Wells Fargo & Co. Appellant testified that in examining the deed to respondent he did not discover this; but in the exercise of due diligence he could have and should have discovered it. It was there plain enough. The fact that the deed was filed for record by Wells Fargo & Co. would have disclosed to appellant, if he had been ordinarily careful in examining it, a source from which he might, and in all probability would, have discovered from whence and by whom the deed had been sent through the company for recordation, and hence have been put in the way of ascertaining the location of the respondent.

[1] The law permits, under some circumstances, a plaintiff to procure an order for the publication of summons where the defendant in the action, after the exercise of

due diligence on the part of the plaintiff, cannot be found within the state, and the fact is so made to appear by affidavit by or on behalf of the plaintiff. Such an affidavit is always *ex parte*, and the court, when it is sufficient in form, must accept and act upon it and grant the order. But in proceeding to avail himself of this statutory mode for constructive service of summons, a plaintiff must, in fact, have exercised due diligence. A mere formal compliance with the provisions of the statute, or a statement to that effect in his affidavit, will not suffice; nor will an order for publication based upon such an affidavit, or a judgment following a service by publication thereon, be conclusive of the fact that such diligence was exercised. The question is open as between the parties under a direct attack on the ground of fraud on the part of plaintiff in procuring the judgment, which is the attack made here. When a false affidavit is presented to the court for the purpose of obtaining an order for the service of summons by publication, this, of itself, is an act of fraud, both upon the court which was induced to make the order thereon, and equally a fraud upon the defendant in the action; and any judgment based thereon will be set aside in an action by the defendant constructively served against the plaintiff claiming the benefit of the judgment thus fraudulently procured, and where no rights of innocent third parties claiming under the judgment are involved.

[2] Here the evidence fully warranted the court in concluding that the investigation which the appellant claims to have made to ascertain the whereabouts of a number of persons against whom he contemplated suit, including this respondent, was a mere perfunctory one, amounting to no more than a mere form of investigation, which of itself would indicate lack of good faith in making it. When, in addition, there is taken into consideration that there were sources from which he could obtain information, if his inquiry had been pursued with ordinary care and candor, as the law requires he shall exercise, and other sources of which he had knowledge, or should have had, from which the residence and whereabouts of the defendant might have been ascertained, there can be no question but that the findings of the court that the appellant had not used due, reasonable, or bona fide diligence to ascertain the whereabouts or address of respondent, and that his statements in the affidavit that he had were false and untrue, are sufficiently sustained by the evidence.

The order appealed from is affirmed.

We concur: HENSHAW, J.; MELVIN, J.



(163 Cal. 797)

## In re KUNKLER'S ESTATE.

POLLETT v. DUDEN et al. (S. F. 6,103.)

(Supreme Court of California. Sept. 26, 1912.)

Rehearing Denied Oct. 26, 1912.)

## 1. WILLS (§ 863\*)—CONSTRUCTION—DISTRIBUTION OF RESIDUUM.

Where a testatrix disposed of a portion of her estate and directed that the remainder should be converted into cash and apportioned, appropriated, and paid out to different legatees in different percentages, the legatees named did not constitute a class, in the sense that on the death of one of them, who was related by blood to the deceased, his share would be ratably divided among the other parties thereto, rather than pass, under the statutes of distribution and descent, to his lineal descendants, who were legal heirs of the testatrix.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2187; Dec. Dig. § 863.\*]

## 2. WILLS (§ 863\*)—CONSTRUCTION—EFFECT OF DEATH OF RESIDUARY LEGATEE.

And legacies to strangers in blood, who predeceased the testatrix, became a part of the undisposed of residuum of the estate, and would pass to the heirs at law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2187; Dec. Dig. § 863.\*]

Department 2. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

In the matter of the estate of Laura E. Kunkler, deceased. From a decree of distribution entered, Marie Kunkler Pollett appeals. Affirmed.

S. Bloom, of San Francisco (Costello & Costello, of San Francisco, of counsel), for appellant. W. C. Graves, of San Francisco, for respondents.

**HENSHAW, J.** By her olographic will Laura E. Kunkler, after disposing of certain articles of personal property to designated legatees, directed that all of the remainder of her estate should be converted into cash, and after the payment of her debts the money remaining should be "apportioned, appropriated and paid out as follows." Then followed the names of 14 legatees, to each of whom she left a named percentage of the moneys; to one 15 per cent., to another 5 per cent., to another 10, to another 4, to another 2, and finally "ten per cent. to some worthy charity"—the total aggregating 100 per cent., and thus making a disposition of her whole estate. A codicil to her will, also admitted to probate, provided: "At my death I wish my nephew Eugene L. Duden receive but five (\$5.00) dollars from my estate. He will know the reason why. This is my last wish. My other heirs will see that this is carried out." Three legatees named in the will, who were strangers in blood to the testatrix, died prior to her death. Another legatee, a niece, also died prior to the death of the deceased, leaving no lineal descendants. The attempted legacy of 10 per cent. to "some worthy charity"

is admittedly void. As to all of these legacies, the court, upon distribution, declared that they were undisposed of by the will and belonged to the heirs at law. Civ. Code, §§ 1343, 1386. Eugene L. Duden, named in the codicil, had been left a legacy of 10 per cent. This was revoked by the codicil, and the court decreed that this fell also in the residuum undisposed of by will.

[1] Certain legatees related by blood to the deceased died prior to her death, leaving lineal descendants. The court decreed distribution of their legacies, amounting in the aggregate to 8 per cent. of the whole, under section 1310 of the Civil Code, to their lineal descendants. The appellant, one of the legatees, insists that this distribution is erroneous; that all of the legatees constitute a class as residuary legatees; and that all the legacies which have failed by reason of death, revocation, or other cause belong to, and should be ratably distributed amongst, the remainder of the class. Herein appellant argues that a construction resulting in testacy is to be preferred to one producing intestacy in whole or in part; that the testatrix's intent is to govern, and that her intent clearly was to dispose of all her property to and amongst the named legatees; that they therefore constitute a class; that significance attaches to her use of the words "apportioned, appropriated and paid out"; and, finally, that the language of the second codicil, above quoted, revoking the 10 per cent. legacy to her nephew Eugene, sets at rest "any possible doubt as to the foregoing conclusions." The argument upon this proposition will suffer, if stated in any other words than those of appellant's attorney, and it is therefore quoted in extenso: "Now, at the time when this codicil was written by the testatrix herself, Clarence E. Duden, the brother of testatrix and the father of Eugene, was living, and was known to the testatrix to be living, and said Clarence was an heir at law of the testatrix. Eugene, the son of Clarence, was therefore *not* a technical heir at law of the testatrix by reason of the fact that his father, Clarence, was living. And when the testatrix in this codicil speaks of her *other* heirs, it is evident that she used the word 'heir' in the colloquial sense and not technically, and that she regarded Eugene as one of her 'heirs,' according to the common usage of the term as meaning simply the legatees under the will, her beneficiaries, and by 'other heirs' the residuary legatees 'other' than Eugene. Now, it is further evident that if Clarence, the brother of deceased, and one of her technical heirs at law at the time of making the will and codicils, should at any time after making the second codicil have died before decedent, how could the other heirs at law, technically so called, prevent Eugene from succeeding, as an heir at law of deceased, by right of representation in lieu of his fa-

ther, Clarence, being the child of a deceased brother, who was an heir at law, unless it was the intention of testatrix in this will that the residuary legatees should take the whole residuum, to the exclusion of her heirs at law? Unless this construction is given to the will, how would it be possible for the 'other heirs' to 'see that this is carried out,' namely, Eugene prevented from succeeding to a greater portion of the estate than \$5? The only way in which Eugene could by every possibility be shut off from succeeding as an heir would be by the construction given to this will by the appellant, namely, that the surviving legatees named in the residuary clause shall take all lapsed, void, and revoked legacies 'in proportion' or pro rata."

We cannot, however, agree with appellant as to the conclusiveness of the argument here presented. Nor is it as plain to this court as it seems to be to appellant that this language creates a bequest by necessary implication. To the mind of the court, the testatrix disposed of her property by 14 different legacies to 14 different legatees. These legatees constituted a "class" only in the sense that it may be said as to any will that all legatees are in a class, as separated from the rest of the world, or as separated from other legatees in other wills. In no other sense, and in no legal sense at all, were these legacies a gift to a class; nor were the legatees a class. So plain we take this proposition to be that we hesitate even to quote authority upon the proposition, but in quoting it is certainly enough to set forth the following from Jarman on Wills (6th Ed.) p. 432: "A gift to several named persons is not a gift to a class, unless words of contingency are added, as where the gift is to A., B., C., and D., 'if living'; and a gift to several named persons, without more, is not a gift to a class, even if they stand in a common relationship to the testator, as where the gift is to my sons A. and B., and to my daughter C.; and if a testator, after a gift to children, proceeds to name them, and he specifies their number, as by giving to the five children of A., this is a designation personorum, and is a bequest to those who are named, or to the five in existence at the time of the will, and the shares of any who dies before the testator lapse." See, also, *Estate of Hittell*, 141 Cal. 432, 75 Pac. 53, and *Estate of Murphy*, 157 Cal. 63, 106 Pac. 230, 137 Am. St. Rep. 110.

[2] The court's decree of distribution was correct in holding that the legacies to the strangers in blood, who predeceased the testatrix, became a part of the undisposed residuum of the estate and went to the heirs at law. *Estate of Sutor*, 139 Cal. 87, 72 Pac. 827. Equally sound was the court's conclusion as to the relatives who died leaving lineal descendants. The case is simply one where, as was said in the *Estate of Hit-*

tell, supra, the decedent did not anticipate every contingency and changed condition.

The decree appealed from is affirmed.

We concur: LORIGAN, J.; MELVIN, J.

163 Cal. 793

ALDEN v. MAYFIELD. (Sac. 1,943.)

(Supreme Court of California. Sept. 25, 1912.)

FIXTURES (\$ 15\*) — STORE FRONTS — "TRADE FIXTURES."

Heavy plate glass windows and marble installed by a tenant as the front of a store building cannot be regarded as "trade fixtures" which he was entitled to remove, where removal exposed the interior of the building, though it was accomplished without wrenching nails, breaking beams, or weakening the building.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 23-29; Dec. Dig. § 15.\*

For other definitions, see *Words and Phrases*, vol. 8, p. 7042.]

Department 2. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by Victoria Alden against C. E. Mayfield. From a judgment for defendant and from an order granting a new trial, plaintiff appeals. Reversed and remanded.

W. U. Goodman, of Fairfield, for appellant. T. T. C. Gregory, of Fairfield, for respondent.

HENSHAW, J. Plaintiff sued to recover damages for injury to her freehold and for an injunction to restrain threatened future damages. The specific charge of damages was that the defendant "between midnight of the 28th day of May and daylight of the 28th day of May, wrongfully and unlawfully cut down, tore out, and removed the heavy plate glass and stone front of a brick building belonging to plaintiff and replaced the same with a cheap temporary structure with great damage to said property and the said plaintiff in the sum of \$1,000." Defendant admitted the taking down and removal of the plate glass and the marble stone front, but alleged that while tenant of the building he placed the plate glass and marble in the building; that the windows and marble were owned by him "and were placed there by him for the purpose of trade, ornament, and convenience only, and were trade fixtures, and not an integral part of the said store or premises, and could be and were removed without any injury to the premises." The court found in accordance with this averment of the answer. It further found that defendant threatened to remove fixtures which were part of the freehold, and as a conclusion of law declared that plaintiff was entitled to an injunction restraining defendant from injuring the freehold; but by its judgment withheld the injunction and gave judgment for defendant for costs. From this judgment, and from the order denying her motion for a new trial, plaintiff appeals.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



It is to be noted that the answer does not base the right of removal upon any agreement between the landlord and tenant, and the court does not find that the removal was by virtue of any such agreement. Wherefore, all of respondent's argument based upon section 1013 of the Civil Code is meaningless. The pleadings and the findings are to the effect that the property removed was the tenant's property, was affixed to the freehold for the purpose of trade, ornament, and convenience, and had not become an integral part of the store or premises. This is a finding under section 1019 of the Civil Code, which permits such removals under the indicated circumstances. The questions presented are, first, whether the plate glass and marbles so removed belonged to the defendant, and whether, if they so belonged to the defendant, they were attached to the freehold in such manner as to justify his removal of them. That they were attached by screws is uncontradicted. That the plate glass windows and the marble formed the front of the store occupied by defendant is equally without controversy. Their removal necessarily, and against any evidence to the contrary, was the removal not of a fixture but of a portion of the building itself—the very front of the store. By such removal the building itself ceased to be an inclosure, and was open to intruders and the elements. The testimony of the contractor who placed the windows and marbles in place, to the effect that "they were so attached that the removal could be effected without injury to the premises," could only mean that they were so attached that in the process of removal the rest of the building would not be weakened or injured. If the evidence meant anything else, it was contrary to the manifest physical facts, and can have no weight; for it is futile to say that the removal of the plate glass and marble front of a store is not an injury to the building itself, and so to the freehold. But construing this evidence to mean only that the process of removal did not, by the wrenching of nails, or the breaking of beams or the weakening of the structure, injure the building, it must be said that the evidence does not support the finding, for it is not and cannot be disputed that by the removal the building was injured and its value impaired. Nor is respondent's position strengthened by calling this store front of marble and glass trade fixtures or trade ornaments to attract patronage. They were not trade fixtures nor trade ornaments. They constituted a part and an important part of the building itself. Concededly a beautiful store front of plate glass and marble may be expected to exercise a trade attraction superior to unkempt windows and dirty wood, but the plate glass and stone front do not for this reason suffer conversion from their true character as part of the building, into a mere trade ornament.

The famous dome of Tiffany glass in Marshall Field's Chicago establishment undoubtedly exercises by its beauty a trade attraction. But one would not therefore acquiesce in the proposition that the tenant could remove the dome as a trade fixture and ornament. The same is true here. Under the very language of section 1019 of the Civil Code the plate glass and marble had become an integral part of the premises by their use and by the very manner in which they were affixed. They were so affixed by screws and by these screws made a part of the store front. Section 660, Civil Code, declares that: "A thing is deemed to be affixed to land when it is permanently attached to what is thus permanent on the land, as by means of cement, plaster, nails, bolts or screws." It is useless to discuss so plain a proposition, or to do more than to cite, amongst the many authorities bearing upon it, *McNally v. Connolly*, 70 Cal. 3, 11 Pac. 320; *Hendy v. Dinkerhoff*, 57 Cal. 6; *Lavenson v. Standard Soap Co.*, 80 Cal. 245, 22 Pac. 184, 13 Am. St. Rep. 147.

Upon the question of ownership, it is made to appear that defendant as tenant desired to make certain changes in the building. On account of the cost of these changes, he was allowed by plaintiff \$175, or, in other words, plaintiff bore \$175 of the cost of these changes upon her premises. Defendant testifies that the plate glass windows and the marbles were his, and that the \$175 was not applied in whole or in part to their cost or to their placement. In this, however, he is contradicted by statements in his own handwriting presented to his landlord, where for several months he deducted \$20 from the rent on account of these very changes in the store front.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: MELVIN, J.; LORIGAN, J.

164 Cal. 6

ALDEN v. MAYFIELD (two cases).  
(Sac. 1,940, 1,944.)

(Supreme Court of California. Sept. 25, 1912.  
Rehearing Denied Oct. 25, 1912.)

1. LANDLORD AND TENANT (§ 308\*) — EVIDENCE—SUFFICIENCY.

Evidence held to sustain findings that a landlord's duly authorized agent waived an increase in rent imposed by the landlord, but insufficient to show waiver by him of a notice to quit previously served.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1314-1316; Dec. Dig. § 308.\*]

2. PRINCIPAL AND AGENT (§ 100\*)—EXISTENCE OF RELATION.

A tenant could not rely upon a son's agency for his mother, the lessor, as giving authority to waive a notice to quit which had been served, where she repudiated the son's previous action in waiving an increase in rent

and employed an attorney to dispossess the tenant, who was told that the son had no further agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 262-273, 345, 364, 368-374; Dec. Dig. § 100.\*]

### 3. PRINCIPAL AND AGENT (§ 120\*) — EXISTENCE OF AGENCY.

On an issue of waiver by the landlord of a notice to quit which had been served, it was error to exclude testimony that, as soon as the lessor discovered at the trial that rent payments had been deposited to her son's credit as her agent after such service, she directed return of the same, where it appeared that the son had no agency for her.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 402-412; Dec. Dig. § 120.\*]

### 4. PLEADING (§ 129\*)—ADMISSIONS—FAILURE TO DENY.

On proceedings to eject a tenant under notice to quit, his failure to deny that he was holding over against the lessor's will constitutes an admission that he knew there was no waiver of the notice.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 270-275; Dec. Dig. § 129.\*]

### 5. LANDLORD AND TENANT (§ 308\*)—NOTICE TO QUIT—WAIVER—EVIDENCE.

Unconditional acceptance by a landlord of moneys as rent accruing after possession should have been surrendered under notice to quit is strong evidence of waiver of the notice, but not conclusive; intent to waive being an essential element.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1314-1316; Dec. Dig. § 308.\*]

### 6. WORDS AND PHRASES—"WAIVER."

"Waiver" is the intentional relinquishment of a known right after knowledge of the facts.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7375-7381.]

### 7. LANDLORD AND TENANT (§ 132\*).

A tenant from month to month is as much entitled to damages for illegal interference with his tenancy as any other tenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 460-464, 467-469; Dec. Dig. § 132.\*]

### 8. DAMAGES (§ 40\*)—PROSPECTIVE PROFITS.

In proper cases, damages based for loss of prospective profits may be awarded a tenant for interference with the possession.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 72-88; Dec. Dig. § 40.\*]

### 9. APPEAL AND ERROR (§ 1175\*)—REVERSAL—DISPOSITION OF CAUSE.

On reversal of a judgment because the findings, which are not attacked by respondent, are insufficient to sustain the judgment and would support judgment for appellant, judgment will not be rendered, where it appears that it would result in injustice to respondent; a new trial being properly awarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.\*]

Department 2. Appeals from Superior Court, Solano County; A. J. Buckles, Judge.

Action by Victoria Alden against C. E. Mayfield. From the judgment and from an order denying a new trial, plaintiff appeals, and defendant appeals from a judgment for plaintiff on a cross-complaint. Reversed and remanded.

T. T. C. Gregory, of Fairfield, for appellant. W. U. Goodman, of Fairfield, for respondent.

HENSHAW, J. Plaintiff sued in ejectment to recover possession of certain property, which possession was withheld by defendant after service upon him of 30 days' notice to quit. In separate counts and causes of action plaintiff sought to recover, besides the possession of the property, damages for its detention and the value of the rents and profits. *Sullivan v. Davis*, 4 Cal. 291; *Johnson v. Visher*, 96 Cal. 310, 31 Pac. 106.

The admitted facts are that Victoria Alden, plaintiff, was the owner of a store in Suisun which the defendant had been occupying under a tenancy from month to month, paying therefor a rental value of \$65 a month. In June, 1908, there was served upon the defendant a notice of an increase of rent from \$65 a month to \$100 a month. This increase in rent was never paid by defendant, but defendant continued in possession, paying \$65 a month and contending that the notice of an increase of rent was waived by R. C. Haile, agent of the plaintiff, duly authorized to make such waiver. Haile resided in Suisun, Mrs. Alden, his mother, resided in Oakland, and Haile managed her property. By direction to Haile the rent was to be deposited each month in a local bank to the credit of plaintiff. In the latter part of March, 1910, Mrs. Alden was at her bank in Suisun, and discovered that the defendant had been paying, not \$100 a month, but \$65 a month. She sought and had an interview with him at the bank, in which interview she demanded the payment of the back rent. Defendant refused to acknowledge the indebtedness, saying that her son Richard had declared that the rent should remain without increase. Mrs. Alden then informed him that Mr. Haile had no authority to reduce the rent, and, upon the defendant's offer to pay \$100 a month if he could secure a lease for a term of years, Mrs. Alden answered that she declined to have anything further to do with him, and would not let him remain longer in possession of the property under any circumstances. Mrs. Alden then immediately consulted her attorney, and upon May 2, 1910, served upon defendant a formal notice to quit and surrender possession upon the last day of May, 1910. Civ. Code, § 827. The complaint alleged that the defendant "refused on the 1st day of June, 1910, to deliver up said possession of the said premises to said plaintiff and continues in possession of same without the consent and against the will and wish of plaintiff; that said defendant now withholds the possession of said premises from the said plaintiff." This allegation is not denied by the answer. But, notwithstanding his failure



to deny, defendant undertakes to plead a waiver of the notice to quit, and does so by averring that, under the terms of the lease, he was to deposit the rental upon the first of each and every month in a local bank to the credit of plaintiff; that all sums paid as rental have been so deposited; that on or about June 1, 1910, and on or about the first of each succeeding month, defendant has deposited a like sum in like manner; that "R. C. Haile, agent of plaintiff as aforesaid, is duly authorized to draw from the bank any money on deposit there to the credit of plaintiff; that said R. C. Haile knew that the notice to quit had been served as therein alleged ever since on or about April 12, 1910, and with full knowledge of the breach thereof and that defendant was in possession of the said premises contrary to the said notice, accepted the said sum deposited as the rent for June and with full knowledge thereof has accepted a like sum on or about the 1st of each and every succeeding month."

[1] Appeal No. 1914. The foregoing outlines the important issues presented upon this appeal, which is taken by the plaintiff from the judgment and from the order denying her motion for a new trial. The court's findings were in favor of the defendant as to the agency of Haile and his waiver of the increase in rent to \$100 a month, which was to go into effect upon the 31st day of July, 1908. The waiver it is found was an oral waiver. Upon the waiver of the notice to quit and surrender possession the findings follow the allegations of the answer.

Appellant attacks these findings as being unsupported. The first to invite consideration are those which find that Haile, the duly authorized agent of plaintiff, waived the increase of rent from \$65 to \$100 a month. Without reviewing the evidence, it is enough to say that there is sufficient to establish the agency and the power of Haile to make this waiver. It is true that the notification was in writing, and that the waiver was by parol agreement. Civ. Code, § 1698. But it sufficiently appears from the unconditional acceptance by the agent of the lesser amount of rent that the oral agreement became executed and therefore binding. It is argued that Mrs. Alden knew nothing of this purported waiver, and this is doubtless true. Yet she had clothed her son as her agent, actual or ostensible, with sufficient power to make the waiver, and she is bound by his conduct in so doing. True it is, also, that Haile, who at the trial was dead, had denied by verified answer that he had ever agreed to such a waiver. True it is that in other respects the evidence upon the matter is sharply conflicting, but, as has been said, there is sufficient to support the finding of the court in this regard.

[2] The same, however, cannot be said of the finding of the waiver of the notice to

quit. All the facts and all the circumstances demonstrate that there was no waiver, and that the defendant never honestly believed that there was a waiver. Those facts and circumstances are the following: He knew, and so testifies, that in March, 1910, Mrs. Alden insisted upon the payment of the back rent and refused to accept his explanation that her son had waived it, then telling him in terms that her son had no authority so to do. He knew, and so testifies, that, because of this difference and of other grievances which Mrs. Alden entertained against him, she refused and to him declared that she refused to allow him longer to occupy her premises upon any terms. He knew that the notice to quit was thereafter promptly served upon him. He knew who Mrs. Alden's attorney was and consulted that attorney, seeking a way out of his difficulties, and was by this attorney informed that he, the attorney, had sole charge of the matter, and that Haile had nothing further to do with the property. He was by this attorney informed that the notice to quit would be enforced, and that he would be expected to deliver possession upon the 1st of June following. In his answer he even admits that he was withholding possession without the consent and against the will of the plaintiff, but seeks to justify that holding because of an asserted waiver by the agent of plaintiff. And in what did that waiver consist? His tenancy terminated with the beginning of June 1st. Yet upon June 1st he deposits with the bank not even the \$100 a month rental insisted upon by Mrs. Alden, but \$65. He did this without notice to Mrs. Alden, her attorney or to Haile. This action in ejectment was begun the day after. Nothing could more clearly evince a refusal to waive the terms of the notice, or a refusal to accept rent, than the commencement of this action, and yet it is contended and found, because this amount was thus slipped into the bank and by the bank placed to the credit of the plaintiff, that she had waived her right to enforce the termination of the tenancy. To this point the contention is so preposterous as not to merit discussion. But it is said that the tenant continued month by month so to deposit the \$65, and that Haile must have known of this, and that, therefore, Haile's acceptance and use of the money constitutes the waiver, though admittedly Haile's principal, the plaintiff herein, knew nothing about it. The difficulty with this argument is that the defendant was informed before the deposit of money, both by the principal and by her attorney, that Haile no longer had anything to do with the matter, and we repeat that defendant's endeavor under those circumstances to re-establish the relationship of tenancy with the landlord who had repudiated him and terminated the tenancy was but a shallow bit of subterfuge and trickery.



[3] In this connection it should be added that, doubtless on the theory that Haile's agency and his power to waive the terms of the notice to quit had been established, the court improperly refused to allow plaintiff to testify that only at the trial had she for the first time discovered that defendant had so deposited the money, that such deposits were without her authority, and that she instructed the bank to return them.

[4-6] Still further in this connection, it is to be noted that the defendant does not deny, as it was incumbent upon him to deny, the allegation that he was holding over against the will and consent of the plaintiff. This he admits and the admission under the circumstances is a pregnant one. It amounts to an admission that he knew there was no waiver and no continuation of the tenancy so far as plaintiff was concerned. The testimony as to the receipt of the rents amounts to no more than this. The plaintiff owned other pieces of property, and had other tenants thereon. One and all they were instructed to deposit their rents when due to her credit in the local bank. The local bank received these deposits and credited them to the account of plaintiff. Not having received positive instructions from the plaintiff to the contrary, they received the deposits made by defendant on and after June 1st, entered them in a bank book, and credited them to the account of plaintiff. It does not appear except inferentially, and because of the fact that Haile had possession of the bank book from time to time, that even Haile knew that defendant was depositing moneys for rent, and it certainly does not appear that Haile ever knew that defendant was claiming that he (Haile) had assented to a continuation of the tenancy and to a waiver of the notice to quit. The unconditional acceptance by a landlord of moneys as rent, which rent has accrued after the time the tenant should have surrendered possession, will constitute strong evidence of the landlord's waiver of his notice to quit. 18 Am. & Eng. Ency. of Law, 402. But waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts. *Silva v. Campbell*, 84 Cal. 422, 24 Pac. 316. Therefore the evidence, so far from establishing a waiver, with all that a waiver implies—a meeting of minds and the intentional forbearance to enforce a right—clearly establishes that there was no waiver, but only an effort by defendant surreptitiously to do something which might in some way advantage him and enable him the longer to hold possession. This is made manifest from the fact that defendant was not prepared to leave the building, had no other location or store in which to move his goods, and was desirous of remaining where he was until he could secure other accommodations. The finding in this respect being unsupported, it follows that the judg-

ment and order appealed from should be reversed and the cause remanded for a new trial. And it is ordered accordingly.

Judgment in 1944.

Appeal No. 1940. Besides answering plaintiff's complaint, defendant cross-complained and presented as grounds of cross-complaint the disturbance of his quiet possession and the injury to his business occasioned by the acts of Haile, agent of plaintiff, while defendant was occupying the premises as the tenant of plaintiff. In particular the cross-complaint charged that: "Within the last year, and both before and after June 1, 1910, the said R. C. Haile, agent as aforesaid, entered the said premises and threatened to immediately remove defendant and his said stock of merchandise from the premises. Said R. C. Haile on all of these occasions told the defendant that he owed many thousands of dollars back rent and requested its payment, and demanded possession of the premises on behalf of plaintiff and as her agent and said that the said plaintiff was entitled to the possession thereof. The said R. C. Haile, agent as aforesaid, on all of these many occasions talked in a loud and threatening manner. On one of the said occasions it was necessary for the defendant to eject the said Haile from the said premises on account of the great disturbance he was creating."

[7, 8] The court found in accordance with the allegation last above quoted, and further found that "the quiet enjoyment and possession of defendant was molested and disturbed to such an extent that he concluded to sell and did sell his said stock at a great sacrifice and at more than \$3,127.59 below its real worth and cost and suffered a loss thereby including prospective benefits of more than \$7,691.22." Further findings of the court are identical with those just considered in the previous appeal, and are to the effect that the tenancy was continued after June 1st, through the waiver of the notice to quit. The court's unexplained conclusion of law from these findings is that the plaintiff take nothing by his cross-complaint, and judgment upon the cross-complaint was entered accordingly. From that judgment cross-complainant and defendant Mayfield appeals upon the judgment roll alone, and urges, with justice, that the tenant under a tenancy from month to month is as much entitled to damages for an illegal interference with his tenancy as is any other tenant. This is true. *Heilbron v. Centerville & Kingsburg Irr. Ditch Co.*, 76 Cal. 8, 17 Pac. 932; *Dwyer v. Carroll*, 86 Cal. 298, 24 Pac. 1015; *McDowell v. Hyman*, 117 Cal. 67, 48 Pac. 984. And in proper cases damages may be predicated upon a loss of prospective profit. *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327; *Civ. Code*, § 3300; *Hawthorne v. Siegel*, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291.

[9] Appellant next contends upon the authority of such cases as *Overacre v. Blake*, 82 Cal. 77, 22 Pac. 979, that this appeal presents a case where the findings are unattacked and are sufficient to support a judgment in his favor, but that the conclusions of law are erroneously drawn from the findings; that, since the findings establish that the judgment should be in his favor, this court will reverse the judgment upon appeal, with directions to the court below to enter a correct judgment upon the findings. In many cases, indeed it may be said that ordinarily, such would be the ruling and direction of this court. But not so here, nor in any case where to do so would be to countenance a grave injustice. In this case, as in the preceding appeal, the whole superstructure rests upon the finding of the continuation of defendant's tenancy after June 1st. That finding, as we have said and discussed, is unsupported, and upon direct appeal the case in which that finding has been made has been reversed. To grant appellant's request in the present instance would be to countenance a judgment based upon this unsupported finding and cast the plaintiff in damages in the sum of over \$7,000, for no dollar of which the record shows her justly liable. Under the plenary powers vested in this court by section 53 of the Code of Civil Procedure, it will order a judgment only in a proper case and order a new trial where the action seems to demand it. Certainly this is such an occasion; for, in addition to what has already been said, the allegation of the cross-complaint and the finding of the court thereon still further negative the idea that Haile could have waived or could have believed that he had waived the notice to quit, or could in any other way have recognized the continuance of the tenancy, since the finding is that before and after June 1st he was repeatedly threatening to remove defendant and his stock of merchandise from the premises and demanding possession of the premises—conduct absolutely foreign to any notion of a waiver and a renewal of tenancy.

Wherefore the judgment here appealed from is reversed, and the cause remanded for a new trial.

We concur: MELVIN, J.; LORIGAN, J.

163 Cal. 740

FIEG v. GJURICH. (Sac. 1922.)

(Supreme Court of California. Sept. 23, 1912.  
Rehearing Denied Oct. 23, 1912.)

DEEDS (§ 70\*) — FRAUD IN PROCUREMENT — EVIDENCE.

Plaintiff was entitled to cancellation of a deed which defendant induced her to make to him, where she was old and infirm, and, reposing trust in him, permitted him to transact nearly all of her business, and where he fraud-

ulently led her to believe that she would be arrested by the federal authorities for having in her possession uncanceled revenue stamps, etc., unless she made the conveyance; he promising to hold the property for her benefit.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 165–182; Dec. Dig. § 70.\*]

Department 2. Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Action by Fanny Fieg against Emanuel Gjurich. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

See, also, 160 Cal. 331, 116 Pac. 745.

Jacobs & Flack and A. H. Carpenter, both of Stockton, for appellant. Chas. Light, of Stockton (Percy S. Webster, of Stockton, of counsel), for respondent.

MELVIN, J. This action was brought by Fanny Fieg for the setting aside of a conveyance of real property on the ground of fraud. The court gave judgment in her favor. From it defendant appeals, and also prosecutes an appeal from the order denying his motion for a new trial.

The findings, which are amply supported by the evidence, are to the effect that for 10 years prior to the delivery of the deed from plaintiff to defendant the parties to this action, although unmarried, had cohabited and lived together, on the premises owned by the plaintiff, as husband and wife; that they had there conducted a saloon, defendant acting for plaintiff and transacting nearly all of the business of the place for her; that she reposed an especial confidence and trust in defendant, and was in all things influenced and controlled by him; that Fanny Fieg was an old woman, infirm in health, and particularly susceptible to the influence of defendant for those reasons; that defendant corresponded with a special agent of the Treasury Department of the United States, informing him that uncanceled revenue stamps could be found upon plaintiff's premises, and that through his efforts revenue officers visited the place, and, assisted by defendant, there found uncanceled revenue stamps; and that plaintiff did not know of the existence of such stamps on the premises before they were found by the revenue officers. There are further findings, reciting the means by which defendant worked upon the fears of the aged plaintiff until she executed a deed conveying all of her property to him. It is not necessary to recite all of these findings, but among them are the following: "That beginning about two weeks immediately preceding said 27th day of November, 1907, said defendant at different times during said two weeks told said plaintiff that said revenue officers were about to and would again visit her said premises, and they would arrest said plaintiff for having in her possession



said uncanceled stamps, and also for having in her possession certain confederate bills; that immediately preceding said 27th day of November, 1907, said defendant held in his hand and showed said plaintiff a letter, which he said that he had just received from the said revenue officers; that in and by said letter he was informed and notified that the said revenue officers were coming to her said premises, and that said revenue officers would then and there arrest said plaintiff, and that said revenue officers would proceed to and would confiscate all of her said property, and that she would be imprisoned in the state's prison from five to ten years; that said defendant then and there informed said plaintiff that there was but one way of saving her property from said threatened confiscation and loss, and that was by conveying the whole of her said property to him (defendant); that he (defendant) would save and hold all of her said property for her."

We are at a loss to know why appellant contends that such representations, shown to have been false, were not sufficient to constitute fraud and to support the judgment. The whole record shows a most despicable and carefully planned swindle by which the old woman was deprived of her property. Appellant's principal contention seems to be that, the land having been conveyed to defeat the government, it may not be recovered by the grantor. In this behalf he cites such cases as *Hills v. Sherwood*, 48 Cal. 386, and *Sexey v. Adkinson*, 34 Cal. 346, 91 Am. Dec. 698, which hold that a conveyance, made for the purpose of defrauding creditors, is good as against all the world except creditors. But such cases have no application here. The rule announced by those cases applies to persons in pari delicto; but where one acts under the influence and domination of another standing in a relation of trust and confidence, and the conveyance is obtained by means of that very relation, equity will always cancel the deed. 6 Cyc. 317, and cases there cited.

No other questions raised by appellant require special comment.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(163 Cal. 782)

PERKINS v. BLAUTH et al. (Sac. 1,956.)

(Supreme Court of California. Sept. 24, 1912.  
Rehearing Denied Oct. 24, 1912.)

# 1. TRESPASS (§ 19\*)—DAMAGE TO PROPERTY—RIGHT TO SUE—OWNERSHIP OF PROPERTY.

A plaintiff in an action for damages for injury to property need only show that the ownership and right of action were in him at the time of the commencement of the suit.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 18-31; Dec. Dig. § 19.\*]

## 2. PLEADING (§ 403\*)—DEFECTS—CURE BY SUBSEQUENT PLEADING.

Though a complaint in an action for damages for injury to land did not sufficiently show that the plaintiff was the owner of the property at the time of the commencement of the action, where the answer tendered issue on the question of ownership by denying that the plaintiff was ever the owner or in possession of the property, evidence was introduced and the cause tried on the theory of the issue thus joined, there was a cure of any defect in the complaint.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1343-1347; Dec. Dig. § 403.\*]

## 3. TRESPASS (§ 40\*)—DAMAGE TO PROPERTY—COMPLAINT—SUFFICIENCY.

In an action for damages to land from the cutting of a gap in a levee and the failure to repair it, a complaint is not insufficient for its failure to aver that the acts of the defendants were without the plaintiff's consent, as there is no presumption that the plaintiff consented to an unwarranted invasion of his property rights.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 80-88; Dec. Dig. § 40.\*]

## 4. DRAINS (§ 57\*)—DAMAGE TO PROPERTY—COMPLAINT.

And though such complaint does not aver in terms that the acts of the defendant were negligently done, where it does state that the defendants cut a canal through the natural bank of a river and after cutting it failed to take proper precautions to prevent the waters of the river from flooding plaintiff's land, to his injury, it is sufficient to charge the necessary negligence.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 67, 69; Dec. Dig. § 57.\*]

## 5. DRAINS (§ 17\*)—DREDGING—INJURIES TO PROPERTY OWNERS—LIABILITY OF RECLAMATION DISTRICT COMMISSIONERS.

Though a reclamation district entered into a contract with a dredging company to do dredging work, and the district was liable for the negligent performance of such work whereby property was injured, the trustees of the district were also liable to the owner of land injured by a negligent failure to perform their duty.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 11, 12; Dec. Dig. § 17.\*]

## 6. MUNICIPAL CORPORATIONS (§ 745½\*)—LIABILITY FOR INJURIES—ACTS OF OFFICERS AND AGENTS.

While municipal corporations are not liable for an injury resulting from the dereliction of municipal officials or agents in the performance of public or governmental functions, or in the performance of such duties imposed upon those officers as are prescribed and limited by express law, where the act is one commanded by the municipality itself and is inherently wrong, the municipality and the agents who perform it will both be liable.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1568, 1569; Dec. Dig. § 745½.\*]

## 7. MUNICIPAL CORPORATIONS (§ 744\*)—LIABILITY FOR INJURIES—ACTS OF OFFICERS AND AGENTS.

But where the injury results not from the wrongful plan or character of municipal work, but from the negligent and improper manner in which it is performed, the one so negligently acting will always be responsible and the corporation may or may not be responsible, depending upon the relationship which it may sustain to that agent.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1565; Dec. Dig. § 744.\*]

**8. EMINENT DOMAIN (§ 69\*)—CONSTITUTIONAL GUARANTY—DAMAGING PRIVATE PROPERTY FOR PUBLIC USE.**

Under Const. U. S. Amend. 5, neither the state nor any of its agents or mandatories may claim exemption from liability for an injury from the taking or damaging of private property for public use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 171-179; Dec. Dig. § 69.\*]

**9. DRAINS (§ 57\*)—DRAINAGE DISTRICT—DAMAGES TO LAND—EVIDENCE.**

In an action for damages against the trustees of a reclamation district for injuries caused to land in cutting a ditch through a river bank and levee to permit the passage of a dredger, evidence held to show negligence on the part of the trustees in failing to provide a suitable dam.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 67, 69; Dec. Dig. § 57.\*]

**10. APPEAL AND ERROR (§ 1002\*)—REVIEW—FINDINGS OF FACT.**

The findings of a jury on conflicting evidence are conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

**11. MASTER AND SERVANT (§ 332\*)—INDEPENDENT CONTRACTOR—WHEN A JURY QUESTION.**

While, where the nature of a contract establishing the relationship of parties defendant in an action for tort is disputed, the question of employé or independent contractor may properly be left to the jury under appropriate instructions, yet where the evidence is not conflicting as to what is the contract, the question of dependent or independent contractual relationship is one of law for the court.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1274-1277; Dec. Dig. § 332.\*]

**12. DRAINS (§ 57\*)—LIABILITY FOR INJURY—SERVANT OR INDEPENDENT CONTRACTOR—CONSTRUCTION OF CONTRACT.**

A contract for dredging, between trustees of a reclamation district and a dredging company, reserved to such "trustees, their superintendent, or engineer," the right to direct and supervise the work of dredging and indicate the manner thereof, and the manner of the making of repairs where it should become necessary to cut the levee. Held, the dredging company was not an independent contractor, but was an employé of the district.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 67, 69; Dec. Dig. § 57.\*]

**13. DRAINS (§ 57\*)—DAMAGES TO LAND—ACT OF GOD.**

In an action against the trustees of a reclamation district and others for damages for injuries caused to land in cutting a ditch through a river bank and levee to permit the passage of a dredger, evidence held insufficient to show that the damage was caused by a flood so extraordinary as to amount to an act of God, and which could not have been prevented by the exercise of ordinary care.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 67, 69; Dec. Dig. § 57.\*]

**14. TRIAL (§ 91\*)—ADMISSION OF EVIDENCE—MOTION TO STRIKE OUT.**

A motion to strike out evidence which was not objected to at the time it was offered, made after the witness had left the stand and the case was closed, was properly denied.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 242-244, 252; Dec. Dig. § 91.\*]

**15. DAMAGES (§ 217\*)—INJURY TO LAND—INSTRUCTIONS.**

In an action for damages for injuries caused to land in cutting a ditch through a river bank and levee to permit the passage of a dredger, an instruction that the difference in the market value of the land before and after the damage was the measure of the defendants' liability was proper, where there was no evidence on behalf of the defendants that there was no permanent injury to the land, and that it could have been cleared of sand washed thereon, and cured of its other injuries for a sum less than the damages awarded, and the court limited it by other instructions that the jury could only award damages for the detriment or injury to the land which they found was caused by the negligent act of defendants.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 556-559; Dec. Dig. § 217.\*]

**16. DAMAGES (§ 69\*)—INTEREST.**

Interest on the jury's award in an action for negligent injury to land could only run from the date of the liquidation of damages by the jury's assessment, and was improperly allowed from the date of the injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 137-140; Dec. Dig. § 69.\*]

Department 2. Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by C. Perkins against Theodore Blauth and others. From a judgment for plaintiff, Theodore Blauth, Charles F. Silva, and C. M. Goethe appeal. Modified and affirmed.

P. S. Driver and Devlin & Devlin, all of Sacramento, and Charles W. Thomas and Charles W. Thomas, Jr., both of Woodland, for appellants. Arthur C. Huston and Harry L. Huston, both of Woodland, for respondent.

HENSHAW, J. Plaintiff sued defendants for damages in tort for injuries caused to his land. It is charged that the defendants cut a ditch some 60 feet wide and 12 feet deep through the bank of the Sacramento river and through a large levee constructed about 150 feet back from the river margin, to permit the passage of a dredger; that, after so excavating and cutting the bank, the defendants failed to erect a suitable dam or other fill sufficient to prevent the water of the Sacramento river from flowing through the ditch or canal thus dug and upon plaintiff's land; that, by reason of its negligence in this respect, the waters of the Sacramento river did flow through this canal upon plaintiff's land, inundating the same, carrying large deposits of sand, destroying fences, removing the soil, and injuring it in the amount sued for. The defendants were Blauth, Goethe and Silva, trustees of reclamation district No. 785, Ashley, the surveyor and engineer of the district, and the Bay & River Dredging Company, which cut the canal. The reclamation district was not made a party to the action, and a nonjoinder was set up by defendants' answer. It was proven at the trial that the defendants Blauth, Goethe,



and Silva were acting in their official capacity as trustees of the reclamation district. A nonsuit was granted as to the Bay & River Dredging Company, and as to Ashley, the surveyor and engineer of the district. The jury rendered a verdict in favor of the plaintiff against the defendants Blauth, Goethe, and Silva. From the judgment which followed and from the order denying their motion for a new trial these defendants appeal.

[1] 1. The complaint sufficiently states a cause of action. While the complaint alleges that at all times therein mentioned plaintiff was the owner of the property, it is contended that it does not allege that he was the owner and in possession at the time of the commencement of the action, and it is argued that for all that appears to the contrary at the time of the commencement of the action plaintiff may have sold the property, and with it his right to damages for its injury. All, however, the plaintiff is required to show in this regard is his right of action at the time of the commencement of the suit.

[2] The answer tendered issue on the question of ownership by denying that plaintiff was at any time or at all the owner or in possession of the property. The ownership thus becoming an issue, evidence was introduced thereon, and the case was tried upon the theory of the issue thus joined. This sufficiently cured any defect that it may be conceived existed in the complaint.

[3] It is next urged that the complaint does not aver that the cutting of the canal, and the failure to erect the dam was done without plaintiff's consent. But we are not advised of any rule of pleading which requires a declaration from plaintiff that an unlawful trespass was committed without his acquiescence. There is no presumption that a plaintiff consents to an unwarranted invasion of his personal rights or rights of property.

[4] For the third objection to the sufficiency of the complaint, appellants argue that it is not averred that any work was negligently done, and that no facts are alleged from which negligence can be imputed. In this connection it is said that there is no averment that no dam or obstruction to the water of the river was erected, but only that no sufficient dam or other obstruction was erected. It is, of course, not necessary to aver in terms that an act was negligently done to state a cause of action in tort. Says Cooley (2 Elements of Torts, p. 19): "One may become liable in an action as for tort either (1) by actually doing to the prejudice of another something he has no legal right to do; (2) by doing something he may rightfully do, but wrongfully or negligently doing it by such means, or at such time, or in such manner, that another is injured; (3) by neglecting to do something which he ought to do, whereby another suffers injury." The allegations of the complaint taken together

amount to this: That the defendants cut a canal through the natural bank of the Sacramento river. After cutting the canal, it failed to take proper precautions to prevent the waters of the river from flooding plaintiff's land; that the waters of the river did in fact flood plaintiff's land to his injury. The complaint was therefore sufficient to pass a general demurrer.

[5] 2. Notwithstanding the fact that Blauth, Goethe, and Silva were acting as trustees of the reclamation district, they were responsible to plaintiff for the injury occasioned to his property by the negligent performance of their duty. The argument of appellants against this proposition is that the reclamation district entered into a contract with the Dredging Company to do the dredging work; that the part which the defendants took was solely in their official capacity as trustees of the district. If the work was negligently performed, the legal responsibility rests upon the district alone. But, if a tortious act has been committed by an agent acting under authority of his principal, the fact that the principal thus becomes liable does not, of course, exonerate the agent from liability. It may be conceded that a liability was cast upon the principal. *Hopkins v. Clemson College*, 221 U. S. 636, 31 Sup. Ct. 654, 55 L. Ed. 890, 35 L. R. A. (N. S.) 243. But this fact in and of itself does not relieve from liability the agents of the reclamation district who permitted or committed the wrong. Appellants rely upon that class of cases which hold that, under circumstances where discretion is vested in public officers, those officers are not responsible for mistakes of judgment when they have honestly, though mistakenly, exercised their discretion. The doctrine is thus stated by Chief Justice Taney in *Kendall v. Stokes*, 3 How. 98, 11 L. Ed. 506: "A public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion, even though an individual may suffer by his mistake." It is an unwarranted extension of this rule to seek to apply it to the exoneration of an officer for an act which would have been proper if performed by him with due care, but which has resulted in injury to another because of the performance by him without due care. *Green v. Swift*, 47 Cal. 536 (upon which appellants rely), was an action for damages brought by a property owner for injuries to his land because of the act of the commissioners of the state appointed under authority to rectify the channel of the American river. In so doing they forced the waters of the river upon the land of plaintiff to its injury and destruction. A bare majority of the court rendered the decision in this case. It was said that "there is no question that the work as done by the defendants was in point of execution done with proper care



and skill." The reasoning of the opinion proceeds with the declaration that the work itself having been done with proper care and skill defendants are not responsible "for injuries to others resulting from the work itself," and it concludes that such damages belong to that class known as *damnum absque injuria*; the implication being that the state had the power to order the work done as a public convenience or necessity, and that the property owner whose lands were injured or destroyed in the process of the work was not entitled to redress under the constitutional provision forbidding the damaging or taking of private property for public use. The soundness of the conclusion in this case is open to grave question, in view of the later decision of the Supreme Court above cited. *Hopkins v. Clemson College*, 221 U. S. 636, 31 Sup. Ct. 654, 55 L. Ed. 890, 35 L. R. A. (N. S.) 243. The same may be said of *De Baker v. Railway Co.*, 106 Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237, which cites *Green v. Swift* as authority to the proposition that the agents in the performance of work of public character are exempted from liability for any direct or consequential damages to third persons which may arise from their execution of the work, provided they execute it with due care and according to the adopted plan. But, giving to these cases all the weight as authority for which appellants contend, still it is apparent that they do not measure up to the contention which is advanced in this case. In this case the gravamen of the charge is that these agents did not exercise due care. In 47 Cal. and in 106 Cal., 39 Pac., 46 Am. St. Rep., it is expressly admitted that responsibility attaches to the agent if he has failed to exercise such care. *Ballerino v. Mason*, 83 Cal. 447, 23 Pac. 530, was an action against the assessor for damages; it being alleged that as assessor he "willfully and against law" assessed plaintiff's property at too large a sum. This court quoted the language of Chief Justice Taney as above given, held the complaint to be insufficient to charge that the assessor acted maliciously with intent to wrong or injure the owner, and declared that, in the absence of such averment, it must be assumed that the assessor simply erred in his judgment, and for such a mere error of judgment he was not responsible. To the same effect, under very similar circumstances, arose the case of *Gridley School District v. Stout*, 134 Cal. 592, 66 Pac. 785.

[6] The principles to be deduced from the decisions in this state are that municipal corporations are not liable for dereliction or remissness of municipal officers or agents in the performance of public or governmental functions of the city, or in the performance of duties imposed upon those officers which are prescribed and limited by express law; and, when an injury results from the wrongful act or omission of a municipal officer charged with duty prescribed and limited by law,

the doctrine of respondeat superior is inapplicable. The officer is not treated as the agent or servant of the corporation in the performance of such duty, but is held to be the servant and agent of and controlled by the law, and, while for his tortious acts he will be held responsible, the municipality will not. *Sievers v. San Francisco*, 115 Cal. 648, 47 Pac. 687, 56 Am. St. Rep. 153. Upon the other hand, if the act is one commanded by the municipality itself, if inherently wrong, the municipality and the agent who performed will both be liable. *Brownell v. Fisher*, 57 Cal. 150; *De Baker v. Railway Co.*, 106 Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237.

[7] If the injury results, however, not from the wrongful plan or character of the work, but from the negligent or improper manner in which it is performed, the one so negligently acting will always be responsible, and the public corporation may or may not be responsible, depending upon the relationship which it may sustain to that agent. *Conniff v. San Francisco*, 67 Cal. 45, 7 Pac. 41; *De Baker v. Railway Co.*, supra; *Denning v. State*, 123 Cal. 316, 55 Pac. 1000; *Melvin v. State*, 121 Cal. 16, 53 Pac. 416.

[8] One important principle, however, is to be noted in this connection. Wherever the injury complained of is the taking or damaging of private property for public use without compensation then under the guarantee of the federal Constitution against such invasion of the private rights of property, neither the state itself nor any of its agencies or mandatories may claim exemption from liability. Amendment Const. U. S. art. 5; *Hopkins v. Clemson College*, supra. The case presented against these defendants is precisely that of *Brownell v. Fisher*, supra, and *Bellegarde v. S. F. Bridge Co.*, 90 Cal. 180, 27 Pac. 20. In the *Brownell* Case the defendants, as here, were the trustees of a swamp land district, and for the trespass charged against them they urged that they were acting as trustees of the district, were authorized by the district to perform the acts which were done, wherefore the district was responsible for the damages occasioned by their acts, and not the defendants. In *Bellegarde v. S. F. Bridge Co.*, the street contractor sued for damages urged as a defense that he had not been guilty of negligence in the performance of the work, but that the acts resulting in the injuries were justifiable and unavoidable in the prosecution of the lawful work authorized by the city and county of San Francisco. In both instances, to these asserted defenses, the answer of this court was the same, that regardless of the responsibility of the principals the agents were unquestionably responsible for the negligent performance of their duties.

[9] 3. The evidence established the negligence of the defendants in their failure to

construct a suitable dam or fill to prevent the entrance into the cut or canal of the river water. The evidence showed that entering from the river the dredger made a cut 50 or 60 feet in width up to the levee, through the levee and along the side of respondent's ranch. Thereafter a small fill or dam was made between the excavation in the levee and the channel of the river. This fill was 4 feet below the natural bank of the river, and but 12 or 14 feet wide on top. Nothing further was done to obstruct the flow of the river or to protect the lands of the respondent. Thus, while theretofore respondent's lands had been protected by a levee situated from 100 to 150 feet from the natural bank, which levee was 20 to 50 feet on its base and about 8 feet above the natural surface of the ground, the condition left by these defendants was a canal 50 or 60 feet wide cut 12 feet below the natural surface and dammed to prevent the intruding waters to a height not even level with the natural surface, but 4 feet below. It is in evidence that this fill or dam gave way, with the resulting overflow of the respondent's lands while the water in the river was below its natural bank. There was a sand-bar near to the mouth of this canal, and the sand from this bar, by reason of the depth of the cut, was drawn through it and deposited in great quantities upon plaintiff's land.

[10] Many subordinate questions in the case as to whether the sand was actually deposited through the cut or through breaks in the levee in front of plaintiff's place, which afterwards occurred, were all submitted to the jury under conflicting evidence, and their findings are conclusive upon this court.

[11, 12] 4. The Bay & River Dredging Company was not an independent contractor, and the court was correct in instructing the jury to this effect. In cases where the nature of the contract between the parties establishing their relationship is in dispute, and the evidence thereon conflicting, the question of employé or independent contractor may properly be left to the jury under appropriate instructions from the court. But where the evidence is not conflicting and the contract between the parties is without dispute, the question of dependent or independent contractual relationship is one of law for the court. *Green v. Soule*, 145 Cal. 96, 78 Pac. 337. Such was the case here. The contract in terms was between the reclamation district and the Bay & River Dredging Company, but it provided that the dredger of the company should be at a place to be indicated by the trustees of the district by a given date "and from that time shall be under the direction and supervision of the said trustees, \* \* \* and shall do the work of cutting itself from the Sacramento river into said district where and in the

manner to be indicated by the said trustees, their superintendent or engineer. \* \* \* After entering said district the said dredger 'Mogul' is to fill in a dam in the canal where the front of the levee has been cut and repair the same in such manner as may be indicated by said trustees, their superintendent, or engineer." Enough has thus been quoted to show how entirely foreign the facts and the contract in this case are to those appearing in *Teller v. Bay & River Dredging Co.*, 151 Cal. 209, 90 Pac. 942, 12 L. R. A. (N. S.) 267, 12 Ann. Cas. 779, upon which appellants rely. In the *Teller Case* it was sought to charge responsibility upon the Frankenheimers, farmers, inexperienced in dredging work, who simply employed a dredger to dig a ditch upon their land and who exercised no control over the dredger or its operations other than to indicate the location of the ditch. It was held that the dredging company was responsible as an independent contractor and not the farmers. But, under the contract in the present case, the trustees, not only in fact directed what should be done and how it should be done, but the very right of direction and control was reserved to them by the contract, even the right of control in the specific matter of repairing the cut in the levee made by the dredger.

[13] 5. Defendants' argument that the damages were caused by an extraordinary flood, an act of God, to prevent the consequences of which the exercise of ordinary care would not avail, is not supported by the evidence. The evidence establishes that while there was a high flood, indeed it may be said an exceptional flood, the dam in the canal went out before the river was even bank full, and that it was by reason of the inadequacy and insufficiency of this dam that sand in injurious quantities was drawn through the cut and cast upon plaintiff's land.

[14] 6. To prove damages, evidence of the difference in the market value of the land before and after the injuries complained of was admitted. No objection was made to this evidence, but, after the witnesses had left the stand and the case was closed, defendants moved to strike out all the testimony. The motion was properly denied. *People v. Samario*, 84 Cal. 484, 24 Pac. 283.

[15] 7. The court instructed the jury fully and even elaborately, and the instructions were quite as favorable to the defendants upon all points as the law and the evidence warranted. Hedged about by the limitations which the court was careful to point out, to the effect that the jury could only award damages for the detriment or injury to the land which they found was caused by the negligent act of defendants, and that, if other causes contributed to the injury, defendants were not responsible, it was not error to instruct the jury that the difference in the market value of the land before and aft-



er the damage was the measure of defendants' liability. If, as appellants contend, there was no permanent injury to the land, or if the land could have been cleared of its sand and cured of its other injuries, and if respondent could have been reimbursed for all his losses for an amount much less than the damages awarded, it would have been permissible for appellants, in mitigation of the damages claimed by plaintiff, so to have established by evidence. They did not undertake to do so, or at least did not do so to the satisfaction of the jury, and appellants are therefore in no position here to complain.

[16] 8. The court erred in allowing interest upon the jury's award from the date of the injury. The damages were unliquidated until assessed by the jury, and only after judgment upon such assessment did legal interest run. *Brady v. Wilcoxson*, 44 Cal. 239; *Hewes v. Germain Fruit Co.*, 106 Cal. 441, 39 Pac. 853; *Ferrea v. Chabot*, 121 Cal. 233, 53 Pac. 689, 1092.

The judgment is therefore modified by striking out the allowance of interest. In all other respects the judgment and order appealed from are affirmed. Respondent will recover costs upon this appeal.

We concur: MELVIN, J.; LORIGAN, J.

163 Cal. 801

In re ROBL'S ESTATE. (S. F. 6,025.)  
(Supreme Court of California. Sept. 26, 1912.)

1. INSURANCE (§ 580\*)—DESTRUCTION OF PERSONALTY PENDING ADMINISTRATION—RIGHT OF LEGATEE TO INSURANCE MONEY.

Where the executrix, to whom personalty was bequeathed, procured a fire policy thereon, and the property was destroyed by fire during administration, the insurance money took the place of the personalty destroyed, and passed to her.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1439-1443; Dec. Dig. § 580.\*]

2. EXECUTORS AND ADMINISTRATORS (§ 500\*)—MANAGEMENT OF ESTATE—SPECULATION—COMPENSATION.

Where an executrix, empowered by will to sell real estate when a fair price might be obtained therefor satisfactory to all, sold real estate of which she was co-owner, and exercised the same judgment with respect to the estate's interest as she did toward her own, and her two brothers, who were co-owners with her, coincided with her views, and she acted with fidelity and prudence, she was entitled to commissions on the sale, as against the objection that she speculated with the property of the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2131-2139; Dec. Dig. § 500.\*]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Proceedings for the distribution of the estate of Margaret Robl, deceased. From a

decree of distribution, the parties aggrieved appeal. Affirmed.

R. F. Mogan, of San Francisco, for appellant. Percy E. Towne, of San Francisco, for respondent.

HENSHAW, J. [1] 1. By this appeal it is sought to modify a decree of distribution which gave to Catherine E. Robl the insurance collected on furniture which had been specifically bequeathed to her and had been burned during administration. Catherine E. Robl, to whom the furniture had been bequeathed, was also the executrix of the estate. The insurance was under a policy payable to the executrix, and \$712.50 was collected upon the insurance policy after the destruction of the furniture. Title to the furniture vested in the legatee at the death of the testatrix. There would be no equity in depriving the legatee of the insurance indemnity, and in giving it to the estate, to which it did not belong. If, as implied, the executrix improperly charged insurance premiums to the estate, that is a matter for adjustment in her account, but is not before this court. It is well settled, in cases such as this, that the insurance money takes the place of the personal property destroyed. *Wyman v. Wyman*, 26 N. Y. 253; *Haxall v. Shippen*, 37 Va. 536, 34 Am. Dec. 745; *Culbertson v. Cox*, 29 Minn. 309, 13 N. W. 177, 43 Am. Rep. 204; *Parry v. Ashley*, 3 Simons, 97; *Durant v. Friend*, 11 Eng. Law & Eq. 2.

[2] 2. Under the assertion that the executrix was "speculating" with the property of the estate, it is contended that the court erred in allowing her commissions on the sale of real estate; the fact being that, because of the great conflagration of 1906, the real property was sold thereafter for a less price than could have been obtained before. The language of the will provided that the property "may be sold when a fair price may be obtained therefor satisfactory to all." The executrix herself was co-owner of the property in question. She exercised the same judgment and adopted the same policy with respect to the estate's interest in the property as she did toward her own. Her two brothers, who were co-owners with her and the estate in the property, coincided with her views. It is shown that the executrix acted with fidelity, and with that degree of prudence and diligence which one of ordinary judgment would be expected to bestow upon his own affairs of like nature. Indeed, more than this, it is shown that it was the very judgment which she did exercise in her own affairs of the same nature, and this fills the requirement of an executor's duty. In re Moore, 96 Cal. 522, 31 Pac. 584.

The decree appealed from is therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

163 Cal. 772

**MASSIE v. CHATOM.** (Sac. 1,937.)(Supreme Court of California. Sept. 24, 1912.  
Rehearing Denied Oct. 23, 1912.)**1. BROKERS (§ 54\*)—RIGHT TO COMMISSION.**

Readiness and willingness of a prospective purchaser to buy does not establish a broker's right to compensation for producing him; entry, or offer to enter, into a binding contract with the vendor, being essential.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 75-81; Dec. Dig. § 54.\*]

**2. BROKERS (§ 54\*)—RIGHT TO COMMISSION.**

That the parties to a prospective contract to sell land entered into agreements which were in form absolute contracts to purchase does not entitle a broker to a commission for producing the prospective purchaser, if the instruments were not intended by the parties to operate as such contract and no sale was agreed upon.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 75-81; Dec. Dig. § 54.\*]

**3. EVIDENCE (§ 433\*)—PAROL EVIDENCE AFFECTING WRITING—ADMISSIBILITY.**

Parol evidence is admissible to vary the terms of a writing to correct a natural mistake.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1990-2004; Dec. Dig. § 433.\*]

**4. EVIDENCE (§ 424\*)—PAROL EVIDENCE AFFECTING WRITING—ADMISSIBILITY.**

The rule excluding parol evidence which tends to vary or contradict a written contract applies only in actions between parties thereto or their privies.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1966-1968; Dec. Dig. § 424.\*]

Department 2. Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by James P. Massie against A. Chatom. From a judgment for plaintiff and from an order denying a new trial, plaintiff appeals. Affirmed.

William H. Jordan, of San Francisco, W. H. Hatton, of Modesto, J. E. Foulds and Frank Shay, both of San Francisco, J. W. Hawkins, of Modesto, and Jordan, Rowe & Brann, of San Francisco, for appellant. P. H. Griffin, of Modesto, and Olney, Pringle & Mannon, J. M. Mannon, Jr., Page, McCutchen, Knight & Olney, all of San Francisco, for respondent.

**HENSHAW, J.** This action was brought to enforce the payment of two promissory notes, each for \$4,000, which notes were given by defendant to plaintiff. Plaintiff is a real estate agent, and was the agent of plaintiff for the sale of the latter's ranch. Defendant, a farmer and the owner of the ranch, entered into a written contract with plaintiff, agreeing to pay him a commission for his services in "introducing a purchaser and effecting a sale" of defendant's Lakeview ranch. Plaintiff brought to defendant as intending purchasers Louis Bartlett and George J. G. Marsily. In conversation it developed that Bartlett and Marsily were not themselves financially able to purchase the ranch, but desired an option upon it,

hoping to interest European investors and through them to secure the funds to make the purchase. In the negotiations had between plaintiff, defendant, and these prospective purchasers the discussion turned upon the price at which defendant would sell his ranch. A price of \$12.50 per acre and \$1,000 added was agreed upon. By the time the discussion had reached this point the hour had grown late, and it was agreed to postpone further negotiations until the next day. Before separating, and solely to avoid discussion upon the question of price when the negotiations were again resumed, a preliminary memorandum was drawn up by Bartlett at plaintiff's suggestion. This memorandum is as follows: "San Francisco, Dec. 23rd, 1904. It is hereby agreed that the Chatom ranch in Stanislaus Co., consisting of about eight thousand acres, is this day sold to George J. G. Marsily and Louis Bartlett for the sum of twelve and 50/100 dollars (\$12.50) per acre and the further sum of one thousand dollars, payable \$10,000 when the title to said property has been found to be good and merchantable, thirty thousand dollars July first, 1905, balance in two annual payments of equal size, due respectively July 1, 1906, and July 1, 1907. Seller to assume the commission of J. P. Massie. A. Chatom. George J. G. Marsily. Louis Bartlett. J. P. Massie." No copies or duplicates were made of this memorandum which was taken by Chatom, by him entrusted to plaintiff, and by the plaintiff produced at the trial. On the following day the same persons met at Bartlett's office in San Francisco pursuant to agreement. Their conversation and negotiations resulted in an option contract in which Chatom acknowledged the receipt of \$500 on account of the purchase price of his ranch, and granted Bartlett and Marsily 90 days within which to make further payment. Provision was made for the furnishing of abstracts by Chatom, to be examined by Bartlett and Marsily, and for partial payments of the purchase price at times stated. There was nothing, however, in the option which made it obligatory in any way upon Bartlett and Marsily or either of them to purchase the ranch. After this option agreement was signed, Massie took Chatom into an adjoining room, and asked him to sign the two promissory notes here in suit, representing \$8,000 commission on the sale of the ranch. Chatom declined to sign the notes on the ground that the commission had not been earned. He asked Bartlett's advice whether to sign or not and Bartlett declined to advise him. Massie then told Chatom that he need have no hesitation about signing the notes, that he would never have to pay them unless the sale went through. In reliance upon this statement Chatom signed the notes. The \$500 paid by Bartlett and Marsily for the option was immediately given by Chatom to Massie, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



this \$500 explains the payment of \$500 indorsed upon one of these notes. In February, 1905, Bartlett notified Chatom that he and his associate would proceed no further under their contract, and the option thus lapsed. Following defendant's refusal to pay the promissory notes, this action was brought. The findings follow the statement of facts above set forth, and judgment was given in favor of defendant under his defense of want of consideration. Plaintiff appeals from the judgment, and from the order denying his motion for a new trial.

The evidence not only supports the findings of the court, but it is overwhelmingly in favor of those findings, the evidence of Bartlett, Marsily, and Chatom, the real parties to the option agreement and to the agreement preceding the option agreement, being all to the same effect. Thus they are all agreed that the contract of December 23d, above quoted, was never meant or understood to be a completed contract of purchase and sale, or anything more than a memorandum of the selling price of the ranch, which memorandum was to obviate the necessity of further discussion upon that subject when they resumed the next day their negotiations as to terms. Moreover, it appears from the testimony of all of them that it was distinctly understood that Bartlett and Marsily, not having the financial ability so to do, could not and would not engage to purchase the ranch, but did desire to secure an option upon it in the hope of interesting European capital in the purchase. It is further in evidence that the suggestion as to the memorandum of December 23d, came from Mr. Massie himself.

[1, 2] Appellant's propositions upon appeal may be thus summarized. He contends first that he fulfilled all the conditions of his agency so as to entitle him to the agreed commissions, namely, that he produced a purchaser willing and able to purchase the property, who entered into a contract of purchase with the owner satisfactory to the owner himself; and, second, that the defense of no consideration of the promissory notes is not in truth a defense of no consideration, but is an unwarranted effort by parol to vary the terms of a written contract. Neither of these positions, however, is well taken. The duties of a real estate agent under such a contract as the one under consideration are well settled in this state and well defined by such cases as *Gunn v. Bank of California*, 99 Cal. 349, 33 Pac. 1105, and *Mattingly v. Pennie*, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87. In the former case it is said: "The contract of the broker is to negotiate a sale; that is, to procure a valid contract, to purchase, which can be enforced by the vendor if his title is perfect, or, if he does not procure such contract to bring the vendor and the proposed purchaser together, that the vendor may secure such a contract, unless he is willing to trust to an oral agree-

ment." In the latter case it is said: "The readiness and willingness of a person to purchase the property can be shown only by an offer on his part to purchase; and unless he has actually entered into a contract binding him to purchase, or has offered to the vendor, and not merely to the broker, to enter into such contract, he cannot be considered a purchaser." Appellant insists that the contract of December 23d, and the contract of December 24th, each and both were valid, enforceable contracts of purchase, as well as valid, enforceable contracts of sale, and that, therefore, he had performed all of his duties and was not obliged to wait for his compensation until the actual consummation of the sale. The premises being granted, the conclusion is irresistible. But the difficulty is that the findings of the court are wholly against him. Conceding that in its terms the contract of December 23d, is sufficiently explicit as a contract of purchase and sale under such authorities as *Preble v. Abrahams*, 88 Cal. 245, 26 Pac. 99, 22 Am. St. Rep. 301, and *King-Keystone Oil Co. v. S. F. Brick Co.*, 148 Cal. 87, 82 Pac. 849, the answer to this is that by the testimony of all the parties to it it was not intended to be a contract of sale, but a mere memorandum of price, to be used in future negotiations. To this the vendor upon the one hand and the vendees upon the other are in full accord. The result, therefore, is that, if the contract in terms is more than such a memorandum, it is the result of the mutual mistake of the parties, and neither could in honesty have gone before a court to enforce it according to its terms. It would have at once been subject to reformation because of the mutual mistake.

[3, 4] And in this case these facts were susceptible of proof by parol, since the mistake was mutual, and also because the rule excluding parol evidence which tends to vary or contradict a written contract applies only in actions between parties thereto or their privies. Marsily was in no sense a party to this contract. *Code Civ. Proc.*, 1856; *Dunn v. Price*, 112 Cal. 46, 44 Pac. 354; *Bickerdike v. State*, 144 Cal. 681, 78 Pac. 270. With far less force does the argument of appellant apply to the option contract of December 24th. From its terms this was a unilateral contract of sale. It was a mere option to Bartlett and Marsily to purchase within a limited time upon agreed terms, without attempting in any way to bind them to make the purchase.

Up to this point it appears that appellant did not secure a purchaser who did enter or was willing to enter into a contract with the defendant for the purchase of the land. The utmost that he did was to secure for defendant persons who took from plaintiff an option to purchase, not enforceable against the intending vendees. Up to this point, therefore, the consideration for the notes had wholly failed. It may be conceded, without

deciding the question, that, if the option had been exercised and the purchase under it completed, plaintiff would have been in a position to enforce the collection of the promissory notes as representing his commissions on the sale. But with the lapsing of the option all consideration for the promissory notes failed utterly. There is no parallelism between the case thus presented and that of *Carver v. San Joaquin Cigar Co.*, 16 Cal. App. 572, 118 Pac. 91, upon which appellant relies. In the latter case full recognition is made of the indisputable legal proposition that oral evidence is admissible to impeach the consideration of a promissory note, and, as has been said, the evidence in this case establishes a total failure of consideration. But it is held, and properly held, by the Court of Appeal that a valid consideration for the promissory note there in suit was established by a showing of a pre-existing indebtedness and the effort really made was to avoid the obligation of the note, not for failure of consideration, but because of the breach of a contemporaneous oral agreement totally at variance with the terms of the note itself.

No other matters call for special consideration.

For the reasons given, the judgment and order appealed from are affirmed.

We concur: MELVIN, J.; LORIGAN, J.

163 Cal. 752

PEOPLE v. EDWARDS. (Cr. 1,736.)

(Supreme Court of California. Sept. 23, 1912.)

1. JURY (§ 135\*) — CRIMINAL CASES — "PEREMPTORY CHALLENGE" — EXAMINATION OF JURORS—RIGHT TO.

Under Pen. Code, § 1067, which defines "peremptory challenge" as an objection to a juror for which no reason need be given, under sections 1081, 1082, providing for the examination of witnesses on challenge to jurors, and under sections 1087, 1088, which provide for peremptory challenges after challenges for cause, the accused is not entitled to examine a juror upon his voir dire to determine whether a peremptory challenge should be used upon him.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 599-606; Dec. Dig. § 135.\*]

For other definitions, see *Words and Phrases*, vol. 6, p. 5288.]

2. JURY (§ 103\*)—CRIMINAL CASES—QUALIFICATIONS—OPINION AS TO GUILT.

It was not error in a criminal case to overrule accused's challenge to a juror, though he stated on his voir dire that he had talked with other persons, not witnesses, about the merits of the case, and that from what he had heard and read that he had formed an opinion as to accused's guilt, and that the opinion was so fixed that it would require evidence to remove it, where he stated that the opinion was founded entirely upon public rumor, and that, notwithstanding such opinion, he could and would set aside the opinion and act entirely upon the

evidence; the trial court's decision upon his conflicting statements being conclusive.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 461-479; Dec. Dig. § 103.\*]

3. RAPE (§ 59\*)—INSTRUCTIONS.

In a prosecution for rape upon a girl under 16 years old, an instruction that the jury should consider the fact that she made no outcry and concealed the offense for several days was properly refused, since those facts were immaterial.

[Ed. Note.—For other cases, see *Rape*, Cent. Dig. §§ 88-100; Dec. Dig. § 59.\*]

In Bank. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Webb Edwards was convicted of rape, and he appeals from the judgment, and from an order denying a new trial. Affirmed.

See, also, 13 Cal. App. 551, 110 Pac. 342.

Thomas Scott, of Bakersfield, H. T. Miller, of Visalia, and Jesse R. Dorsey, of Bakersfield, for appellant. U. S. Webb, Atty. Gen., and Frank Lamberson, Dist. Atty., of Visalia, for the People.

SHAW, J. The appeal is from the judgment, and from the order denying a new trial.

Defendant was charged, upon information, with the crime of rape upon a girl then under the age of 16 years.

[1] 1. It is claimed that the court erred in refusing to allow defendant's counsel to examine a juror upon the voir dire, for the purpose of determining whether or not a peremptory challenge should be used upon him. The records of the cases appealed to this court, in which rulings made while impaneling a jury have been involved, indicate that there is an increasing tendency to prolong the proceedings inordinately by allowing counsel on either side to indulge in tedious examinations of jurors, apparently with no definite purpose or object in view, but with the hope of eliciting something indicating the advisability of a peremptory challenge, and that the supposed privilege of doing this has been greatly abused. Remarks in some of the decisions in this state upon this subject are apparently conflicting. It may be that this has led trial courts to give counsel great latitude, rather than risk prejudicial error by confining the examination to reasonable limits. We deem it important, therefore, to review the subject and declare the rule, so that the trial courts may confidently follow it.

The Penal Code divides challenges into two kinds: (1) To the panel; (2) to an individual juror. Section 1055. The latter kind is again divided into two classes, namely, peremptory challenges and challenges for cause. Section 1067. A peremptory challenge is defined as "an objection to a juror for which no reason need be given, but upon which the court must excuse him." Section 1069. This definition shows that no issue of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



fact can possibly arise with regard to the reasons for such challenge. In sections from 1071 to 1078, inclusive, the Penal Code defines the several kinds of challenges for cause, and prescribes the mode of forming issues of fact as to the grounds upon which they may be predicated. It then proceeds to provide the manner of trying such issue, as follows:

"Sec. 1081. Upon the trial of a challenge to an individual juror, the juror challenged may be examined as a witness to prove or disprove the challenge, and must answer every question pertinent to the issue.

Sec. 1082. Other witnesses may be examined on either side, and the rules of evidence applicable to the trial of other issues govern the admission or exclusion of evidence on the trial of the challenge."

These provisions and those relating to the formation of such issues seem to assume that the challenge for cause and the denial of the fact asserted as the foundation thereof should precede the examination of a juror. In practice, however, it usually saves time and promotes justice to allow the party to first elicit the facts by questioning the juror, and this course is generally followed. *People v. Reynolds*, 16 Cal. 131. There is no other provision for the examination of jurors, either to prepare for or to prove the basis for a challenge to an individual juror. It is clear that the foregoing sections do not relate to or authorize the examination of a juror for the purpose of enabling the parties intelligently to determine whether or not to make a peremptory challenge. This is shown, not only by the language of the sections mentioned and quoted, which provide only for questions pertinent to the *issue*, but also by the succeeding sections, relating to the order of challenges. Thus section 1087 declares that they must be taken "in the following order, including in each challenge all the causes of challenge belonging to the same class: 1. To the panel; 2. To an individual juror, for a general disqualification [see section 1072]; 3. To an individual juror for an implied bias; 4. To an individual juror for an actual bias." Section 1088 then declares that "if all challenges on both sides are disallowed, either party, first the people and then the defendant, may take a peremptory challenge, unless the parties' peremptory challenges are exhausted." It is thus clearly shown that the law contemplates that all the challenges for cause, including the examination of jurors preparatory thereto and upon the trial thereof, shall be disposed of before any peremptory challenges are in order. The conclusion is that there is no statutory authority for the examination of jurors solely for the purpose of a peremptory challenge, or for the allowance of questions which do not tend to prove some fact material to a challenge for cause.

There is no real necessity for giving either party this privilege. It tends to encourage

inquiries into matters wholly collateral to the case in hand. The field of inquiry upon subjects properly involved, in the endeavor to ascertain whether the juror is free from actual or implied bias, is so broad that it will give each party ample opportunity to obtain information concerning the advisability of making peremptory challenges to the respective jurors. Turning now to the previous decisions of this court, we find that in *Watson v. Whitney*, 23 Cal. 379, and *People v. Soy*, 57 Cal. 102, there are remarks to the effect that a party has a right to question a juror for the sole purpose of deciding whether or not to exercise a peremptory challenge upon him. But, as is pointed out in *People v. Hamilton*, 62 Cal. 382, the questions in each of those cases were allowable, because they tended to elicit facts constituting grounds for a challenge for cause, and the remarks relating to peremptory challenges were obiter dictum. In the last-mentioned case (*People v. Hamilton*) the court carefully reconsidered the question, and, in effect, overruled the two previous cases. After referring to the provisions for inquiry concerning challenges for cause, the court, in the *Hamilton Case*, says: "After giving the opportunity thus to ascertain the existence or non-existence of implied or actual bias, the Penal Code accords to a defendant on trial for an offense punishable with death 20 *peremptory* challenges. These he exercises at his own volition. The state cannot say he ought not to challenge peremptorily a particular juror. No issue is raised upon the result of the trial of which his right depends. As no issue can be made or tried, to which the question, intended simply to enable a defendant to make up his mind whether he will challenge peremptorily, can apply, it would follow, if appellant is right, that the trial court can place no limit upon the questions which defendant may choose to ask. While, therefore, a defendant may, when the opportunity to interpose a peremptory challenge arises, have the benefit of any information acquired during the trial of a challenge for implied or actual bias, he cannot embark in a general exploration for the sole purpose of satisfying himself whether it will be safe to be tried by a juror against whom no legal objections can be urged."

This decision may be said to establish the law in this state on the subject. It was cited with approval in *People v. Plyler*, 126 Cal. 381, 58 Pac. 904, and it was approved and followed by this court in *People v. Brittan*, 118 Cal. 412, 50 Pac. 664, and by the District Court of Appeal in *People v. Trask*, 7 Cal. App. 105, 93 Pac. 891. Some remarks of the court in the opinion in *People v. Helm*, 152 Cal. 546, 93 Pac. 99, appear to have occasioned some doubt of the authority of the previous decisions. There, the defendant being on trial for the murder of one Hayes, it was ascertained that he had previously been

subjected to a preliminary examination on a charge of murdering one Jackson. A juror stated he had an opinion as to his guilt or innocence in the Jackson case. The court refused to allow the defendant to ask the juror if he believed that the defendant was guilty of the murder of Jackson. This court held that this ruling was error, saying that the question was proper, because an affirmative answer would be relevant to the question of actual bias of the juror against the defendant, and for the additional reason that it would enable the defendant to decide whether or not to excuse him peremptorily. It will be observed that the question rejected was obviously proper as to actual bias, and that the second reason given in the opinion was unnecessary to the decision. The case is, in that respect, parallel with the cases of *Watson v. Whitney* and *People v. Soy*, supra, which were overruled in the *Hamilton Case*. In the *Helm Case* the court's attention was not called to the previous decisions in the *Hamilton* and *Brittan Cases*. The remark concerning peremptory challenges must, under these circumstances, be regarded as obiter, and the case is not authority on the question. The court below was correct in refusing to allow the examination to proceed for the sole purpose of exercising peremptory challenges thereon.

[2] 2. The juror McIntyre stated that he had talked with other persons, not witnesses, about the merits of the case, and that from what he had read and heard he had formed an opinion as to the guilt or innocence of the defendant; that the opinion was so fixed that it would require evidence to remove it, and that it was founded entirely upon public rumor and what he had read; and that, notwithstanding such opinion, he could and would, if sworn as a juror in the case, set aside the opinion and act entirely upon the evidence as introduced, and act fairly and impartially as a juror upon the evidence given. This qualified him as a juror, under section 1076 of the Penal Code. The fact that some parts of his examination contained statements by him inconsistent with the above statement merely raised a conflict of evidence as to his state of mind. Upon such conflict the decision of the trial court is conclusive. *People v. Loper*, 159 Cal. 11, 112 Pac. 720, Ann. Cas. 1912B, 1193; *People v. Riggins*, 159 Cal. 117, 112 Pac. 862; *People v. Ryan*, 152 Cal. 371, 92 Pac. 853.

It is suggested that it does not affirmatively appear from the juror's testimony that the persons to whom he talked about the case were not witnesses. On this point he was asked, "Have you talked it over with any witnesses in the case?" His answer was: "Not that I know of; I don't know any of the witnesses; no." The trial court might reasonably have understood that the last word, "No," was intended as a positive de-

nial. Furthermore, he stated positively, in answer to other questions, that his opinion was founded entirely upon public rumor and what he had read. It is not claimed that he had read anything except public journals. The decision of the trial court upon this question of fact is, upon the authorities above cited, conclusive. The juror appeared to be fair and impartial in all other respects. The challenge was properly denied.

[3] 3. The court correctly refused the instruction asked by defendant, to the effect that the jury should consider the fact that the victim had made no outcry, and had concealed the act of sexual intercourse for several days after it was committed. This was not a case of rape committed by force or violence, but a voluntary act of sexual intercourse to which the girl had, in fact, consented, and which constitutes rape solely because the statute makes her incapable of giving a legal consent because of her tender years. In such cases the fact that the victim makes no outcry or complaint is immaterial. *People v. Jacobs*, 16 Cal. App. 478, 117 Pac. 615; *People v. Howard*, 143 Cal. 324, 76 Pac. 1116.

Other rulings denying challenges, refusing instructions, and admitting or rejecting evidence are complained of; but they are of no substantial importance, and we are satisfied that the defendant was not prejudiced thereby. We do not deem any of these points of sufficient merit or general importance to justify further mention. The evidence of the defendant's guilt was clear, and we see no ground for reversing the judgment or order.

The judgment and order are affirmed.

We concur: HENSHAW, J.; MELVIN, J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.

163 Cal. 747

INGLIN et al. v. SNIDER et al., Board of Supervisors of Yolo County (LAUGENOUR et al., Interveners). (Sac. No. 1,950.)

(Supreme Court of California. Sept. 23, 1912.)

1. DRAINS (§ 50\*)—RECLAMATION DISTRICTS—EXCLUSION OF TERRITORY—STATUTORY PROVISIONS.

Under Pol. Code, § 3481, authorizing owners of land who desire to have the same set off from a reclamation district to file a petition as required by section 3446, authorizing petitions for formation of reclamation districts, and to show to the board of supervisors that the land sought to be excluded is capable of an independent reclamation, and section 3449, providing that, where it is shown that any land has been improperly included in a proposed district the board must reform the district, the board of supervisors creating a reclamation district may in their discretion refuse to exclude land therefrom on finding that the district as originally formed will protect, though not completely reclaim, all the land, and that the whole work of reclamation may be pursued more economically by adhering to the original plan, or where to exclude land from a



district will make the work of protection of the lands less effective.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. § 62; Dec. Dig. § 50.\*]

**2. DRAINS (§ 50\*)—RECLAMATION DISTRICTS—“RECLAMATION.”**

The word “reclamation” in Pol. Code, § 3481, providing that owners desiring to have their lands set off from a reclamation district must show to the board of supervisors that the land sought to be excluded is capable of an independent reclamation, means practical protection from probable dangers, and does not mean absolute protection from all dangers, and where a district may properly be classed, under the evidence, as one in which the land has been reclaimed, owners are not entitled to relief under the statute.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. § 62; Dec. Dig. § 50.\*]

**3. MANDAMUS (§ 90\*)—RIGHT TO RELIEF—DISCRETION.**

Where the evidence was conflicting on the issue of whether land in a reclamation district was capable of independent reclamation, within Pol. Code, § 3481, and the board accepted the view that the land was not capable of independent reclamation, the owners of the land were not entitled to compel the board by mandamus to exclude the land from the district, and create an independent reclamation district.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 196, 204; Dec. Dig. § 90.\*]

Department 2. Appeal from Superior Court, Yolo County; Wm. M. Finch, Judge.

Petition for mandamus by M. Inglin and another, as executrices of D. N. Hershey, deceased, against Eli Snider and others, constituting the board of supervisors of the county of Yolo, in which T. F. Laugenour and others intervened. From a judgment denying relief, petitioners appeal. Affirmed.

E. A. Bridgford and W. W. Davidson, both of San Francisco (Hudson Grant, of Woodland, and Morrison, Dunne & Brobeck, of San Francisco, of counsel), for appellants. A. C. & H. L. Huston and Charles W. Thomas, all of Woodland, for respondents. Charles W. Thomas, of Woodland, for intervening respondents.

MELVIN, J. Petitioners are the owners of land within reclamation district No. 730. Shortly after the first assessment list was returned to the district, these petitioners filed with the board of supervisors of Yolo county a petition asking that their lands be organized into an independent reclamation district. This petition having been denied by the board of supervisors, the petitioners applied to the superior court for a writ of mandate requiring the supervisors to hear and determine their petition. A demurrer having been sustained to the petition for a writ of mandate, an appeal was taken to this court, and it was here determined that the pleading was sufficient. *Inglin v. Hopkin*, 156 Cal. 484, 105 Pac. 582. Subsequently, upon a petition filed long after that considered in *Inglin v. Hopkin*, but altogether similar to it, the board of supervisors, after

a hearing, denied the prayer of petitioners on July 12, 1910. Whereupon they applied to the superior court of Yolo county for a writ of mandamus directing the board to set aside its order, and to make another order approving the plan of separation of petitioners' lands from the district. The court gave judgment denying the prayer of the petition for mandate, and from such judgment this appeal is taken.

The position of the petitioners is that their showing before the board of supervisors established without contradiction their right to have their property cut off from Reclamation District No. 730, and that, therefore, they are entitled to a writ of mandate enforcing their wish in that regard. The court below, however, determined that there was a substantial conflict in the evidence given on the hearing before the supervisors, and that it was therefore powerless to interfere with the legal discretion of the board duly exercised and based upon evidence addressed to that body. Appellant contends that when the owners of a compact body of land within a reclamation district, in which the lands have not been reclaimed, desire to have their property set off from such district, they need only demonstrate that such segregation is possible, and thereupon it is made the duty of the board of supervisors to grant their request, without reference to the effect of such action on the remaining lands in the district or the cost of independent reclamation of the tract thus sought to be set aside. They insist that without conflict the evidence demonstrates two propositions. The first of these is that the lands of reclamation district No. 730 had not been reclaimed when petitioners sought to secede from it, and the second is that, having demonstrated the fact that their land may be independently reclaimed, they are entitled, of right, to withdraw their property from the district.

[1] Even if we concede the first of these postulates, it would not necessarily follow that the board of supervisors would be compelled to permit petitioners to separate their land from the old district. If the board of supervisors found that the old district, though not completely reclaimed, was somewhat protected, and the whole work of reclamation could be pursued more economically for all persons concerned by adhering to the original plans rather than by dismembering the district, then the board would be clothed with discretion to deny the requested segregation. The petitioners must, under the very terms of section 3481 of the Political Code, comply with section 3446 of the same Code. In other words, they stand in practically the same position before the board as those seeking to form a new district from lands not theretofore included in an old one, except that additionally they must “show to the board of supervisors that

said body of lands is capable of an independent reclamation." Their petition would be subject to the provisions of section 3449 of the Political Code, which requires, among other things, that, "if it be shown that any land has been improperly included in or excepted from the proposed district, they must reform the district in such respects in their order." Now, if in the effort to organize district No. 730 these lands had been omitted from the petition, the supervisors in the exercise of their discretion might have reformed the district so as to include such lands; and it follows that a like discretion is vested in the board when an application is made under section 3481. If in the exercise of their discretion the supervisors should determine that the proposed excision of lands from a district already formed would increase the cost of reclamation to all parties concerned or make the work of protection of their lands less effective, they would have a perfect right to reject petitioners' application. In the case at bar there was a conflict of evidence regarding the question whether or not the lands in district No. 730 had been reclaimed before appellants made their request of the board of supervisors. It is true that the engineer of the district had named a large sum of money as being necessary for the purpose of completing the reclamation of the lands in the district. The great flood of 1909 had caused levees above district No. 730 to break and the waters to flow upon the lands of said district over the ridge at Knights Landing which at seasons of ordinary high water was of sufficient elevation to protect the district on its northerly side. It was in view of the extraordinary conditions which developed in 1909 that the plan of reclamation was amended to fortify the district against all possible future danger; but there was evidence which was sufficient to support a determination by the board of supervisors that at the time of the hearing the district was capable of protecting the lands situated therein from ordinary floods.

[2] The learned judge of the superior court who presided at the hearing of this case defined "reclamation" as "practical protection from probable dangers." This is an apt definition. The word cannot mean absolute protection from all dangers because such a thing is scarcely possible. If, therefore, the district could be properly classed under the evidence as one in which the land had been reclaimed, then petitioners are entitled to no relief under section 3481 of the Political Code.

[3] We cannot say that there was no conflict of evidence regarding the question whether or not the land of petitioners was capable of independent reclamation. Witnesses for petitioners testified that it was and at least one witness for the respondents said that it was not. Thereupon the board

of supervisors inspected the premises. This was the taking of evidence (*People v. Milner*, 122 Cal. 182, 54 Pac. 833), and is sufficient in itself to destroy the contention that no conflict existed because, acting upon the evidence before it, the board of supervisors accepted the view that the lands of the petitioners were not capable of independent reclamation. We conclude, therefore, that the matter presented to the board of supervisors by petitioners having been decided upon sharply conflicting evidence, the superior court was justified, under familiar principles, in refusing to interfere with the action of the board.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

163 Cal. 758

GIBBS et al. v. PETERSON. (S. F. 5,476.)

(Supreme Court of California. Sept. 23, 1912. Rehearing Denied Oct. 23, 1912.)

1. JUDGMENT (§ 743\*)—RES JUDICATA—DECISION OF THE SUPREME COURT—CLAIM TO TIMBER.

A decision of the Supreme Court that a purchaser of standing timber on a described tract, with the right to remove the same within 10 years, and with the privilege of removal thereafter on paying a yearly rental and a half of the taxes on the land, acquired an absolute title to the timber, not forfeited by failure to remove within the 10 years, or failure to pay thereafter the annual rental and a half of the taxes, rendered in a suit by a grantee of a part of the tract brought after the expiration of the 10 years, is the law of the case in a subsequent suit between the parties involving their rights to the timber.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1275-1277; Dec. Dig. § 743.\*]

2. LOGS AND LOGGING (§ 3\*) — SALE OF STANDING TIMBER—CONTRACTS—FORFEITURE.

A purchaser of standing timber on an 800-acre tract, with the right to remove the same within 10 years, and with the privilege of removal thereafter on paying an annual rental and a half of the taxes on the land, performs his covenant as to the annual rental where he pays the entire sum to the vendor, who has sold a part of the tract to a third person, in the absence of any apportionment of the yearly rental between the vendor and the third person.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.\*]

3. LOGS AND LOGGING (§ 3\*) — SALE OF STANDING TIMBER—CONTRACTS—FORFEITURE.

A contract for the sale of standing timber for removal within 10 years, which provides that the purchaser failing to remove the timber within the 10 years will pay a yearly rental thereafter for the privilege of removal until the timber is removed, and will pay a half of the taxes on the land until the removal is completed, gives the purchaser an absolute title to the timber, but does not give him a right to perpetually maintain the timber on the land, and thereby render the land valueless as to the owner; but the court, at the suit of the owner at the expiration of the fixed period, will



fix a time for the removal of the timber by the purchaser.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.\*]

4. LOGS AND LOGGING (§ 3\*) — SALE OF STANDING TIMBER — CONTRACTS — FORFEITURE.

Where the title of a purchaser of standing timber to the timber could not be forfeited by his failure to remove the same within a specified time, or by his failure to subsequently pay a yearly rental for the privilege of removal, and the land was valueless to the owner so long as the timber remained, the court, at the suit of the owner after the expiration of the fixed period, will grant relief analogous to the relief granted under Code Civ. Proc. § 752, in an action between joint tenants, or tenants in common, and will fix a time within which the purchaser shall remove the timber, and declare that if he does not do so the owner of the land may remove and sell the same at the expense and for the benefit of the purchaser, subject to reasonable compensation for loss of the use and occupation of the soil from the expiration of the period fixed for removal to the time of actual removal, subject to the right of the owner to the yearly rental after the expiration of the period as a condition of the purchaser's privilege to remove the timber.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.\*]

In Bank. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by J. H. Gibbs and another against Andrew Peterson, who filed an answer and a cross-complaint. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Mannon & Mannon, of Ukiah, for appellant. McNab & Hirsch, of Ukiah, for respondents.

ANGELLOTTI, J. This is an appeal by defendant from a decree enjoining him from cutting down or removing any timber growing or standing upon certain described land, and from interfering in any way with plaintiffs' peaceable possession thereof; said plaintiffs peaceable possession decreed to be the owners in possession and entitled to the possession of all of said timber. The action was one commenced on May 12, 1906, to obtain a permanent injunction enjoining the doing of any of said acts.

Demurrers were sustained to defendant's answer and cross-complaint, and, defendant declining to amend or appear at the trial, the trial court, after receiving evidence on the part of plaintiffs, found the facts to be as alleged in the complaint and gave judgment as already stated. The question presented by this appeal is whether the facts stated in the answer and cross-complaint were sufficient to show any defense to plaintiffs' action, or any foundation for relief against them.

Substantially these facts are as follows: Defendant, Peterson, is the owner of the 160 acres of land upon which he claimed the right to cut and remove the timber, subject to such rights therein as are possessed by

plaintiffs under a certain instrument executed to them (and duly recorded on December 28, 1887) by C. Oppenlander and Gustav Hansen, the then owners thereof, purporting to convey to them "all the timber now standing, lying or being" on this land and other lands belonging to them, aggregating some 800 acres. This instrument, after providing that the vendors "do by these presents grant, bargain, sell, and convey unto the said parties of the second part \* \* \* all the timber now standing, lying or being on" certain described land, was as follows, viz.: "And the parties of the first part promise and agree to and with the parties of the second part that they shall have a period of ten years in which to remove the timber from the above-described lands, and they do covenant and promise to allow and empower the parties of the second part, their agents and servants, to enter in and upon the real estate upon which the timber hereby conveyed is growing or situate as above described, to cut such timber, manufacture the same into lumber, and do all things upon such land which may be necessary for the purpose of manufacturing such timber into lumber and the removal thereof, as well as the right to make roads and build camps upon such lands, and also full ingress and egress have over such land for the removal of the timber hereby conveyed, and also such timber as the parties of the second part may acquire upon adjoining lands or lands in the vicinity of the lands of the parties of the first part as described herein. The parties of the second part hereby covenant and agree to and with the said parties of the first part, that if the timber is not removed from the above-described land within a period of ten years that they will pay a yearly rental to the parties of the first part of two hundred dollars a year thereafter for the privilege of removing such timber from the lands of the parties of the first part with the covenants and agreements of the parties of the first part herein to continue until all the timber is removed, and it is agreed between the parties hereto that all the privileges granted herein are to continue until such timber is removed, subject to the provisions of this agreement. It is further agreed by and between the parties hereto that each of the parties hereto are to pay one-half the taxes upon all of the foregoing described real estate that shall be covered with standing timber or upon which the timber is standing, that may be levied upon such land for state, county or municipal purposes during each and every year from the date hereof until all the timber is removed from such real estate. Dated Ukiah, Dec. 28th, 1887. C. Oppenlander, G. Hansen, Michael Ward, J. H. Gibbs."

Peterson acquired his title to the 160 acres on July 18, 1891, from C. Oppenlander, who had in the meantime acquired Hansen's in-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

terest; the deed reciting a consideration of \$1,560, and expressly "excepting and reserving, however, for the benefit and use of a former grantee of mine, the standing and down timber on the hereinbefore granted land, and the privilege to work it up and to remove it from said land." Plaintiffs had actual notice of the acquirement of Hansen's interest by Oppenlander at the time thereof, and of the conveyance by Oppenlander to Peterson of the 160 acres ever since July 19, 1901. Plaintiffs have never removed any of the timber, or made any preparations to remove any of the timber, from defendant's land, and the same is still standing and growing thereon, largely increased by the natural growth thereof and greatly enhanced in value. The land is situate on the Albion river, a navigable stream, by which the timber could have always been conveyed to a profitable market, and also within five miles of a railroad station, from which said timber could have been conveyed to a profitable market. A reasonable time for the removal of such timber has long since elapsed. The whole of the land is covered by a dense growth of redwood, pine, and other timber, and cannot be used for any other profitable purpose while such timber remains thereon. Such land is comparatively level, and is fertile and very productive; and if the timber was removed all of the same would be valuable for agricultural purposes and fruit growing. Defendant has desired to use the same for such purposes for a long time, but has been prevented from so doing by reason of the presence of such timber. Plaintiffs have not paid any part of the taxes on such land for the years 1891 to 1896, both inclusive, and defendant has been compelled to pay all of the same in order to protect his interest therein from being sold for taxes. The reasonable value of the use and occupation of such land is \$100 per month. Defendant has repeatedly demanded of plaintiffs that they pay him a rental for said lands and remove the timber therefrom; but plaintiffs have refused to do either.

By the prayer of his cross-complaint, defendant asked for judgment awarding him the sum of \$8,700, the alleged value of the use and occupation of the land, and decreeing that plaintiffs had forfeited all their rights in the timber, "or that a future time shall be fixed by this court within which all of said timber shall be removed, and that proper compensation be fixed by the court to be paid to this defendant by plaintiffs herein for the further privilege of removing said timber," and for general relief.

Certain questions as to the proper construction and effect of the instrument executed by Oppenlander and Hansen to plaintiffs on December 28, 1887, were before this court on an appeal in an action to quiet title instituted by the defendant herein against the plaintiffs herein on July 19, 1901, several years

after the expiration of the 10-year period prescribed in such instrument. This court then said:

"While there is much apparent conflict in the decisions as to the proper construction of a contract for the sale of standing trees to be removed, it is well settled that such a sale may be absolute, and the agreement to remove within a specified or reasonable time merely a covenant, in which case the timber remains the property of the purchaser, although not removed within the specified time. See 28 Am. & Eng. Ency. of Law (2d Ed.) p. 541; *Holt v. Stratton Mills*, 54 N. H. 109 [20 Am. Rep. 119]. The question in each case is as to what is the contract between the parties.

[1] "Here there is absolutely nothing in the terms of the agreement which can be construed as making the removal of the timber a condition precedent to the passing of title, or as causing delay in such removal beyond the period of 10 years from the date of the instrument, or failure to pay the rental reserved or one-half the taxes, to operate as a divesting of the title conveyed.

"The terms of the instrument literally signify an absolute conveyance of the timber; and there is nothing in the provisions relied upon by plaintiff to impair the force of the plain words of present grant. The provision to the effect that the vendees should have a period of 10 years in which to remove the timber that they had purchased must be read in connection with the provision to the effect that if it is not removed within 10 years the vendees 'will pay a yearly rental to the parties of the first part of \$200 a year thereafter for the privilege of removing such timber,' etc. This provision, together with the provision for the payment by the vendees of one-half of all taxes that may be levied upon the land from the date of the agreement until all of the timber has been removed, both of which are mere covenants in no way affecting the title, must be held to express the agreement of the parties as to the effect of any failure of the vendee to remove the timber within the designated period of 10 years." See *Peterson v. Gibbs*, 147 Cal. 1, 6, 81 Pac. 121, 123, 109 Am. St. Rep. 107.

[2] It is clear that this expression of the view of this court constitutes the law of this case. The opinion shows that it appeared from the record in that case that the defendants there (plaintiffs here) had not commenced to remove any of the timber, and that their alleged derelictions were the same in kind as are alleged here; the only difference being that they had not continued so long. What was said in the opinion disposes of all questions raised as to the forfeiture by plaintiffs of any of their rights in regard to such timber, and determines that they are the absolute owners thereof, notwithstanding their failure to take any step to remove the same, and notwithstanding their failure to pay any of the taxes



for the years 1891 to 1896. The same would be true as to the failure of plaintiffs to pay the \$200 per annum specified in said instrument, if there has been any such failure. But we do not understand any such failure to be alleged in either answer or cross-complaint; the rental referred to therein obviously being the amount to which defendant deems himself entitled, independent of any provision of the instrument, as the reasonable value of the use and occupation of his land by plaintiffs' timber. In no event would defendant be entitled to receive the whole of said \$200 per annum; he having acquired only a small portion of the entire land on account of which such payment was to be made. It does not appear that plaintiffs did not annually pay to Oppenlander the whole of said sum of \$200 as provided in the instrument of December 28, 1887, and, in the absence of any apportionment of such sum by defendant and his grantor to the respective parcels of land, it would appear that plaintiffs by so paying the whole sum to defendant's grantor fully performed their covenant in this regard. See *Dreyfus v. Hirt*, 82 Cal. 621, 627, 23 Pac. 193. As to the taxes, it is further to be said, as was said in *Peterson v. Gibbs*, supra, that it was not alleged that any demand for reimbursement had ever been made on plaintiffs, and there was no allegation as to the amount of such taxes.

From what has been said, it seems clear that defendant was not warranted in proceeding on the theory that plaintiffs had lost all rights in the timber standing on his land, and that, notwithstanding the matters set up in his answer and cross-complaint, plaintiffs were entitled to a decree enjoining him from so doing. The effect of the former decision, which is the law of the case as between these parties, clearly is that no delay in the removal of the timber can operate as a forfeiture of plaintiffs' rights in regard thereto. Learned counsel for defendant expressly admit in their petition for a hearing in this court, after decision by the District Court of Appeal for the Third District, that plaintiffs are the owners of the timber which covers defendant's land. In view of the facts both as to the taxes and the stipulation for the payment of \$200 annually, it is clear that the equitable rule invoked by defendant, that he who seeks equity must do equity, would not have warranted the trial court in refusing to enjoin the threatened appropriation by defendant of plaintiffs' property.

The only questions remaining are as to the right of defendant under his cross-complaint in regard to the matter of compensation for the use and occupation of his land by plaintiffs' timber, and the matter of requiring plaintiffs within a specified time to remove such timber from the land.

[3] It was said in the opinion in *Peterson v. Gibbs*, supra, that "it is true that the timber was sold in contemplation of its re-

moval from the land, and that it was the understanding of all parties that it should be so removed." There can be no doubt that this is clearly shown by the instrument upon which plaintiffs rely as their source of title to the timber. And while, in view of the terms of that instrument, no forfeiture of plaintiffs' rights can be caused by any delay in the removal of the timber from the land, we are satisfied that any construction of such instrument that would give to plaintiffs the absolute right to perpetually maintain such timber on the land, upon the payment of the "yearly rental" of \$200 and the payment of one-half of the taxes, would be unwarranted. No such question was involved in *Peterson v. Gibbs*, supra, and nothing said in the opinion therein can fairly be held to determine such a question. In the agreement between the parties, plaintiffs were expressly given "a period of ten years in which to remove the timber," subject to no other burden than that of the payment of one-half of the taxes on all land covered with standing timber until the timber was removed therefrom. The provision as to what should be the rights of the parties in the event that the timber was not removed within 10 years was manifestly inserted simply to protect the purchasers, in the event that the timber was not removed within such time, to preserve all their rights therein until it was removed, and to require the payment of \$200 per annum by them until such removal was had; in other words, as said in the opinion in *Peterson v. Gibbs*, supra, "to express the agreement of the parties as to the effect of any failure of the vendee to remove the timber within the designated period of 10 years." Clearly it was not intended thereby to confer upon plaintiffs the right to perpetually maintain the timber upon the land, and thus render the land valueless to the vendors, as, in view of the allegations of the cross-complaint, would be the result of the exercise of such a right. What, then, is the situation between these parties, in the light of the cross-complaint? Plaintiffs are the owners of the timber standing and growing on defendant's land, having by reason of such ownership, it may be conceded, an interest in the real property. They are such owners, however, under an instrument clearly contemplating and intending the removal by them of such timber. While, under the terms of this instrument, there can be no forfeiture of their interest, the time expressly given by the instrument of conveyance during which they have the absolute right to maintain the timber on the land has long since expired. The land is valueless to its owner so long as the timber remains thereon, and would be valuable to him for agricultural and fruit-growing purposes if such timber were removed.

[4] Under these circumstances, we cannot doubt the power of a court of equity to grant

such relief to defendant as is analogous in its result to the relief granted in an ordinary action for partition between "parceners, joint tenants, or tenants in common" (section 752, Code Civ. Proc.), to accomplish in some way a segregation and beneficial appropriation of the respective interests in the property to the respective owners. A suggestion of this nature is to be found in the opinion of the Supreme Court in Mississippi, in *Butterfield Lumber Co. v. Guy*, 92 Miss. 361, 46 South. 78, 15 L. R. A. (N. S.) 1123, 131 Am. St. Rep. 540. We think there can be no question that such relief is proper under such circumstances as were made to appear by the cross-complaint in this case. A different question would, perhaps, be presented if it were not clear that it was the contemplation and intention of the parties to the instrument of December 28, 1887, that the timber would be removed from the land by the purchasers. As to that we express no opinion, as no such case is presented. We are simply determining the question presented by this particular contract, in the light of the decision already given as to its proper construction. *Peterson v. Gibbs*, *supra*. It is our conclusion that, assuming the facts to be as stated in the cross-complaint, the defendant was entitled to have the judgment fix a reasonable time within which plaintiffs shall remove their timber from defendant's land, and providing that if plaintiffs do not remove the same within said time the defendant may remove and sell the same at the expense and for the benefit of plaintiffs, accounting to them for the net proceeds thereof. The judgment should further provide that if the timber be not removed within the time specified by the court the defendant shall be entitled to retain from the proceeds of his sale of the timber such an amount as will reasonably compensate him for his loss of the use and occupation of the soil from the expiration of the period fixed by the court for such removal to the time of actual removal, such amount to be determined by the court. The judgment given should be interlocutory in its nature; the court retaining jurisdiction of the cause for the purpose of an accounting between the parties, in the event that plaintiffs fail to remove the timber within the specified time.

We are further of the opinion that, in view of the provisions of the instrument of December 28, 1887, defendant is not entitled to any compensation for the maintenance of the timber on the land prior to the expiration of such time as may be fixed by said judgment, except possibly such portion of the \$200 per annum specified in such instrument as may fairly be apportioned to the land purchased by him from Oppenlander. As we have indicated, his right to this pro rata share does not appear to be involved in the case made by the cross-complaint. It must

be assumed, in view of the want of allegation to the contrary, that plaintiffs have paid the \$200 per annum to their grantors, as they were warranted in doing in the absence of an apportionment by such grantors and defendant, and notice to them thereof; and defendant's right, if any, to a portion of the amounts so paid is against Oppenlander, and not against plaintiffs here. As to any amounts remaining unpaid, if any such there are, it is clear that no apportionment could be made by the court in the absence, as parties, of the owners of the other land covered by the instrument of December 28, 1887.

Until the final determination of the issues presented by the cross-complaint, the plaintiffs should, of course, be protected against any interference by defendant with their timber, by a temporary injunction.

For the reasons stated, we are of the opinion that the demurrer to the cross-complaint should have been overruled.

The judgment is reversed, with directions to the lower court to overrule the demurrer to defendant's cross-complaint, with leave to plaintiffs to answer the same, and to proceed thenceforth in a manner not inconsistent with the views herein expressed.

We concur: SHAW, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.

163 Cal. 717

TAYLOR v. MORRIS et al. (L. A. 3,065.)

(Supreme Court of California. Sept. 21, 1912.  
Rehearing Denied Oct. 21, 1912.)

1. TRUSTS (§ 44\*) — EXPRESS TRUSTS — EVIDENCE TO ESTABLISH — SUFFICIENCY.

In an action to quiet title, in which the administrator of plaintiff's mother intervened as defendant, evidence *held* to show that plaintiff held title to the property, in part, in trust for her mother.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 66-68; Dec. Dig. § 44.\*]

2. EVIDENCE (§ 584\*) — WEIGHT AND SUFFICIENCY.

The explanation of a transaction, given in a contemporaneous writing before any differences have arisen, is of more weight as evidence than a subsequent oral explanation at variance with the writing, given after differences have arisen.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2424, 2426, 2427; Dec. Dig. § 584.\*]

3. TRUSTS (§ 43\*) — EXPRESS TRUSTS — EVIDENCE TO ESTABLISH — PAROL EVIDENCE.

Parol evidence is admissible to prove that a deed, absolute in form, was made on a parol trust in favor of the grantor, since the statute of frauds cannot be used as a shield for fraud, and the repudiation of a parol trust is a fraud.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 62-65; Dec. Dig. § 43.\*]

4. STIPULATIONS (§ 18\*) — CONCLUSIVENESS AND EFFECT — MATTERS CONCLUDED.

In an action to quiet title, a stipulation that the property was conveyed to plaintiff by her mother, and that it stood in plaintiff's

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



name, did not prevent proof that such conveyance was made on a parol trust.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 41-54; Dec. Dig. § 18.\*]

**5. TRUSTS (§ 108\*) — EXPRESS TRUSTS — EVIDENCE TO ESTABLISH — PAROL EVIDENCE.**

While a constructive trust cannot be created by a grantee's naked promise after a conveyance, his admissions and declarations, showing that a trust relationship was created and existed contemporaneously with the conveyance, are competent evidence of the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 158; Dec. Dig. § 108.\*]

**6. TRUSTS (§ 372\*) — EVIDENCE TO ESTABLISH — ADMISSIONS BY TRUSTEE.**

Where a trustee, at the time of purchasing land, had trust funds in her possession, and admitted and declared thereafter that such trust funds went into the purchase, she cannot repudiate her declarations by showing that the precise funds did not go into the purchase.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 600-603; Dec. Dig. § 372.\*]

**7. TRUSTS (§ 371\*) — VARIANCE BETWEEN ALLEGATIONS AND PROOF — MATERIALITY.**

In a suit to quiet title, where defendants pleaded that plaintiff's mother furnished plaintiff with \$8,000 with which to purchase a two-thirds' interest in property, while the evidence showed that plaintiff had \$8,000 of her mother's money, and, although not investing this precise fund in the land, she treated \$8,000 of the purchase price as representing the trust fund, and admitted that the trust fund had been so invested, the variance could not have misled or injured plaintiff, and hence, under the express provisions of Code Civ. Proc. § 469, was immaterial.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 588-599; Dec. Dig. § 371.\*]

**8. LIMITATION OF ACTIONS (§ 103\*) — COMPUTATION OF PERIOD — TRUSTS — REPUDIATION BY TRUSTEE.**

The statute of limitations will not run against a positive, voluntary trust resting in parol until repudiation of the trust by the trustee and knowledge of the repudiation by the beneficiaries.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 506-510; Dec. Dig. § 103.\*]

In Bank. Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by Jessie W. Taylor against Grace Morris and others, in which W. A. Snedaker, as administrator of Zerelda S. Wheeler, intervened as defendant. Judgment for the interveners, and plaintiff appeals. Affirmed.

J. W. Swanwick and Taylor O. Taylor, both of Los Angeles, for appellant. Andrew Park, Flint, Gray & Barker, and Bowen, Allen, Van Dyke & Jutten, all of Los Angeles, for interveners and respondents.

**HENSHAW, J.** The heirs at law of Zerelda S. Wheeler, deceased, are her daughters, Jessie W. Taylor and Helen O. Morris, both married women. At the time of and some time prior to the institution of this action, Helen O. Morris was and had been an incompetent person. Frank M. Kelsey was appointed her guardian ad litem. Upon the death of Zerelda S. Wheeler, testate, Jessie W. Taylor was appointed administratrix

with the will annexed of her mother's estate. Thereafter she instituted this action against Grace, Cleda, and Ethel Morris, daughters of her incompetent sister Helen, to quiet title to three separate pieces of property situated in the county of Los Angeles. The administrator of the estate of Zerelda S. Wheeler, deceased (Jessie Taylor having been relieved from her administrative duties), and the guardian ad litem of Helen O. Morris, incompetent, were permitted to intervene, and by intervention asserted an interest in the property growing out of the trust relations theretofore existing between Jessie W. Taylor and her mother. In brief, the averments of the intervention are that Zerelda S. Wheeler in her lifetime gave to her daughter Jessie, in trust, \$8,000, which the daughter used in purchasing the properties to settle title to which the action was brought. In particular it is alleged that a certain piece of property, known as "the flats on Flower street," was purchased by Jessie W. Taylor for \$12,000, \$8,000 of which was trust money of the mother, and \$4,000 of which was Mrs. Taylor's own; that this property had been sold by Mrs. Taylor for \$26,000, \$16,000 of which, under the trust, belonged to Mrs. Wheeler in her lifetime and to her estate after her death, and that with accrued interest upon this sum there was thus due to the estate of Mrs. Wheeler the sum of \$22,000. The answer to this complaint by Mrs. Taylor was a denial of the receipt of the trust funds, or of any trust relationship and the plea of the statute of limitations. The court found in favor of plaintiff's title to two of the pieces of property in controversy. As to the third, the court found that the mother did advance to her daughter, Mrs. Taylor, \$8,000, for the purpose "of purchasing a piece of property situate in the city of Los Angeles, being the same piece of property described in the complaint, which said property was known to the mother and daughter as 'the flats on Flower street.'" Further, the court found "that it was then and there orally agreed between said mother and daughter that the said mother should contribute said \$8,000 in money and the daughter \$4,000 in money, and that with the said aggregate amount of \$12,000 that said daughter should purchase said property last described, taking the title thereto in the name of said daughter and holding the same in trust for her said mother to the extent of two-thirds thereof. In pursuance of said agreement and arrangement, the said Jessie W. Taylor did then and there, on or about the 7th day of February, 1902, purchase said property and took the title thereof in her own name, paying therefor with the money thus contributed; \$8,000 in money belonging to her said mother and \$4,000 in money of said daughter."

It was made to appear, and so found, that in March, 1894, the mother conveyed to the



plaintiff a piece of property in trust for herself, which piece of property was known as the "Highland Villa." This Mrs. Taylor subsequently sold, receiving therefor \$1,000 in cash and \$7,000 in a note secured by a mortgage. This mortgage note she sold and assigned to the Southern California Savings Bank for its face value. Still further the court found: "On February 7, 1902, the flats were conveyed to plaintiff, and she paid therefor \$12,000 in cash. No part of the money which plaintiff received from the savings bank upon the assignment of said mortgage was used in the purchase of the flats; but the court finds that the plaintiff considered and treated two-thirds of the money which she paid for the flats as the proceeds of the Highland Villa, and as the property of her mother, and considered and treated the flats as belonging one-third to herself and two-thirds to her mother; and the court finds that plaintiff held two-thirds of said property in trust for her mother." The further findings compute the amount of the trust fund in the hands of the plaintiff to be \$20,805.90, and declare against the plea of the statute of limitations. Judgment was given for the interveners accordingly.

[1, 2] The evidence to establish the trust is ample and convincing. Mrs. Wheeler, in December, 1902, drew her olographic will, which was admitted to probate. That will contained the following: "Mrs. Parke [now plaintiff, Mrs. Jessie W. Taylor] and I paid twelve thousand dollars for the flats on Flower street; I paid eight thousand and she paid four thousand dollars. I want Jessie Parke to have one half and Mrs. Helen Morris to have the other half." The testimony is that upon the reading of this will Mrs. Taylor acquiesced in the statements above quoted, and pronounced them correct. Mrs. Taylor's letters to her sister are strongly confirmatory of this. Thus, four years after her mother had conveyed to her the Villa property, she writes to her sister Helen: "Don't worry about what will happen in five years. Mama, in all probability, will not be living, and you will have one-half of the Villa to live on or to do business with. In the meantime I will take care of her as best I can like I always have. I would sell the Villa this winter if I could and pay off the debt on it and put the money on interest or buy something that I could rent so she can support herself." In April, 1902, about three months after the sale of the Villa, and about two months after the purchase of the flats on Flower street, she wrote to her sister as follows: "I have sold the Villa for \$10,000, paid the mortgage, principal and interest, and after settling up everything I had \$8,000 left. Don't you think I did well. I had to repair the roof and paint the front and steps and had a lot of small repairs inside and paid the spring taxes. Well, I went right straight and got another place with it. I took moth-

er's \$8,000 and put \$4,000 of my money with it and bought some very fine flats on Flower street between 9th and 10th streets, the whole costing me \$12,000. The lot is 50 by 150 feet to a 20 foot alley. It is a very good piece of property and I wouldn't think of selling it for less than \$15,000. I long so much to talk to you and if I can sell the flats for \$15,000.00 Ma will have \$10,000 clear and I will have \$5,000. They are for sale. I am trying to make all the money I can so you can have something when you are old." Mrs. Taylor's explanation of these letters is that her sister was having trouble with her husband and was fearful that her husband would leave her, and that she wrote these letters at her sister's request, that they might be shown to the husband and convey to him the idea that she would soon have property of her own. But, of course, the court was not bound to accept this explanation; and it is well recognized as matter of law, as well as of plain common sense, that an account of a transaction, given in a contemporaneous writing when no differences have arisen, is to be preferred to a subsequent oral explanation at variance with the writing, given after differences have arisen.

[3] Appellant contends that the evidence entirely fails to establish that she held the Villa property in trust, and that, failing to establish this, the whole foundation for the asserted trust in the Flower street flats is destroyed. It is conceded, as it must be, that there is evidence to establish that plaintiff was trustee for her mother of the Villa property; but it is asserted that the deeds by which her mother conveyed title to her were absolute in form; that the stipulation of the parties in this action acknowledges her absolute title; and that therefore the evidence to establish the trust in contradiction of the deed and of the stipulation was inadmissible. To this proposition the familiar sections of the Code and the familiar decisions under them, forbidding the attempt to vary the language of written contracts by parol, are cited. But appellant mistakes the scope of the rule. The statute of frauds is never permitted to become a shield for fraud, and fraud at once arises upon the repudiation by the trustee of any trust, even if that trust rests in parol. When it rests in parol, either parol evidence must be received to establish the trust, or the faithless trustee will always prevail. Certainly no elaboration of so plain a proposition is necessary, and it should be sufficient to refer to such cases as *Butler v. Hyland*, 89 Cal. 575, 26 Pac. 1108; *Hayne v. Hermann*, 97 Cal. 261, 32 Pac. 171; *Odell v. Moss*, 130 Cal. 352, 62 Pac. 555; *Becker v. Schwerdtle*, 141 Cal. 391, 74 Pac. 1029; *Fanning v. Green*, 156 Cal. 279, 104 Pac. 308; *Cooney v. Glynn*, 157 Cal. 589, 108 Pac. 506; *Lauricella v. Lauricella*, 161 Cal. 61, 118 Pac. 430.

[4] The stipulation upon which appellant relies does no more than to declare that it

is stipulated "that the property called 'The Villa,' or 'The Highland Villa,' \* \* \* was conveyed to her by her mother by grant deed March 28, 1894, 16 years ago, and also by a second grant deed made 4 years later in 1898, and it stood in plaintiff's name until she sold it." There is nothing in this stipulation to prevent defendants and interveners from establishing the trust. It is a stipulation affecting the legal title alone; and it is useless to contend that by such a stipulation the defendants and interveners designed to waive their contention of the existence of a trust which lay at the very foundation of their claim.

[5] To the objection of appellant that the evidence does not establish the existence of a trust, and does no more than to show certain naked promises made by the plaintiff after the transaction, it is to be noted that the evidence here adverted to is precisely of the same nature as that discussed in *Fanning v. Green*, supra, and *Cooney v. Glynn*, supra. The statements of Mrs. Taylor were not promises. They were admissions and acknowledgments of a trust relationship resting in parol, which trust relationship was created and existed contemporaneously with the acquisition by her of the Villa property and the purchase by her of the Flower street flats. So, while it is true that a constructive trust cannot be created by a naked promise of the grantee after conveyance made to him, it is equally true that his declarations, showing the existence of a trust at the time he accepted the conveyance, afford strong evidence against him in the establishment of the trust.

[6] Appellant contends that there is a fatal variance between the allegation and the proof; that the allegation (above quoted) is the furnishing by Zerelda S. Wheeler, in February, 1902, of \$8,000 for the purpose of purchasing the flats on Flower street; that the proof fails to establish the furnishing by Zerelda S. Wheeler of this or any money at that time; still further that the evidence fails to establish the trust in the Villa property; that the finding is specific that the proceeds of the Villa property, even if there was a trust therein, were not invested in the Flower street flats; and that for this variance and this failure of proof the cause must be reversed. We have before said that the evidence to establish the trust in the Villa property is sufficient so to do. The findings of the court amount to this: That at the time plaintiff purchased the Flower street flats she was chargeable with the possession of \$8,000 trust funds of her mother; that this identical earmarked trust fund was not invested in the Flower street flats, but that of the \$12,000 paid by plaintiff for the purchase of those flats she herself, contemporaneously with the transaction, treated \$8,000 of it as being and representing the trust fund of her mother; that defendants and interveners have accepted this, and their accep-

tance binds the plaintiff. This, we say, is the substance of the court's findings. These findings are unquestionably supported by the evidence. Generally speaking it is, of course, true that to charge a constructive or resulting trust upon any specific piece of property it must be shown that trust funds went to the purchase of the property. Here the proof that the trust funds so went into the purchase of the property is largely established by the declarations and admissions of the trustee herself. The question is: Shall she be allowed to repudiate these declarations by showing that the precise trust funds did not go into the purchase, and upon this repudiation contend for a variance between the allegation and proof; or shall it be said that, under such admissions and declarations of a trustee, it will be held, against an attempt to make a countershowing, that the trustee, who had commingled the trust funds, herself treated the investment as an investment of the specific trust funds, and will be bound accordingly? No doubt can be entertained but that the latter, which was the conclusion of the trial court, is the only one which equity will countenance.

[7] Moreover, it is not every variance which will necessitate the overthrow of a judgment. Section 469, Code Civ. Proc. The allegation in this instance is that Mrs. Wheeler, in February, 1902, furnished her daughter, with \$8,000 trust funds to purchase, and with which she purchased a two-thirds interest in the Flower street flats. The proof established the possession by the daughter at that time of \$8,000 of the mother's money, and her declarations in writing that she applied that money to the purchase of the Flower street flats, and that because of this application her mother was the equitable owner of two-thirds of the property. There is, as between this allegation and these proofs, no variance which could have misled or injured the plaintiff.

[8] The plea of the statute of limitations was not sustained. Appellant argues that respondents rely upon an implied trust arising by operation of law; that the statute of limitations runs against the right to charge upon such an implied trust from the date the right arises; and that the action is therefore barred by section 343, Code of Civil Procedure. See *Hecht v. Slaney*, 72 Cal. 366, 14 Pac. 88; *Nougues v. Newlands*, 118 Cal. 104, 50 Pac. 386; *Broder v. Conklin*, 121 Cal. 288, 53 Pac. 699. The difficulty with appellant's contention is that the claim against her does not arise under an implied trust, but under a positive, voluntary trust resting in parol; and it is, of course, well settled that the statute of limitations does not run against such a trust until repudiation of it by the trustee, with knowledge of this repudiation brought home to the beneficiaries. Only after this repudiation and knowledge does the four-year statute of limitation apply. *Odell v. Moss*, 130 Cal. 352, 62 Pac. 555; *Norton v.*



Bassett, 154 Cal. 415, 97 Pac. 894, 129 Am. St. Rep. 162. As late as December, 1906, plaintiff had written to her sister, acknowledging the trust and her trusteeship. As appears by the evidence, the first act amounting to a repudiation and disavowance of her trust was the filing by her of an inventory of her mother's estate, by which inventory no interest of the estate in the property, and no indebtedness to the estate from the plaintiff, was shown.

No showing is here made to justify appellant's contention that she should have a judgment for costs.

Her other contentions all revolve about the propositions which have heretofore been discussed. They do not therefore require specific consideration.

For the reasons given, the judgment and order appealed from are affirmed.

We concur: MELVIN, J.; ANGELLOTTI, J.; SHAW, J.

163 Cal. 778

In re CROSS' ESTATE. (L. A. 3,121.)

(Supreme Court of California. Sept. 24, 1912.)

1. WILLS (§ 630\*)—VESTED INTERESTS—DEVISE TO SURVIVOR—DIVESTING OF VESTED INTERESTS.

Under joint and mutual wills, executed by a husband and wife, providing that in the event of the death of either and the survival of the other for 30 days the whole estate of the deceased testator and of the community should pass to the survivor, there is no failure of a vested title during the 30 days after which the terms of the will take effect, but the law interposes; and under the rules of inheritance and succession the title vests in the heirs, devisees, or legatees, subject to divestiture if either husband or wife survive the other for more than 30 days.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1464-1480, 1486, 1487; Dec. Dig. § 630.\*]

2. WILLS (§ 184\*)—CONSTRUCTION—CODICIL—ADDITIONAL LEGACIES.

Under Civ. Code, §§ 1296, 1287, 1320, 1321, relating to the revocation, effect, and construction of wills, a prior will is not revoked by a codicil, unless the same is inconsistent with the will; and where joint and mutual wills, executed by a husband and wife, provided that on the death of either the survivor, if living at the end of 30 days, should take the whole estate of the decedent, and appointed the surviving husband or wife executor or executrix, and by another paragraph provided for disposition in the event that one of the testators should not survive the other for 30 days, and appointed certain other persons executors, and a joint and mutual codicil appointed the previously named executors and another as executors, the codicil did not revoke the first provision, but was a substituted clause for the second paragraph, naming the executors, so that under the first provision the widow, surviving for 30 days, was entitled to letters testamentary.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 462-467; Dec. Dig. § 184.\*]

Department 2. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of John Cross, deceased. From an order admitting the will to probate and granting letters testamentary to Albert P. Cross and others, Laura L. Cross appeals. Reversed.

H. M. Barstow, of Los Angeles, and C. W. Cross, of San Francisco, for appellant. Edwin A. Meserve, of Los Angeles, for respondents.

HENSHAW, J. John Cross and Laura L. Cross, his wife, had been married for 45 years. They were childless and owned property of considerable value. In May, 1898, they executed their joint and mutual wills. By paragraph I of those wills it was provided:

"In the event of the death of either one of the testators herein, if the survivor shall continue living for the period of thirty days thereafter, then and in that event the following terms of this instrument shall prevail, that is to say:

"1. The whole estate of the deceased testator and of the community shall pass to the surviving husband or wife; and for that purpose and in that event above described, each testator herein does hereby give, bequeath and devise to the other so surviving, all of said property and estate.

"2. That said surviving husband or wife is hereby appointed executor or executrix of this will as the will of the testator first dying as aforesaid, to serve without bonds, such executor or executrix to have full power to sell and convey and to manage said estate and all property thereof, without any order of court thereafter."

By paragraph II it was provided: "In the event that the deaths of the testators herein shall occur so that the one shall not survive the other for the full period of thirty days, then and in that event, and not otherwise, the following dispositions of this will shall have force and effect; and then and in that event, and not otherwise, we give, bequeath, and devise the said property and estate as follows; that is to say." Specific legacies were then made to named legatees. It was declared that the value of their property was estimated at \$50,000; and provision was made for the ratable increase or decrease of these legacies in the event that the estate should prove to be of greater or less value than was estimated. It was further provided: "7. In the like event first described in this division II of this will, the said Albert P. Cross and Charles R. Diver (they having formerly been named as legatees) are hereby appointed as executors of this will."

Subsequently, in March, 1909, John and Laura L. Cross, in like manner, executed a joint and mutual codicil to their last will, which codicil increased legacies given by the original will to certain legatees, revoked

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



another legacy because of the legatee's death, and provided in paragraph 6 as follows: "Albert P. Cross and Charles R. Diver mentioned in the original will, and J. E. Loomis of Los Angeles, California, are hereby appointed executors of the original will and of this codicil, and power is given to any two of them to act at any time, and the act of any two to have the same force and effect as if all three had acted."

John Cross died, and Laura, his wife, surviving him for more than 30 days, made application for the probate of the will and codicil, and for issuance to herself, as executrix, of letters testamentary. Opposition was made by Albert P. Cross, Charles R. Diver, and J. E. Loomis, with a petition that letters testamentary be issued to them as executors. The court admitted the will and its codicil to probate and granted letters testamentary to Cross, Loomis, and Diver. From the order issuing letters testamentary, the widow appeals.

[1] Thus the single question directly involved is the correctness or incorrectness of the court's decision that Cross, Loomis, and Diver were entitled to execute the will against the claims of the widow to letters testamentary. The court's ruling seems to have been based on the argument advanced by respondents that the first part of the will above quoted, was invalid, because to sustain it would "suspend the vesting of his whole estate entirely for a period of 30 days after his death, leaving the title to all his property in abeyance and nowhere, and preventing its vesting anywhere for a period of 30 days." This quotation is from respondents' brief. But the answer to this is that it is not humanly possible for a testator to do any such thing. The law itself intervenes and provides for the vesting of title. There was no failure to vest during the period of 30 days fixed by the will as the duration of the survivor's life before the terms of the will took effect. The rules and laws of inheritance and succession interposed wherever the will was silent, with the result that title vested in the heirs, devisees, or legatees, subject to divestiture if either spouse should survive the other for more than 30 days. The order, therefore, cannot be justified upon the argument that clause 1 of the testator's will is null and void.

[2] There remains then only for consideration the effect of the codicil and its nomination of executors upon the original will. To this the briefest reference to certain provisions of the Code embodying the fundamental rules of construction of wills and codicil thereto may be made. A prior will is not revoked by a subsequent will or a subsequent codicil thereto, unless the latter contains words of express revocation, or provisions wholly inconsistent with the terms

of the former. In all other cases the prior will remains effectual, so far as consistent with the provisions of the subsequent will or codicil. Civ. Code, § 1296. All instruments testamentary in character, executed by the same testator, are to be construed as one instrument. Civ. Code, § 1320. All parts of a will are to be construed in relation to each other, so as to form, if possible, a consistent whole. Civ. Code, § 1321. The execution of a codicil, referring to a previous will, has the effect to republish the will, as modified by the codicil. Civ. Code, § 1287; Estate of Ladd, 94 Cal. 670, 30 Pac. 99; Estate of Plumel, 151 Cal. 80, 90 Pac. 192, 121 Am. St. Rep. 100. Growing out of these principles, it has become well established that additional or substitutional legacies given by a codicil are held to be attended by the same incidents and conditions as were the legacies given originally by the will. 1 Jarman on Wills, p. 149.

With these principles of construction before us, this appeal presents no difficulty. To construe the language of the codicil as being substituted language for paragraph II of the will makes of the will and codicil a harmonious whole. To say that the codicil meant to strike down paragraph I of the will is to do violence to these rules of construction, and to find a revocation where a revocation is not expressed, and where the construction of the instruments does not call for it. Subdivision 6 of the codicil, in nominating Cross, Diver, and Loomis as executors of the original will under this codicil, is clearly but a substituted clause for subdivision 7, paragraph II, of the will, where Cross and Diver alone are named. Thus Cross, Diver, and Loomis would be entitled to letters testamentary only upon the failure of the plan and scheme set forth in paragraph I of the will. This scheme has not failed. The wife has survived her husband for the named period, and by the terms of the will is entitled to letters.

The order appealed from is therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

163 Cal. 742  
EATON et al. v. WILKINS et al. (Sac. 1,924.)  
(Supreme Court of California. Sept. 23, 1912.  
Rehearing Denied Oct. 23, 1912.)

**1. SPECIFIC PERFORMANCE (§ 29\*)—DESCRIPTION OF LANDS—SUFFICIENCY.**

A contract for the sale of land is unenforceable, unless the land be described, either in terms or by reference, so that the property may be identified without resort to parol evidence.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 69-82; Dec. Dig. § 29.\*]

## 2. SPECIFIC PERFORMANCE (§ 114\*) — PLEADING—DESCRIPTION OF PROPERTY.

A complaint seeking specific performance of a contract for the sale of land, dated W. ranch, and describing the property as "our land of 1,060 acres," is insufficient, where the only allegation is that the land lay in a certain county, but there was no pleading of extrinsic facts tending to identify this property by reference.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356-372; Dec. Dig. § 114.\*]

## 3. DEEDS (§ 194\*)—DELIVERY—PRESUMPTION.

There is a presumption that a deed is delivered on the day of its date.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 574-583, 623; Dec. Dig. § 194.\*]

## 4. ESTOPPEL (§ 71\*)—RIGHT TO PERFORMANCE —ESTOPPEL AGAINST REAL OWNER.

Where the owner of part of a tract of land made a contract for the sale of the whole, and his co-owner, whose deed was not recorded until after the making of the contract, then denied his own title, specific performance on ground of estoppel cannot be against the co-owner, in the absence of his fraud or gross negligence.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 173-179; Dec. Dig. § 71.\*]

Department 2. Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by M. D. Eaton and another against W. H. Wilkins and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

R. C. Minor and Clary & Louttit, all of Stockton, for appellants. Nicol & Orr and Nutter & Orr, all of Stockton, for respondents.

MELVIN, J. Defendants' demurrer to plaintiffs' third amended complaint having been sustained, and plaintiffs having refused to amend further, judgment was accordingly given in favor of defendants, and from it plaintiffs take this appeal. The action was one for specific performance of a contract for the sale of real and personal property. The complaint contains allegations that on September 22, 1909, defendant W. H. Wilkins was the owner of a certain described tract of land in San Joaquin county, together with certain specified personal property situated thereon, and that on said day Wilkins executed and delivered to plaintiffs a contract, signed by him, giving them until September 29, 1909, to purchase the said land and personalty for \$18,000. This contract is set out in full in the complaint as follows: "Wilkins Ranch, September 22, 1909. Messrs. Eaton and Buckley: We hereby grant you until next Wednesday, September 29th, 1909, in which to buy our land of 1,060 acres and all the personal property including hay, wood, wagons, 12 horses, 4 cows, 10 hogs and pigs, harness, mowers, plows, etc., meaning everything on the ranch excepting the baled hay in the warehouse, for the sum of eighteen thousand (\$18,000.00) dollars. Terms of sale to be cash and you are to get your commission and a commission for Tom Walsh

by selling for a greater sum. Land is to be clear of all debts and possession to be given with the deed. Personal property is to be clear of all debt. Abstract showing clear title to be furnished by us. The intention is to sell everything on the ranch except the hay mentioned above and the furniture and household goods, hay in barn and small stack in field across the river goes with the ranch. W. H. Wilkins."

The complaint contains averments that the real property described as "our land of 1,060 acres" was intended by Wilkins to refer to and did refer to the property in San Joaquin county theretofore specifically described in the complaint; that defendant E. A. Clifford was present when the contract was signed and delivered, and that he disclaimed any interest in the property involved; that, relying upon his statement, plaintiffs accepted the agreement, signed by Wilkins alone, and thereupon contracted and agreed to pay the purchase price according to the terms of the instrument; that on September 27, 1909, Wilkins caused certain abstracts to be delivered to plaintiffs; that from these abstracts plaintiffs ascertained that the title to the property stood of record in the name of W. H. Wilkins; that on September 29, 1909, plaintiffs tendered to Wilkins \$18,000 for said property; that this sum was a just, fair, and reasonable price therefor; that plaintiffs have fully performed their part of the contract; that they have no plain, speedy, or adequate remedy at law; and that Wilkins has failed to execute a conveyance or to deliver to plaintiffs the possession of the real or personal property involved. The complaint contains the further averments that defendant E. A. Clifford knew of the execution of the contract by Wilkins, of the delivery thereof, and of the acceptance of the terms thereof by plaintiffs; but that on September 28, 1909 (the day before the tender to Wilkins of the \$18,000), he caused to be recorded a deed from said Wilkins, dated January 31, 1907, conveying to him an undivided one-half interest in and to a large portion of the real property here in dispute. Plaintiffs further allege that at the time of the acceptance of the terms of the agreement, and at the time of the tender of the purchase price to Wilkins, they had no knowledge of the existence of said deed. The rest of the pleading is concerned with certain liens claimed by the other defendants and the reconveyance to Wilkins by Clifford of a certain interest in the property; but we need not concern ourselves with these matters.

[1, 2] The first contention of respondents in defense of the court's ruling sustaining the demurrer is that the contract is too indefinite to be specifically enforced. We think this position must be sustained. We have in mind the liberal rule with reference to indefinite descriptions capable of being made

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



certain; but here the description of the real property as "our land of 1,060 acres," in a contract dated "Wilkins Ranch, September 22, 1909," is not sufficient. There is an allegation, as we have shown, that Wilkins intended by this vague description to designate the land in San Joaquin county, which is particularly described in the complaint; but that averment is of a bald conclusion, and is by no means sufficient. *Marriner v. Dennison*, 78 Cal. 210, 20 Pac. 386. There is no pleading of extrinsic facts which would support this conclusion, as, for instance, that the tract of land which plaintiffs desired to secure by this action was known as "Wilkins Ranch," or was the only realty containing 1,060 acres possessed by Wilkins. From the contract itself, it is impossible to determine whether or not the land is situated within the state of California. The description of the land to be conveyed is one of the most essential parts of an agreement to sell. Such a contract must be in writing, subscribed by the party to be charged, and must contain such description of the land, either in terms or by reference, that the property may be identified without resort to parol evidence. *Craig v. Zelian*, 137 Cal. 105, 69 Pac. 853. The contract here pleaded is one which, in and of itself, gives no clue to the property involved, and the complaint states no facts which would clarify the obscure references therein contained. The circumstance that in the agreement Wilkins promises to furnish, and did subsequently furnish, abstracts of title does not help the matter. The *description* in the contract must be sufficient to bind interested parties, and cannot be made to depend for its very existence upon the subsequent action of one of them. The demurrer was therefore properly sustained because of the failure of the complaint to set forth a definite and enforceable contract as a basis for the action.

[3, 4] There is another radical defect in the complaint. While it declares that the title to the property was in Wilkins on September 22, 1909, when the contract was delivered, and on September 27th, when the abstracts of title were examined, it pleads facts showing record title to an interest existing in favor of defendant E. A. Clifford on September 28 and 29, 1909, before the tender of the purchase price of \$18,000 to Wilkins. Appellants contend that, since Clifford knew of their contract with Wilkins, his deed, placed of record on September 28, 1909, gives no title as against their contract. In this behalf they cite *Smith v. Bangham*, 156 Cal. 365, 104 Pac. 689, 28 L. R. A. (N. S.) 522, which holds that a right given by an option relates, when exercised, to the time of giving the option and cuts off intervening rights. But Clifford's deed was not one establishing a right acquired during the life of the option. It bore date January 31, 1907, and the

presumption, in the absence of an allegation to the contrary, is that it was delivered on that date. There is an effort to plead estoppel in pais against E. A. Clifford, because he refused to sign the agreement, declared that he owned no interest in the land, and thereby caused plaintiffs to act upon his statements. There is, however, no allegation that he acted fraudulently, or with such gross negligence as amounted to constructive fraud. It does not appear that he was apprised of the true state of his own title when he made the statements attributed to him, nor that plaintiffs were without knowledge or the means of knowledge of the true condition of the title. The pleading therefore fails to set forth facts which would constitute an estoppel against Clifford; consequently the allegation that he was a grantee in a deed conveying an interest in the property, and presumed to have been delivered some years before the date of the contract upon which plaintiffs must rely for success in this case, establishes a state of the record inconsistent with the possibility of the granting of the equitable relief for which they pray. For this reason, also, the demurrer was properly sustained.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(163 Cal. 769)

FLETCHER v. KIDDER et al. (Sac. 1,959.)  
(Supreme Court of California. Sept. 24, 1912.)

# 1. TRUSTS (§ 44\*)—EXISTENCE—EVIDENCE.

The mere fact that the word "trustee" appeared in stock certificates after the name of the holder is not evidence of ownership outside himself.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 66-68; Dec. Dig. § 44.\*]

# 2. EVIDENCE (§ 271\*)—ADMISSIBILITY—SELF-SERVING DECLARATIONS — UNAUTHORIZED BOOK ENTRIES.

Unauthorized entries made by a corporation's secretary in the corporate books are not admissible to establish a trust in his favor in stock held by another.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. § 271.\*]

# 3. TRUSTS (§ 44\*) — EXISTENCE — EVIDENCE — SUFFICIENCY.

Evidence held insufficient to show that one-half of stock was held in trust for another.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 66-68; Dec. Dig. § 44.\*]

Department 2. Appeal from Superior Court, Nevada County; Joseph W. Hughes, Judge.

Action by George H. Fletcher, administrator of George Fletcher, against Sarah A. Kidder and another. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.



Chas. W. Kitts, C. W. Cross, and Cross & Newburgh, all of San Francisco, for appellant. Fred Searls, of Nevada City, and Lloyd S. Larue, of Sacramento, and Edward J. McCutchen, and Page, McCutchen, Knight & Olney, all of San Francisco, for respondents.

**HENSHAW, J.** By this action plaintiff sought to have a trust in favor of his intestate declared in one-half of the shares represented by certificates for 1,675 $\frac{1}{2}$  shares of the capital stock of the Nevada County Narrow Gauge Railroad Company. John F. Kidder was the president of the defendant corporation. During his lifetime George Fletcher, plaintiff's intestate, was secretary of the corporation. From time to time Kidder acquired stock of the corporation, and upon the surrender of the old certificates caused the new certificates to be issued in the name of "John F. Kidder, Trustee." George Fletcher died upon March 6, 1901, and John F. Kidder, who had been very ill for about a year immediately preceding his death, died upon April 10, 1901. The complaint is surprisingly deficient in its averments as to the nature of the trust. It neither sets up any agreement showing the existence of a voluntary trust, nor does it set up the payment by George Fletcher of any part of the purchase price of the stocks so acquired by Kidder, but contents itself with allegations to the effect that on such and such a day "said John F. Kidder and said George Fletcher became the owners of certificate," etc. It is alleged, further, only that the certificates issued to John F. Kidder as trustee were so issued to him as trustee for himself and George Fletcher. After trial the court found against the existence of the trust, and rendered judgment accordingly. From the order denying his motion for a new trial plaintiff appeals.

[1] Upon the appeal it is argued that the word "trustee" on the stock certificates held by John F. Kidder was evidence of ownership outside of Kidder himself. Authorities from other states are cited to this effect, but the rule is here to the contrary. "The mere addition of the word 'trustee' after the name in the certificate is not in this state of itself, nothing more appearing, to be deemed constructive notice of the equities of the secret owner of the stock." *Brewster v. Sime*, 42 Cal. 144; *Thompson v. Toland*, 48 Cal. 99.

[2] Certain entries on the books of the corporation, which entries were made by George Fletcher, secretary of the corporation, were refused admission in evidence. Thus, in the stock ledger and assessment book in the account of "John F. Kidder, Trustee," is found heading a list of stock the words "Stock owned jointly by John F. Kidder and George Fletcher." In the stock transfer book is a like entry. The ruling was proper.

These were not entries like those considered in *Mt. Water Works Co. v. Holme*, 49 Colo. 412, 113 Pac. 501, where the entries were such as the secretary in the performance of his duty was required to make, and where it was held that under these circumstances the fact that they were in the secretary's handwriting did not forbid their admission in evidence in his favor. Here the entries were not such as the secretary was required to make, had no proper place in the books where they were entered, and the effort to prove them amounted to no more than an effort to prove self-serving declarations by hearsay. See Civ. Code, 378.

[3] The only other evidence to establish this trust is that of George H. Fletcher, corroborated by John H. Coughlan, ticket agent and assistant to the auditor of the railroad company. Mr. Fletcher's testimony is that a few days after his father's death, on March 10, 1901, he called upon Mr. Kidder, who was in bed and very ill, and had with him the following conversation: "How do you do, Mr. Kidder? How do you do, Herbert? Herbert, I intend to place this whole matter in the hands of the probate judge. Mr. Kidder, how much of this 'trust' stock did my father own? He owned 838 shares. Where is that stock? In Wells Fargo's bank." Coughlan testifies that he heard Mr. Kidder say: "Yes, Herbert, half of that stock is your father's." Mr. Kidder at the time of this conversation was very ill, was on his deathbed, and died thirty days thereafter. This is absolutely all of the evidence in the case, saving that Coughlan also testifies that in 1900, when a difference arose between Mr. Kidder and Mr. Fletcher because Mr. Kidder had from the East telegraphed for \$10,000 with which to buy cars and the money had not been sent, Kidder upon his return declared to Fletcher, "I want my orders obeyed," and Fletcher replied, "I have as much to say as you, and we didn't have the money and I didn't send it." It is thus made to appear that no facts and circumstances going to the creation of a trust are in evidence, no pretense is made that Fletcher ever paid any part of the purchase price of the stock, thus raising an involuntary trust in his favor, nothing is shown to establish any equity in the claim of Fletcher, and the whole case, so far as the establishment of the trust is concerned, rests upon the asserted acknowledgment of it made by a very sick man a few days before his death. From its findings the court manifestly concluded that this, to its mind, was not the clear and convincing evidence without which such a trust—particularly after the death of the asserted trustee—should not be declared. It follows herefrom that there were no errors and that the evidence supports the findings.

The order appealed from is therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(163 Cal. 803)

## In re LYON'S ESTATE. (Sac. 1,942.)

(Supreme Court of California. Sept. 26, 1912.  
Rehearing Denied Oct. 26, 1912.)**1. TRUSTS (§ 357\*)—SECRET TRUST—INFORMATION AGAINST THIRD PARTY.**

Under Civ. Code, § 2243, declaring that the transferee of property transferred in violation of a trust holds the same as an involuntary trustee, "unless he purchased in good faith and for a valuable consideration," a secret trust will not be enforced against an innocent purchaser for value without notice, though it may be enforced against the trustee.

[Ed. Note.—For other cases, see *Trusts, Cent. Dig.* §§ 539-552; *Dec. Dig.* § 357.\*]

**2. TRUSTS (§ 357\*)—SECRET TRUST—ENFORCEMENT AGAINST INCUMBRANCER.**

Under Civ. Code, § 856, providing that no implied or resulting trust can prejudice the rights of incumbrancers of real property for value and without notice of the trust, a secret trust was not enforceable against a bank which, in good faith and without notice, took a mortgage upon the trust property as security for a loan and for a debt then due.

[Ed. Note.—For other cases, see *Trusts, Cent. Dig.* §§ 539-552; *Dec. Dig.* § 357.\*]

**3. TRUSTS (§ 372\*)—SECRET TRUST—ENFORCEMENT AGAINST PURCHASER AT MORTGAGE SALE—PROOF REQUIRED.**

Where a secret trust is sought to be enforced against a purchaser at a mortgage sale, the plaintiff must prove, not only the facts establishing the trust, but also that the mortgagee took with notice of plaintiff's equities; such purchaser being entitled to the same protection as the mortgagee, who, under Civ. Code, § 856, providing that no implied trust can prejudice the rights of a purchaser or incumbrancer of real property for value and without notice of the trust, is entitled to the same protection as a purchaser for value.

[Ed. Note.—For other cases, see *Trusts, Cent. Dig.* §§ 600-603; *Dec. Dig.* § 372.\*]

**4. EXECUTORS AND ADMINISTRATORS (§ 315\*)—DECREE OF DISTRIBUTION.**

Where a company sought to have the distribution of part of an estate made to it under a deed absolute in form, and it was established that its claim was false and its deed simply a mortgage, it was improper, in a decree distributing such interest to another, to apparently recognize the company's rights by making the distribution subject to any rights which the company might have by way of any mortgage.

[Ed. Note.—For other cases, see *Executors and Administrators, Cent. Dig.* §§ 1298-1314; *Dec. Dig.* § 315.\*]

Department 2. Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

In the matter of the estate of Martha E. Lyon, deceased. From the decree of distribution, J. J. Rauer appeals. Reversed and remanded.

Louis P. Boardman, of San Francisco, for appellant. A. A. De Ligne, De Ligne & Jones, A. M. Seymour, Seymour & Yell, and George & Hinsdale, all of Sacramento, for respondents.

**HENSHAW, J.** This is an appeal by J. J. Rauer from the decree of distribution in the matter of the estate of Martha E. Lyon, de-

ceased. By her will, which was admitted to probate, Martha E. Lyon devised and bequeathed her property, real and personal, one-third each to Frank D. Willey, her nephew, W. H. H. Willey, her brother, and Dr. P. R. Watts. F. D. Willey and Watts were appointed executors without bonds. By deed of date January 11, 1907, Watts conveyed all his interest in the estate to Frank D. Willey. On August 2, 1907, Frank D. Willey, as devisee and as assignee and grantee of Watts, executed a mortgage to the Market Street Bank of all his interest in the estate, which then (subject to administration) consisted of an undivided two-thirds thereof. This mortgage was given to secure the payment of Willey's promissory note for \$1,700, of even date with the mortgage, and also to secure the payment of all other indebtedness due by Willey to the bank, which in amount exceeded \$4,000. The mortgage contained the power of sale in case of default in the payment of the indebtedness. This mortgage was recorded upon August 6, 1907, and upon August 20, 1907, notice of the mortgage and of its recordation was filed with the court in probate in the matter of the Lyon estate. By assignment, dated February 20, 1909, and recorded September 13, 1909, this mortgage, with all the indebtedness secured thereby, was transferred to appellant, Rauer. He in turn assigned to one Casner upon September 8, 1909; the assignment having been recorded on September 13, 1909. The assignee, Casner, executed the power of sale in accordance with the terms of the mortgage, and caused the property to be sold at public auction on November 29, 1909. Rauer purchased at the sale, and the deed of the property was made to him accordingly. Such is Rauer's title to the distributive portion of Frank D. Willey.

On July 10, 1907, Frank D. Willey executed to the C. W. Clark Company, a corporation, a deed or assignment of all his interest in the estate of the deceased, described as being an undivided two-thirds interest in the real and personal property belonging to the deceased, but this deed was not recorded until August 31, 1907; and it further appears that, while it was in form a deed, it was in fact a mortgage, given to secure the payment of all sums due from Willey to the Clark Company, according to the terms and tenor of five promissory notes, exceeding in amount \$16,000. The C. W. Clark Company and J. J. Rauer filed separate petitions for distribution; each claiming the right to a decree distributing the two-thirds interest of Frank D. Willey. Thereafter W. H. H. Willey, the devisee of the remaining one-third interest under the will, filed his petition for distribution of the estate and for the appointment of trustees. In this petition he averred that he was the



sole equitable owner of all and entitled to all the estate of the deceased; that the devise to Frank D. Willey of one-third and the devise to P. R. Watts of another one-third of the estate were each and both made to them in trust for him. He therefore petitioned, both being dead, that the court appoint trustees to take and hold these thirds for his use and benefit in accordance with the terms of the trust, which terms it is unnecessary to specify.

The court received parol evidence touching the nature and existence of the trust, but, without declaring its nature, found simply "that under the will of said decedent and the trust attached to said will one-half of the property of said deceased was to go to W. H. H. Willey and one-half thereof to Frank D. Willey." It therefore decreed distribution of one-half of the property to W. H. H. Willey and the other moiety to J. J. Rauer, "subject, however, to any rights which C. W. Clark Company may have by reason of any mortgages held by it on said property, given by Frank D. Willey." From this decree Rauer alone appeals.

[1, 2] The effect of the decree is to recognize the title acquired by Rauer through the foreclosure sale under the mortgage to the Market Street Bank, but to deprive him of one-fourth of the title which he took under the sale, because of the secret trust in the Watts' interest in favor of W. H. H. Willey. Such a secret trust, in proper cases, will be enforced in favor of the beneficiary against the recalcitrant trustee, who repudiates the trust and seeks to retain the devise or legacy for himself. *De Laurencel v. De Boom*, 48 Cal. 581; *Curdy v. Berton*, 79 Cal. 420, 21 Pac. 858, 5 L. R. A. 189, 12 Am. St. Rep. 157; *Will of O'Hara*, 95 N. Y. 403, 47 Am. Rep. 53. But where the faithless trustee has parted with the property, and the property has been acquired by an innocent purchaser for value without notice, equity can and will no longer follow the property to impress it with the trust, but will leave the beneficiary to his personal remedy against the trustee. The Civil Code declares that every one to whom property is transferred in violation of a trust holds the same as an involuntary trustee under such trust, unless he purchases it in good faith and for a valuable consideration. Civ. Code, § 2243. And, further, that no implied or resulting trust can prejudice the rights of a purchaser or incumbrancer of real property for value and without notice of the trust. Civ. Code, § 856; *Tripp v. Duane*, 74 Cal. 91, 15 Pac. 439; *Marshall v. Farmers' Bank*, 115 Cal. 334, 42 Pac. 418, 47 Pac. 52. W. H. H. Willey does not plead or attempt to show that the Market Street Bank was not an incumbrancer for value and without notice.

[3] It is beyond controversy that, where such a trust as this is sought to be established against one who has taken the legal

title without anything of record to disclose the trust, the plaintiff must not only prove the facts establishing the trust, but prove that the grantee of the trustee took the conveyance with notice of the equities of the plaintiff. *Long v. Dollarhide*, 24 Cal. 218; *Eversdon v. Mayhew*, 65 Cal. 167, 3 Pac. 641. It is, of course, not in dispute (since such is the declaration of section 856, Civ. Code) that mortgagees come within the rule of purchasers for value, and are protected in the same manner. *Chapman v. Hughes*, 134 Cal. 658, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982. As the mortgagee was thus an incumbrancer for value, it is equally beyond controversy that to the purchaser at mortgage sale is extended the same protection. Otherwise the absurdity would result that the mortgagee would have to buy at his own sale (since any other purchaser with notice would not be protected), but the mortgagee so buying would be able then to convey title free from the trust. It follows, therefore, as to the respondent W. H. H. Willey, whatever may have been the nature of the hidden trust, appellant, Rauer, acquired title deed from it.

[4] Complaint is justly made of the decree distributing the property of the estate to Rauer, "subject, however, to any rights which C. W. Clark Company may have by reason of any mortgages held by it on said property, given by Frank D. Willey." The Clark Company came into court seeking distribution to them as grantees of Frank D. Willey under a deed absolute in form. It was established that its claim was false; that its purported deed was simply a mortgage; and that it had given a defeasance establishing the mortgage, which defeasance was produced at the hearing. It may be said that the decree which distributes the property to Rauer, subject to any right which the Clark Company "may have," is without meaning or efficacy, since unquestionably, if the Clark Company had any right by way of mortgage, the decree would, as matter of law, be subject to it. But as a declaration, seemingly in recognition of the Clark Company's rights, the language has no place in the decree.

The decree appealed from is therefore reversed, and the cause remanded for further proceedings in accordance herewith.

We concur: LORIGAN, J.; MELVIN, J.

(19 Cal. App. 584)  
TRUDEL v. BUTORI et al. (Civ. 982.)

(District Court of Appeal, First District, California. Aug. 15, 1912. Rehearing Denied Sept. 14, 1912; Denied by Supreme Court Oct. 14, 1912.)

PARTNERSHIP (§ 64\*)—NAMES—FICTITIOUS DESIGNATION—RIGHTS OF ASSIGNEES.

While a partnership, which has not complied with Civ. Code, § 2466, which regulates



the use of fictitious names, cannot sue on a contract made by it, its assignee may do so.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 87-91; Dec. Dig. § 64.\*]

Appeal from Superior Court, City and County of San Francisco; M. T. Dooling, Judge.

Action by F. X. Trudel against A. Butori and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Devoto, Richardson & Devoto, of San Francisco, for appellants. Lloyd Macomber, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal by defendants from a judgment against them and from an order denying their motion for a new trial in an action brought by plaintiff against defendants for an alleged balance due for work done and labor furnished.

In January, 1907, defendants entered into a contract with W. Ottmann, in which contract Ottmann agreed to construct for defendants a certain building in San Francisco. With the consent and approval of defendants, Ottmann assigned this contract to F. X. Trudel & Son, who at that time were engaged as copartners in the contracting business. At the request of the defendants, there was some extra work done, and plaintiff, F. X. Trudel, as assignee of the copartnership, claims that on account thereof, and on account of an unpaid balance on the original contract, there is due him the total sum of \$710.55. The cause was tried by a jury, which returned a verdict in favor of plaintiff, F. X. Trudel, for the sum of \$550, and judgment for that sum was accordingly entered.

There were several amendments to the complaint, but the allegations of the pleading upon which the case was finally tried show that F. X. Trudel and his son, Arthur Trudel, were carrying on business under the firm name of F. X. Trudel & Son. It is asserted by defendants that this is a fictitious designation, and that, as the complaint does not show that the partnership had complied with the provisions of section 2466 of the Civil Code, they contend that their demurrer, which raised this point, should have been sustained. There are a number of authorities which seem to hold that this designation is not fictitious. *Guiterman v. Wishon*, 21 Mont. 458, 54 Pac. 566; *Vaughan v. Kujath*, 44 Mont. 484, 120 Pac. 1121; *Pendleton v. Cline*, 85 Cal. 142, 24 Pac. 659; *Wilson v. Yegen Bros.*, 38 Mont. 504, 100 Pac. 613. But it is unnecessary for us to pass upon the point in this case, for it is alleged in the complaint that the copartners assigned the claim against the defendants to the plaintiff, F. X. Trudel, in whose favor judgment was entered; and it has been repeatedly held in this state that while such partnership, not having complied with section 2466,

Civil Code, may not maintain an action on a contract made by it, nevertheless its assignee may do so. *Gray v. Wells*, 118 Cal. 11, 50 Pac. 23. There is, therefore, no merit in this point. While the evidence of the assignment is meager, still we think, under all the circumstances of the case, it must be deemed sufficient.

In view of the stipulation of the parties in open court at the time of the oral argument, it is unnecessary for us to pass upon the point made by defendants concerning the complaint in intervention.

The judgment and order are affirmed.

We concur: LENNON, P. J.; HALL, J.

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164 Cal. 41

**SAN DIEGO & A. R. CO. v. CALIFORNIA  
STATE BOARD OF EQUALIZATION**  
et al. (S. F. 6,260.)

(Supreme Court of California. Oct. 2, 1912.)

**1. TAXATION (§ 446½\*)—POWERS OF BOARD  
OF EQUALIZATION.**

St. 1911, p. 530, provides that the state board of equalization must levy all taxes on the operating property of railroads between the first Monday in March and the third Monday before the first Monday in July, and publish on such third Monday a notice in certain cities, stating that the assessment for state taxes had been completed, and that the record of assessments shall be delivered to the state controller on the first Monday in July, and that any company, etc., dissatisfied with the assessment may apply to the board to have it corrected, and provides that the board "shall have power at any time on or before the first Monday in July" to make corrections, and requires the secretary on the first Monday in July to deliver the record of assessments to the state controller, and that one-half of the taxes shall at once be due and payable, one half shall be delinquent on the sixth Monday after the first Monday in July, and the other half on the first Monday in the succeeding February. Pol. Code. § 3885, provides that no assessment or act relating to the assessment of taxes is illegal because of informality, or because not completed within the time required by law. *Held*, that the power of the board of equalization in making assessments for state purposes and equalizing them ceases with the final delivery of the record of assessments to the state controller, so that any assessment made by it after the time it was required by law to deliver the record to the controller would be invalid.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 446½.\*]

**2. EVIDENCE (§ 83\*)—PRESUMPTIONS—PER-  
FORMANCE OF OFFICIAL DUTY.**

In the absence of a contrary showing, it must be presumed that official duty is performed within the required time, and as required by statute.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.\*]

**3. MANDAMUS (§ 16\*)—DEFENSES.**

A writ of mandate will not issue to compel the performance of an official act which would be wholly void and useless to petitioner, so that, where at the time of an application for a writ to compel the state board of equalization to assess railroad property it had ceased to have power under the statute to make such assessment, the writ will not be issued.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 48; Dec. Dig. § 16.\*]

In Bank. Original application for writ of mandate by the San Diego & Arizona Railroad Company against the California State Board of Equalization and others. Application denied.

L. L. Boone, of San Diego, for petitioner. U. S. Webb, Atty. Gen., and Raymond Benjamin, Chief Dep. Atty. Gen., for respondents.

**PER CURIAM.** [1] This is an original application to this court, upon notice, for a peremptory writ of mandate to require the defendants, the state board of equalization, and the members thereof, to assess as operative property of plaintiff, for taxes for the year 1912, all of its roadbed, rights of way, and rolling stock used by it in the operation of its road between Twenty-Sixth and Main streets in the city of San Diego and the Mexican boundary line, together with certain switches. The notice of application, together with the petition, was filed herein June 24, 1912. The notice stated that the application would be made on July 1, 1912, at which time the application was presented to the court, a demurrer being filed by defendants based on the ground of want of facts to warrant the issuance of the writ prayed for. The matter was ordered submitted upon the demurrer upon briefs to be subsequently filed.

The theory upon which the application was based is that plaintiff railroad company ever since March 1, 1911, has been operating a railroad in this state within the meaning of section 14, article 13, of our Constitution (a new section adopted November 8, 1910), and that the property which it seeks by this proceeding to have assessed by the state board of equalization is operative property, assessable under such section only by such state board for the benefit of the state. Such state board has refused to so assess it on the ground that said railroad company "was not in operation, and is not now in operation" within the meaning of such constitutional provision. If this ground is well based, the property is locally taxable where situated for county and local purposes, and the petition shows that it has been listed for local taxation by the county assessor of San Diego county, and that portions of such property located in National City and Chula Vista have been listed in such cities for taxation.

Section 14 of article 13 of the Constitution provides that the Legislature shall pass all laws necessary to carry the section into effect, and shall provide for a valuation and assessment of the property enumerated in the section, prescribing the duties of the state board of equalization and any other officers in connection with the administration thereof. In pursuance of this provision, the legislative act for that purpose was adopted; the same having been approved April 1, 1911. Stats. 1911, p. 530. It is provided therein substantially as follows: The state board of equalization must assess and levy all such taxes between the first Monday in March



and "the third Monday before the first Monday in July" (which this year was Monday, June 10th), and must publish on said third Monday before the first Monday in July a notice in a daily newspaper in certain cities, stating that the assessment for state taxes has been completed and that the record of assessments for state taxes will be delivered to the state controller on the first Monday in July, and that any company, etc., dissatisfied with the assessment may apply to the board to have the same corrected in any particular. The board "shall have power at any time on or before the first Monday in July" to make corrections. On the first Monday in July the board, through its secretary, must deliver such record of assessments to the state controller, who shall proceed to collect the same. Such taxes are at once due and payable, and one-half thereof shall be delinquent on the sixth Monday after the first Monday in July and the other half on the first Monday in February next succeeding. There is absolutely nothing in the law that can be held to authorize the board of equalization to make any assessment for state purposes as to plaintiff after it has completed its record of assessments for the year and has delivered the same to the controller for collection, thus parting with all custody and control thereof. We have in mind, of course, the provisions of section 3885, Political Code, to the effect that no assessment or act relating to assessment or collection of taxes is illegal on account of informality, nor because the same was not completed within the time required by law and the decisions of this court thereunder, but there is not to be found therein any authority for the proposition that after the assessing officer or board has completed the assessment roll, and delivered the same as a completed roll, in accordance with law, to the proper collecting officer, parting with all custody and control thereof, that he or it can, in the absence of express authority, change any of the assessments therein or add a new assessment thereto. In *Savings & Loan Society v. San Francisco*, 146 Cal. 673, 80 Pac. 1086, the change was held to be one expressly authorized by the board of supervisors under sections 3679 and 3681, Political Code, and it was said that "it must \* \* \* be conceded that the assessor had no power to make any changes in the assessment after he delivered his roll to the board of equalization, unless such changes were authorized by the board of supervisors under sections 3679 and 3681 of the Political Code, or with the written consent of the city and county attorney under section 3881 of the same Code." It seems very clear to us that at least with the final delivery of the record of assessments by the state board of equalization to the state controller all the power of the board in the matter of the mak-

ing of assessments for state purposes and the equalization thereof is at an end.

There is nothing in the petition in this case to negative the idea that the state board of equalization complied with the law in the matter of the completion and delivery of the record of assessment to the state controller.

[2] In the absence of a showing to the contrary, it must be presumed that official duty has been regularly performed, and consequently that the state board of equalization finally delivered its record of assessments to the state controller on July 1, 1912, the very day on which plaintiff presented its application for a writ of mandate to this court. If this be so, the state board of equalization has not had, at any time since July 1st, the power to make any assessment for the year 1912 against plaintiff, and any assessment now made by it for the year 1912 would be absolutely void. This matter was not submitted to us for decision until some days after July 1, 1912.

[3] What we have said appears to us to be a complete answer to the application, even if, as claimed by plaintiff, the state board should have assessed its property, a matter we have in no way considered and upon which we express no opinion. A writ of mandate will not issue to compel the performance of an act that will be wholly void, and of no possible benefit to the petitioner.

The application for a writ of mandate is denied.

163 Cal. 807

BURK v. CITY OF SANTA CRUZ et al.  
(S. F. 5,853.)

(Supreme Court of California. Sept. 27, 1912.)

1. ESTOPPEL (§ 110\*)—ESTOPPEL IN PAIS—AVAILABILITY AS DEFENSE.

Estoppel in pais must be pleaded to be available as a defense.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 300; Dec. Dig. § 110.\*]

2. DEDICATION (§ 39\*)—ACTS CONSTITUTING—ESTOPPEL.

Where a map delineating a tract of land including a parcel was not authorized by the owner of the parcel, and the assessor assessed his land by lots as set off and numbered on the map, though the owner protested against such form of assessment and insisted that his land had not been subdivided and should be assessed as acreage property, he was not estopped from denying that it was his intention to dedicate a part of the parcel for streets delineated on the map.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. § 77; Dec. Dig. § 39.\*]

3. DEDICATION (§ 44\*)—PUBLIC STREETS—EVIDENCE.

Property may not be taken for public use without compensation, unless the owner is willing, as manifested by clear and unmistakable acts; and one may not be deprived of his property on the theory of a dedication thereof for streets, unless the dedication is established by unmistakable acts.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. §§ 85-87; Dec. Dig. § 44.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Department 2. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Mary N. Burk, sometimes known as Mary N. Burke, against the City of Santa Cruz and another. From a judgment for defendants, plaintiff appeals. Reversed.

Cassin & Lucas, of Santa Cruz, for appellant. J. Leslie Johnson, City Atty., of Santa Cruz, for respondents.

HENSHAW, J. Mary N. Burk sued to quiet title to a tract of land situated in the city of Santa Cruz. The defendant, the city of Santa Cruz, asserted that "it was the owner and entitled to a right of way for street and sewer purposes over those certain public streets" delineated upon the map known as Garfield Park No. 1, filed June 7, 1890, and named Bethany Circle, Walk Circle, and Raymond Circle. Further, defendant "averts the fact to be that the said streets hereinabove mentioned have been dedicated as public streets by said defendant, and that the same have been accepted by the city of Santa Cruz, and have been at all times since said dedication and acceptance used and traveled as public streets by the public in general." Judgment passed for defendant, and from that judgment, and from the order denying her motion for a new trial, plaintiff appeals. Plaintiff has since died, and her personal representative, Charles L. McFarland, has been substituted as plaintiff. The court found that plaintiff owned the land described in her complaint, but further found that the streets named in defendant's answer "have been dedicated as public streets by said defendant, and that the same have been accepted by the city of Santa Cruz, and that the same have been at all times since said dedication and acceptance used and traveled as public streets by the public in general, with the knowledge and consent of plaintiff."

The facts disclose that the map of Garfield Park No. 1 delineates and delimits a large tract of land, including the oblong piece owned by plaintiff. The center of the land upon this map is circular in shape and designed apparently as a public park or recreation ground. Immediately surrounding this central plat is a circular street, known as Everett Circle. Distant from the outer boundary of Everett Circle about 150 feet is delimited another street, known as Wilkes Circle. At the same distance beyond Wilkes Circle is, in like manner, delimited Walk Circle. Beyond Walk Circle, in the same way, Bethany Circle, and next to Bethany Circle, Raymond Circle. Radial streets intersect these circular streets, and one of them, Garfield avenue, which cuts plaintiff's oblong piece of land in two unequal portions, is admittedly a public highway. Upon this map of Garfield Park all the land between the circular and radial streets is subdivided into lots and numbers. Mrs. Burk's oblong piece of land is cut by

Walk Circle, Bethany Circle, and Raymond Circle in such a manner and at such angles as to leave, according to the map of Garfield Park, fragmentary bits and pieces of lots. Indeed, it may be said that it would be strong evidence of mental incompetency for an owner to permit his land to be divided and dismembered as upon that map shown.

It should be said without delay, however, that plaintiff is relieved from this imputation, because it is not shown or pretended to be shown that she in any way authorized or consented to the Garfield Park map, or even knew of its existence. Moreover, it is established that she owned her land before the map was filed, and the map itself was so unwarranted and so unauthorized, so far as plaintiff's property was concerned, that it was by the court admitted in evidence only for the limited purpose of showing these circular streets in their relation to the land of the plaintiff.

What the evidence does establish is that Garfield avenue divided plaintiff's land in two unequal oblong portions; the greater lying west of Garfield avenue. Garfield avenue, as has been said, was concededly a public highway. Plaintiff inclosed by fences her two pieces of land, maintained these fences until a year before the trial, and farmed her whole tract, putting it to plow, and in so farming, raised crops upon the so-called Walk, Bethany, and Raymond Circles.

Still further it is shown that none of the so-called streets was ever used as a public street, and that they had no physical existence and no other existence than their delineation upon the map, unauthorized by the owner of the property. There were no streets upon the ground. Says the superintendent of streets of the city: "The only streets, if any, were the streets upon the map." Further, it is shown that the city intruded upon plaintiff's land in 1905 and undertook to remove the fences maintained by plaintiff, first passing a resolution that it was for the best interests of the city and of the inhabitants thereof that the "streets running through and along said property of Mary N. Burk be opened." Pursuant to this resolution, the city, against the protest of the plaintiff, did tear down the fences and proceeded to build sewers upon one or another of these circular streets, and then, according to the evidence, admitted without objection and without conflict, "both the city engineer and the city attorney advised the city officers that they had no title to those streets, and, in order to protect the city from any further trouble, we gave them an easement to the two sewers already laid in the ground. The city received that deed and accepted that map of Prospect Park." Such is the testimony of plaintiff's agent. And it appears that the plaintiff did file a map of Prospect Park, which map was a subdivision of her own land, and which map was a distinct repudia-



tion that Raymond, Bethany, and Walk Circles extended over her land, and which map, furthermore, delimited and laid out other and different streets, and which map was formally recognized by the mayor and city council of the city of Santa Cruz with formal acceptance "on behalf of the public of the streets as shown and delineated on this map as public highways as the same there designated." Furthermore, the city accepted a deed from plaintiff for a right of way to maintain the sewers which it had unlawfully constructed upon plaintiff's land, and accepted this deed without any mention of the circles in which the sewers were constructed, but by express reference and description according to the Prospect Park map, which plaintiff had filed, and for which alone she was responsible.

[1] But it is said by respondent that the acts of the plaintiff estop her from denying that it was her intent to dedicate the streets. It would be a complete answer to this to say that if estoppel in pais was relied upon it was the duty of the defendant to have pleaded this estoppel, and, not having pleaded it, it cannot be considered. Such is the uniform rule of decision laid down by this court from the case of *Clarke v. Huber*, 25 Cal. 593, to *Chapman v. Hughes*, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982.

[2] But waiving this consideration, in what does the evidence consist showing her intent to dedicate? It is said to consist in her knowledge that the map of Garfield Park was recorded; but if she had such knowledge it committed her to no course of conduct. It compelled her to do nothing, for, not only, as has been said, was the map of Garfield Park absolutely unauthorized by and without binding force upon plaintiff, but the trial court recognized this by admitting that map for the sole purpose of showing the location, with reference to plaintiff's land, of the circular streets. The second and only remaining fact is that the assessor of the city assessed plaintiff's land by the lots set off and numbered upon the Garfield Park map. If such a fact can be regarded as evidence establishing a dedication to a public use, or as evidence to estop a party from denying such a dedication, then to municipalities desiring to acquire property is pointed out a direct, though novel, method. Let the city's assessor fail to assess the property to the owner and it becomes the property of the city by gift or dedication, because the owner is estopped to assert the contrary. However, if this be so, the converse must be equally true, and if the assessor of San Francisco should assess Market street to the abutting property owners, and they should pay the assessment, Market street would immediately become private property, and the city be estopped from asserting the contrary. In truth, it is too preposterous to merit serious considera-

tion that a ministerial officer, like the assessor, charged only with the duty of assessing property which should be assessed, can by his mistaken act of omission or commission raise an estoppel for or against the city as to a matter in which he has absolutely no authority. But, finally, and the more completely to dispose of this, it is shown and it is uncontradicted that plaintiff protested against this form of assessment, and insisted that her land had not been subdivided and should be assessed as acreage property.

[3] Where a dedication rests in acts and conduct and not in grant, the rule is well settled and has been many times repeated by this court to the effect that "property cannot be taken for public use without compensation, unless the owner is willing, and this willingness should be manifested by clear and unmistakable acts. Parties may not be done out of their property by doubtful implications, no matter how greatly the public may be inconvenienced." *Cerf v. Pfeiffer*, 94 Cal. 135, 29 Pac. 417; *Latham v. City of Los Angeles*, 87 Cal. 519, 25 Pac. 673; *San Francisco v. Canavan*, 42 Cal. 553; *Spaulding v. Bradley*, 79 Cal. 449, 22 Pac. 47; *San Francisco v. Grote*, 120 Cal. 60, 52 Pac. 127, 41 L. R. A. 335, 65 Am. St. Rep. 155. No case before this court has ever evinced a plainer attempt to do the very thing which the law thus forbids.

The judgment and order appealed from are therefore reversed.

We concur: LORIGAN, J.; MELVIN, J.

164 Cal. 24  
FORESTIER v. JOHNSON et al.  
(S. F. 5,441.)

(Supreme Court of California. Oct. 1, 1912.  
Rehearing Denied Oct. 31, 1912.)

1. NAVIGABLE WATERS (§ 37\*)—PUBLIC LANDS  
—LAND BENEATH NAVIGABLE WATER—PUBLIC EASEMENT.

The title to soil underneath navigable waters, including all that is covered with water at ordinary high tide, as well as that lying below low tide, belongs to the respective states, but it is held in trust for the use of the people in navigating, carrying on commerce and fishing; and the control of the state cannot be relinquished by any transfer, so as to divest the public easement, except where the transfer is for a pier, dock, etc., which is a grant consistent with the trust, and does not substantially impair the use.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 201-227, 285; Dec. Dig. § 37.\*]

2. NAVIGABLE WATERS (§ 37\*)—PUBLIC LANDS—LAND BENEATH NAVIGABLE WATER—DESTRUCTION OF EASEMENT.

The state may, however, establish a harbor line or sea wall in furtherance of navigation, and destroy the public easement by fixing the wall at such a distance from the shore that some of the intervening lands lie so far from the sea wall that they cannot be conveniently applied to any use in aid of navigation or commerce, thereby destroying the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index



public easement over such lands, so that thereafter the state may sell to private parties, who may fill in.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 201–227, 285; Dec. Dig. § 37.\*]

**3. NAVIGABLE WATERS (§ 37\*)—PUBLIC LANDS—TIDELANDS—EASEMENT OF NAVIGATION—RIGHTS OF OFFICER—STATUTORY PROVISIONS.**

The statutory provisions enacted prior to the Political Code and dealing with public lands are, as developed, substantially the same as Pol. Code, §§ 3440–3493½, which authorize the sale of swamp lands, salt marsh, and tidelands; and neither such statutes nor the Code make any provision for the protection or management of navigable waters, or for the regulation of navigation on the soil of such lands. The decisions under the former statutes recognized that the purchaser of tidelands took subject to the right of the public to unrestrained navigation of navigable waters. *Held* that, as the Code does not substantially depart from the provisions previously existing, it will be presumed that the Legislature intended it to be understood as having substantially the same purposes, object, and meaning; and a purchaser of tidelands thereunder will take subject to the public easement.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 201–227, 285; Dec. Dig. § 37.\*]

**4. NAVIGABLE WATERS (§ 37\*)—PUBLIC LANDS—TIDELANDS—EASEMENT OF NAVIGATION—RIGHTS OF OFFICER—CONSTITUTIONAL AND STATUTORY PROVISIONS.**

Const. art. 15, § 2, provides that a claimant of frontage or tidal lands may not obstruct the right of way for navigation in the navigable waters. Pol. Code, §§ 3440–3493½, which authorize the sale of such lands, makes no provision for the protection of the public right. *Held* that, as an intent to contravene the Constitution in enacting a law will not be imputed to the Legislature, unless it clearly appears, the statute will not be considered to authorize disposition or a use which would defeat the public easement.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 201–227, 285; Dec. Dig. § 37.\*]

**5. NAVIGABLE WATERS (§ 37\*)—TIDELANDS—EASEMENT OF NAVIGATION—PATENT AS EVIDENCE OF NONEXISTENCE OF NAVIGABLE WATERS.**

And the sale of such lands by the state and the preparation and execution of a patent thereto do not therefore constitute a determination that the land contains no navigable waters within its bounds, as such matter remains a question of fact, which may be shown by any citizen in defense of an action to prevent his exercise of the public right secured to him by the constitutional provision.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 201–227, 285; Dec. Dig. § 37.\*]

**6. APPEAL AND ERROR (§ 1071\*)—HARMLESS ERROR—FINDING ON AN IMMATERIAL ISSUE.**

Where a judgment is supported by a finding on a material issue, a finding on an immaterial issue, though erroneous, would not bind the parties, and will not require a reversal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4234–4239; Dec. Dig. § 1071.\*]

**7. NAVIGABLE WATERS (§ 16\*)—ACTION TO ENJOIN USE—PUBLIC EASEMENT AS DEFENSE.**

While a private citizen cannot maintain an action to remove an obstruction or open

the way where navigable water or a public way is obstructed or closed, or recover damages caused thereby, or enjoin a threatened obstruction, unless he can show private injury, a person against whom an action is begun to enjoin him from using navigable water or other public way may defend by asserting his public right to do so, and need not show a private injury, either to person or property.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 43–49, 51–53; Dec. Dig. § 16.\*]

**8. GAME (§ 2½\*)—RIGHTS OF PUBLIC—HUNTING WILD GAME.**

The hunting of wild game is a privilege which is incidental to the public right of navigation over tidelands and navigable waters.

[Ed. Note.—For other cases, see *Game*, Dec. Dig. § 2½.\*]

In Bank. Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Edwin H. Forestier against Frank Johnson and others. From a judgment for defendants and an order denying a new trial, plaintiff appeals. Affirmed.

Frank V. Bell and Bell, Straus & Atwood, all of San Francisco, for appellant. Raymond Benjamin, of San Francisco, and Frank L. Coombs, of Napa, for respondents.

SHAW, J. Appeals taken from the judgment and from an order denying a new trial in an action to enjoin trespasses upon and injuries to land alleged to belong to the plaintiff.

The plaintiff claims ownership in fee of 302 acres of land which at ordinary high tide is covered with water, and is known as "Fly's Bay." The defendants are residents and citizens of the state. They deny that the plaintiff is the owner of the land, but do not claim ownership in themselves. Their sole affirmative claim is that, as citizens of the state, they have the right to go upon the premises for the purposes of hunting, fishing, and navigation. They assert that Fly's Bay is a side channel of the Napa river, and is a navigable stream or channel, and as such belongs to the public, so far as may be necessary for the purposes stated. The plaintiff claims title from the state of California, under a sale of the land as tideland, made by the state to him on January 15, 1906. The action was begun on January 26, 1906. Afterwards, on March 4, 1907, in pursuance of said sale, a patent was issued to him by the state.

The court below found that the plaintiff is not the owner or entitled to the possession of the premises; that they belong to the state of California; that the "so-called property \* \* \* consists of a navigable bay, commonly known as 'Fly's Bay,' which said bay is a portion of and opens into and at its northern and southern boundaries is connected with the Napa river, \* \* \* one of the navigable streams within the county of Napa"; and that at mean tide the whole

of the premises is a large body of navigable water which for many years has been and now is used by vessels of small burden for purposes of navigation. Judgment was thereupon given that each defendant is entitled to the privileges, use, possession, and enjoyment of the waters of Fly's Bay for navigation, for fishing, and for hunting wild game thereon, and that plaintiff take nothing by his action.

The evidence concerning the survey under which the plaintiff obtained his patent shows that the tracts surrounding Fly's Bay had been previously sold as tidelands, or as swamp lands, and that the surveys thereof had been made by meandering Fly's Bay and making its banks the boundaries of those tracts. In surveying for the plaintiff, the distances across the channel at the northern end of the bay and across the bay at the southern line of the tract, and across Mud slough on the easterly line, were ascertained by triangulation. The southern end was more than a quarter of a mile wide. The remaining lines were not surveyed, but were ascertained by verifying the surveys of the surrounding tracts and practically adopting the lines thereof next to the bay as the lines of the plaintiff's tract. There is ample evidence to show that through this bay, and extending at each end into Napa river, there is a channel deep enough for navigation at mean tide which has been used for many years, and is now used for navigation by the public. There is evidence, also, that practically the whole area included within the boundaries of the patent is navigable for small boats at ordinary high tide. It does not appear that there has ever been any occasion for running boats out of the main channels, except for the purpose of hunting. At low tide the land is nearly all bare, except the channel aforesaid. The finding that Fly's Bay is navigable water is supported by sufficient evidence.

The issuance of the patent is admitted. If it conveys to the plaintiff the unqualified fee in the entire area, the findings and judgment are unquestionably wrong. If it conveys the title to the soil, subject to the public easement for purposes of navigation and fishery, the finding that the plaintiff has no title at all is without support; but the judgment refusing an injunction and declaring the defendants entitled to the privileges of the bay for navigation and fishery is not erroneous in any substantial respect. The latter proposition presents the principal question for consideration.

The defendants, in their presentation of the case to this court, admit that the patent was valid and effectual to convey to the plaintiff the title to the soil underlying the waters of the bay, and to give him complete title to the premises, except so far as they may be necessary to the public uses of navigation and fishery. With the exercise

of these public rights, they contend, the plaintiff cannot interfere. They further say that, if a citizen has the right to navigate the water in a boat, he may go at will, for any purpose or without purpose, and that if he finds game birds thereon he may shoot them and take them for his own use without infringing any right of the plaintiff as the subordinate owner of the soil. The defendants further concede that they have no private rights in the premises, nor any such privity with the state as would be necessary to authorize them to attack the validity of the patent, except so far as it is absolutely void as matter of law. The decision in *Gale v. Best*, 78 Cal. 235, 20 Pac. 550, 12 Am. St. Rep. 44, and other similar cases, would preclude them from making such attack as mere citizens claiming public rights alone. Their theory is that they are not attacking the patent at all, but that it is qualified and limited by the law and by certain provisions of the statute and the Constitution which enter into and become part of it, and that they are seeking only to have it limited to its true effect, and to claim and maintain the privileges which, as thus qualified, it preserves to them.

[1] So far as may be necessary for the regulation of interstate and foreign commerce, the United States has the paramount right to control the navigable waters within the several states. The state can make no disposition of the soil beneath, or allow any interference with, the navigable waters that will impair this right and power of the United States. The title to the soil beneath such waters, including all that is covered with water at ordinary high tide, as well as that lying below low tide, belongs to the respective states by virtue of their sovereignty. "It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein freed from the obstruction or interference of private parties. \* \* \* The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. \* \* \* It is grants of parcels of lands under navigable waters that may afford the foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels, which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legisla-



tive power consistently with the trust to the public upon which such lands are held by the state." *Illinois C. Ry. v. Illinois*, 146 U. S. 435, 452, 13 Sup. Ct. 110, 118 (36 L. Ed. 1018). Similar statements concerning this subject have been made by this court. *Eldridge v. Cowell*, 4 Cal. 87; *Ward v. Mulford*, 32 Cal. 372; *Oakland v. Oakland W. F. Co.*, 118 Cal. 183, 50 Pac. 277; *People v. Kerber*, 152 Cal. 733, 93 Pac. 878, 125 Am. St. Rep. 93.

Since the defendants concede the validity of the patent, and that the title to the soil passed thereby, and claim only the public rights aforesaid; and, as the question of the validity and effect of such patents, as affecting the right of the state to vacate them or retake the lands, is involved in other cases now pending before this court, we need not determine whether or not the sale passed the title to the soil to the plaintiff, but, for the purposes of the case, we will assume that it is valid and effectual to that extent.

[2] The defendants further concede the soundness of the decision in *Eldridge v. Cowell*, supra, to the effect that the state has power to establish a harbor line, or sea wall, in furtherance of navigation, and to fix it at such a distance from the shore that some of the intervening lands lie so far from the sea wall that they cannot be conveniently or practically applied to any use in aid of navigation or of commerce between land and water, and that, having done so, the public easement over such land is destroyed, and the state may then sell it to private persons to be filled in and applied to other purposes. This proposition has been affirmed, recognized or conceded in other cases in addition to those above cited. *Holladay v. Frisbie*, 15 Cal. 635; *San Francisco v. Straut*, 84 Cal. 124, 24 Pac. 814; *Wheeler v. Miller*, 16 Cal. 124; *Knight v. Haight*, 51 Cal. 171; *Friedman v. Nelson*, 53 Cal. 589; *Seabury v. Arthur*, 28 Cal. 142; *Knight v. Roche*, 56 Cal. 21; *Le Roy v. Dunkerly*, 54 Cal. 459; *People v. Davidson*, 30 Cal. 384; *People v. Klumpke*, 41 Cal. 277; *Hyman v. Read*, 13 Cal. 444. See, also, *U. S. v. Mission R. Co.*, 189 U. S. 405, 23 Sup. Ct. 606, 47 L. Ed. 865.

[3] The sale and patent, under which plaintiff claims title, possession, and control of these waters, were made in pursuance of the provisions of the Political Code authorizing the sale of swamp lands, salt marsh, and tide lands, being sections 3440 to 3493½, inclusive. It is admitted that those provisions were regularly pursued. The aforesaid propositions being conceded by the defendants, the soundness of which we need not consider, the only remaining inquiry necessary to the disposition of the case is whether or not the provisions of the Political Code, conceding that they authorize the sale of the soil covered by water at ordinary high tide, go farther and authorize a sale which destroys or vacates the dedication of the water to the public uses of navigation and fishery,

or vests in the grantee the right to prevent the public use and convert both land and water to his own private use and possession. We are of the opinion, for reasons now to be given, that such sale does not vacate the public easement, or vest such right in the purchaser.

The decisions above cited, so far as they hold that the state may, in the interest of navigation, destroy the public easement and divert to exclusive private ownership parts of the tideland or submerged land not necessary for navigation and capable of reclamation for other uses, were all cases involving dispositions of lands under statutes adjusting, or authorizing the adjustment of, harbor lines and providing for the sale of lands covered by navigable waters, but too far landward of the sea wall to be of any use in connection with navigation—statutes which plainly manifested an intent to deal with and terminate the public easement over such lands. They are not authority for the proposition advanced by plaintiff, unless we shall find that the statute under which he purchased manifests a like intent.

The aforesaid provisions of the Political Code do not express or indicate such intent with respect to navigable waters, but, when properly interpreted and applied, show a design to dispose of the tidelands subject to the public easement in any navigable waters included within the tracts so disposed of.

The provisions in question are the result of an evolution in legislation beginning in 1855. The act of 1855 (St. 1855, p. 189) provided only for the sale and reclamation of the swamp and overflowed lands granted to the state by the United States by the act of Congress of September 28, 1850. Chapter 84, 9 U. S. Stats. 519. The state held these lands free from any public use. This act of 1855 was repealed by the act of 1858 (St. 1858, p. 198), which substantially re-enacted the provisions of the former act. Its title was "An act to provide for the sale and reclamation of the swamp and overflowed lands of this state." It was perceived, however, that in many places the swamp land was contiguous to tidelands; that they were similar in character and appearance; that it was often difficult or impossible to accurately locate the lines of separation; and, indeed, that such line might change temporarily in times of flood. In view of these conditions, the statute provided that if, upon the survey of any land sold under the act—a survey which the purchaser was to have made—any portion should prove to be land belonging to the state by virtue of her sovereignty, the money paid therefor should be paid into the general fund of the state, instead of the swamp land fund. Stats. 1858, p. 198. An amendment, not important here, was made in 1859. Stats. 1859, p. 340. The act of May 13, 1861, provided for the reclamation and segregation of the swamp and



overflowed lands of the state, and for the sale thereof, after segregation. The swamp and overflowed lands were to be segregated from the "high lands"—that is, from lands belonging to the United States—and maps were to be made thereof. Section 27 provided, that the act should also apply to salt marsh and tide lands. Stats. 1861, p. 355. Unimportant amendments were passed in 1862 and 1863. Stats. 1862, p. 197; Stats. 1863, p. 523. A complete revisory act concerning the sales of swamp lands, marsh lands, tide lands, and other lands of the state was enacted April 27, 1863. Stats. 1863, pp. 591-601. In 1864 (St. 1863-64, p. 230), and 1866 (St. 1865-66, p. 799), some amendments were enacted. All these statutes were expressly repealed by the general statute of 1868. Stats. 1867-68, p. 507. It was substantially a revision of the previous laws on the subject. It established a state land office to manage the sale of all lands held by the state and the reclamation thereof, where necessary. So far as the question here under consideration is concerned, it is not materially different from the provisions of the Political Code on the same subjects.

Neither in the Political Code nor in any of the previous statutes, above mentioned, is there any provision for the protection or management of navigable waters, or for the regulation of navigation. No provision is made for the consideration of the subject of navigation, or for a decision of the question whether any tidelands are or are not required therefor, or whether the public right of navigation over any given parcel of the soil may be discontinued and the dedication of the soil to the public use revoked or vacated without detriment to the general welfare. The scheme is manifestly designed, not as an exercise of the sovereign power of dominion over these lands for the preservation and protection of the right of navigation, or of the duty of the state to promote, control, and regulate it, but as a plan to dispose of the soil of the tidelands in such a manner that the grantee shall take it for reclamation and subject to the public rights, wherever they may exist over such lands. It would follow, therefore, that sale under these laws authorizes no destruction of any public easement, and that whenever a navigable channel or navigable water may extend over any tideland granted by the state under these statutes the public right of navigation therein is not destroyed, the purchaser takes subject thereto, and he has no right to enjoin or prevent any citizen from exercising the public rights incident thereto.

[4] If this was true of these statutes originally, because of the nature of the state's title to the land and its duty to protect and preserve navigation, there can be no doubt that it is true since the adoption of the Constitution of 1879. Apparently for the purpose of settling this question, section 2 of

article 15 provides that no one "claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this state, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this state shall be always attainable for the people thereof." The Legislature is without power to dispose of the tidelands of the state in a manner which would conflict with this provision of the Constitution, or to provide for the alienation of a greater estate in such lands than that provision would permit. The provision is that no person possessing tidal lands of a bay, estuary, or other navigable water, whether the possession be lawful or unlawful, can be permitted to obstruct the free navigation thereof. The power of the Legislature is limited by the provisions of the Constitution, which are mandatory and prohibitory. Therefore, if it can dispose of, or authorize the disposition of, the underlying soil to private ownership, it cannot thereby authorize the alienee to obstruct the free navigation of such water. The words of the Constitution are to be considered as incorporated in the grant or patent the same as if inserted therein. They become a part of it and qualify, it so that the estate granted is limited to the permitted uses. All the statutory provisions aforesaid regarding tidal lands must be construed so as to be in harmony with this declaration. An intent to contravene the Constitution will not be imputed to the Legislature, unless it clearly appears, and when it does appear the provision is void. We think it is plain that the provisions for the sale of swamp and overflowed, salt marsh, and tide lands, as set forth in the Political Code, were not intended to affect or extinguish the public rights in navigable waters. The result is that the grantee of such lands may claim the portions of the land so purchased which are not capable of navigation, but that he must leave the navigable waters open for public use.

The previous decisions of this court confirm these conclusions. *People v. Morrill*, 26 Cal. 336, was an action on behalf of the state to cancel a state patent to Morrill for land sold to him under the act of May 14, 1861 (Stats. 1861, p. 363), providing that tidelands might be sold under the laws then in force for the sale of swamp and overflowed lands. The act of May 13, 1861, had not then become operative, and the court held that the laws referred to were the acts of 1858 and 1859. Stats. 1858, p. 198; Stats. 1859, p. 340. The land patented lay upon the sea beach, and extended from the line of high tide seaward beyond the low-tide line. It was unfit for cultivation and unsuitable for reclama-

tion. The court declared that the acts of 1858 and 1859 were enacted to encourage the reclamation of lands suitable, when reclaimed, for cultivation, and were intended to apply only to lands susceptible of reclamation, and that they did not authorize the sale of land along the sea beach lying between the high and low tide lines. *Taylor v. Underhill*, 40 Cal. 471, is similar to the case at bar. The land in controversy there was a narrow strip opposite the city of Sacramento, constituting the sloping bank of the Sacramento river, lying between the high-tide and the low-tide lines. The defendant claimed the right to purchase it from the state under the act of 1868, aforesaid. He had obtained a certificate of purchase from the surveyor general under that act. The court says: "It could not have been intended in authorizing the sale of swamp and overflowed lands to enable persons to obtain titles to lands under navigable waters, which are incapable of being reclaimed for agricultural purposes, and which could not be utilized without materially interfering with navigation. \* \* \* Admitting that the title of the state would pass to the defendant under the patent, it would not authorize him to change the water front or obstruct navigation. The state can probably sell the land and authorize the purchaser to extend the water front so as to enable him to build upon this land; but it must be done in the interest of commerce, and that must first be determined by the Legislature. No such right to obstruct navigation passes to the purchaser under the laws for the sale of swamp and overflowed land." *Kimball v. MacPherson*, 46 Cal. 103, was a land contest referred to the court by the surveyor general. It arose under the act of 1868 aforesaid. Each party claimed the right to purchase the land as tideland. At low tide it was an exposed sand beach; at ordinary high tide it was covered with water. It was not susceptible of use for agricultural purposes, and was useful only for some purpose in aid of commerce and navigation. The court said: "It was not the intention of the Legislature to permit a sand beach on the shore of the ocean, between ordinary high and low water marks, to be converted into private proprietorship under the act of March 28, 1868. \* \* \* The chief purpose of that act was to reduce into one harmonious system all previous provisions for the sale of overflowed, swamp, and tide lands, and other lands belonging to the state, and to provide for the reclamation of the first-named classes. \* \* \* Nothing short of a very explicit provision to that effect would justify us in holding that the Legislature intended to permit the shore of the ocean, between high and low water mark, to be converted into private ownership." The judgment was that neither claimant was entitled to purchase. *People v. Cowell*, 60 Cal. 400, was a direct action to cancel a certificate of purchase of

tideland, issued under the act of 1863, above mentioned. *Stats.* 1863, p. 591. The land was on the shore of Monterey Bay at Santa Cruz, partly below low-tide line and the remainder below the ordinary high-tide line. The trial court found that it could be reclaimed by dykes, but could be made useful for agriculture only by transporting soil for that purpose, and that the cost of reclamation would greatly exceed its value, when reclaimed, for any purpose of tillage and agriculture. It was argued by the claimant that the mere fact that it would be a bad speculation for such uses was immaterial; that the only test was, "Is the land reclaimable?" The court held that, although reclamation was physically possible, land of that character was not within the terms of the statute, but that said statute applied only to land reclaimable for agricultural purposes; that this was clearly not of that character; and that therefore it was not subject to sale thereunder.

In *People v. Russ*, 132 Cal. 102, 64 Pac. 111, the defendant had bought, under the provisions of the Code, a tract bordering on Salt river, a navigable stream in which the water rose and fell with the tide. He had applied to buy the land as marsh and tide land, under said Code provisions. Two small sloughs extended through the tract from Salt river to the ocean. These were not navigable; but the tides forced water from the ocean through them into Salt river. This increased the flow of the river to the ocean, and by that means Eel river bar, at the outlet of Salt river and Eel river, was kept sluiced out to a depth which made it navigable, and thereby navigation from Salt river to the ocean was made possible. The defendant in reclaiming his land dammed these sloughs, so as to prevent this tidal flow through them from the ocean to the river; the effect being that the volume of water in the river was not sufficient to sluice out the bar, and navigation in the river and over the bar was thereby obstructed. The court held that, although the sloughs were not themselves navigable, yet that the filling of them so as to affect injuriously the navigation of the river and bar was unlawful. It said that the right to reclaim the tidelands, under the provision of the Code for the sale of such lands, is not superior to the public use of navigable streams. Speaking of the right of the owner to dam the sloughs, it said: "The swamp and overflowed land act does not purport to give the owner that right, even conceding such a power in the state; and the right of the public in the use of a stream as a public highway is paramount to any right which the owner of the land has to reclaim his land from overflow. \* \* \* While the state is pleased to see its swamp and overflowed lands reclaimed, and thereby become productive, yet the Constitution of the state declares that



no owner of tidelands of any harbor, bay, inlet, estuary, or other navigable water in this state shall be permitted to destroy or obstruct the free navigation of such water."

[5] All of the foregoing decisions, except the last, concern sales made under the laws enacted prior to the Code. As the Code does not substantially depart from the provisions previously existing, it is to be presumed that the Legislature intended it to be understood as having substantially the same purpose, object, and meaning. Hence it cannot be said that the action of the surveyor general in receiving the application approving the survey and preparing the patent, or of the Governor in executing it, are to be considered as a determination by the state that the land does not include any navigable water, or as a destruction or discontinuance of the public easement therein, or as an exercise of the functions of the state concerning the control of navigable waters. It seems necessarily to follow that, conceding that the title to the soil passes when tideland is purchased from the state, under the Code, the question whether it includes within its bounds any navigable waters, and the extent of such navigable waters, are not determined by the sale, but remain open for further adjustment between the purchaser and the state, and the sale does not vest in the purchaser the right to erect reclamation works which may materially interfere with the navigation of such waters. And the question whether or not there is such navigable water over such land must in the meantime remain open as a question of fact; and its existence may be shown by any citizen in defense of an action to prevent his exercise of the public right of navigation secured to him by the said constitutional provision.

The decision in *Bolsa Land Co. v. Burdick*, 151 Cal. 254, 90 Pac. 532, 12 L. R. A. (N. S.) 275, and the comments of the court regarding the power of the state to sell tidelands, are based on the conclusion stated in the opinion that the waters there involved were not navigable. While it appeared that some of the land there involved had been obtained from the state by purchase under the Code provision for the sale of tidelands, yet it also appears that the land or waters so purchased were all included within the limits of a Mexican grant afterwards confirmed by the United States. It is doubtful if the state patent conveyed any title thereto. There is nothing in the decision which, when applied to the facts upon which it is based, is at all inconsistent with the proposition that the provisions of the Political Code for the sale of swamp lands and tidelands do not authorize the closing of navigable waters by the purchaser, and were not intended to affect public easements therein. The effect of the constitutional provision was not mentioned or involved in that case.

It has been said that the right of the United States to control navigable waters and adjust harbor lines in the exercise of its power to regulate interstate and foreign commerce is paramount to any title, dominion, or control of the state over such water. *Illinois C. R. v. Illinois*, supra. Nothing which we have said is intended to apply to this question. It is clear that, in the absence of any exercise of such power by the United States, the state has control and management thereof, and its mandates upon the subject are binding upon all persons.

[6] The appellant claims that the title to the soil was transferred to him by the patent, and hence that, if the finding that the title is in the state and not in him is an adjudication against him, it is a cloud upon his title of such force and effect as to constitute injurious error, for which the judgment must be reversed. As we have shown, the validity of the patent is not involved in this case. The defendants cannot question it. Although it is technically put in issue by the pleadings, the issue is immaterial. The judgment contains nothing on the subject of title, and the finding on title is not necessary to support it. It secured to the defendants nothing but the exercise of the public rights existing in navigable waters. This judgment is supported by the finding that the bay is navigable, and that the defendants are citizens. The findings upon the immaterial issue, even if erroneous, are not binding upon the plaintiff and do not warrant a reversal of the judgment. *Collins v. Gray*, 154 Cal. 135, 97 Pac. 142.

[7] A person against whom an action is begun to enjoin him from using navigable water, or other public way, may defend by asserting his public right to do so. He need not, in such a case, show private injury, either to person or property. This is not inconsistent with the well-established rule that if such navigable water or public way is obstructed or closed a private person cannot maintain an action to remove the obstruction or open the way, or to recover damages thereby caused, or to enjoin a threatened obstruction, unless he can show such private injury.

[8] The authorities do not designate the hunting of wild game as an object for the protection and promotion of which the state holds title to and dominion over the tidelands and navigable waters. Nevertheless it is a privilege which is incidental to the public right of navigation. There is no private property right in wild game. The wild animal or bird, not in captivity nor tamed, becomes the property of him who takes or kills it. Any person has the right to take and kill such wild birds or other game in any place where he may find them. He has no lawful right to trespass on the premises of another for that purpose. But wherever he may lawfully go, he may take and kill such game



as he may find there, subject, of course, to the restrictions of the game laws. The defendants, therefore, having the right of navigation over these waters, may exercise that right at will as a public right; and if, in doing so, they find game birds thereon they may, during the lawful season, shoot and take them. The plaintiff, of course, has an equal right to the same privilege. If the judgment were to be construed as excluding the plaintiff from this privilege, or as giving defendants the exclusive privilege of hunting thereon, it would be to that extent erroneous. But it is clear that it was not so intended and should not be given such effect. It is to be understood as a declaration that the defendants, in common with the plaintiff and all other persons, have the privilege of hunting on these waters while exercising the public right of navigation over them. It is therefore a correct statement of the rights of the defendants.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.

164 Cal. 44

**F. P. CUTTING CO. v. PETERSON.**  
(S. F. 5,762.)

(Supreme Court of California. Oct. 2, 1912.)

**1. REFORMATION OF INSTRUMENTS (§ 19\*)—**  
**GROUND—MISTAKE OF FACT.**

A buyer of canned tomatoes refused to accept the prices offered by the seller, unless the seller would guarantee him against the opening prices for that season, to be thereafter fixed by a fruit canneries association; that is, unless the seller would agree to reduce the prices, if necessary, to correspond with the association's prices. The seller agreed to meet the association's general prices, but not any special price made to particular customers, and, under the mutual belief that the association would, as usual, announce such prices by a printed circular, the contract guaranteed the buyer against the opening printed prices of the association. The association made no printed prices for that season, but did fix prices lower than those fixed in the contract. *Held*, that the word "printed" was inserted in the contract under a mutual mistake in expecting something to happen which did not occur, and that, under Civ. Code, § 3399, authorizing reformation of a contract when, through a mutual mistake of the parties, it does not truly express their intention, the contract would be reformed.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 74-78; Dec. Dig. § 19.\*]

**2. REFORMATION OF INSTRUMENTS (§ 11\*)—**  
**GROUND—MISTAKE OF FACT.**

Although the parties to a contract may have used the exact language they intended to use, inserted nothing that they did not intend to insert, and omitted nothing which they intended to insert, or supposed had been inserted, if the language does not express their actual intent, the contract may be reformed to agree with such intent, in view of Civ. Code, § 3401, providing that in revising a written instrument the court may inquire what it was intended to mean, and is not confined to the

inquiry what the language of the instrument was intended to be.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 24-27, 32-41; Dec. Dig. § 11.\*]

**3. REFORMATION OF INSTRUMENTS (§ 17\*)—**  
**GROUND—MISTAKE OF FACT.**

Relief from the consequences of a mutual mistake is not confined to cases where the mistake was with reference to a past event, or to the present existence of some fact or thing, but also extends to cases where both parties, by mistake, expect a future event to occur, and describe the subject-matter by words making their intent clear if this event does occur but which defeats the real intention if the event does not occur in the manner expected.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 69-71; Dec. Dig. § 17.\*]

**4. REFORMATION OF INSTRUMENTS (§ 19\*)—**  
**MISTAKE OF FACT—MUTUALITY.**

Where a buyer refused to accept the seller's prices, unless the seller would reduce them, if necessary, to correspond with the prices fixed by a third person, but, under the mistaken belief that such third person's prices would be announced in printed form, signed a contract by which the seller only agreed to meet the third person's printed prices, the buyer was entitled to reformation, where the third person fixed no printed prices, although the seller did not mistakenly believe that such prices would be printed, since, under Civ. Code, § 3399, a mistake of one party, which the other at the time knew or suspected, justifies a reformation.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 74-78; Dec. Dig. § 19.\*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by the F. P. Cutting Company against Frank B. Peterson. From an order denying defendant's motion for a new trial, he appeals. Reversed.

Devoto & Richardson, of San Francisco, for appellant. Gerold C. Halsey, of San Francisco, for respondent.

**PER CURIAM.** This action was to recover for the unpaid part of the purchase price of some thousands of cases of canned tomatoes sold and delivered by plaintiff to defendant. The court instructed the jury to render its verdict for the plaintiff in the amount sued for. This the jury did, and from the order denying his motion for a new trial defendant appeals.

[1] Plaintiff is a company engaged in the business of canning fruits and vegetables. Defendant is a wholesale grocer. Plaintiff and defendant entered into a written contract for the sale and delivery of canned tomatoes. These canned tomatoes were "futures"; that is to say, they were yet to be packed. The contract fixed the price per dozen for the different qualities sold, and contained the following provision: "The above prices guaranteed against the California Fruit Canners Association opening printed prices for the season of 1908." It

was executed on August 12, 1908, which was a short time before the beginning of what was called the season of 1908. It is over this provision of the contract that the whole controversy is waged. The plaintiff sued for a recovery under the prices named in the contract, averring that the association "did not print any opening printed prices for the season of 1908 on said goods." The defendant for answer alleged that it was mutually understood and mutually agreed between the parties to the contract that the prices fixed in the contract were subject to reduction if it became necessary to meet any prices that might be fixed for the goods mentioned in the contract by the association, and that the language, "the above prices guaranteed against the California Fruit Canneries Association opening printed prices for the season of 1908," was inserted with the mutual intention of the parties that the "guarantee should protect this defendant against any prices which might be made on said goods by said California Fruit Canneries Association for said season of 1908."

Upon the trial, after a prolonged effort on the part of the defendant to introduce evidence of mutual mistake under the allegations of the answer, the court stated that the answer was not sufficient as an application for the correction of a mistake and to enforce the contract as revised and corrected, but that, as the defect could be supplied by an amendment, evidence would be taken to ascertain whether or not there had been such mistake in drawing the contract, with a view to allowing such amendment if the mistake appeared. No objection was made to this course, and the court proceeded to hear the evidence offered on that subject.

At the close of this evidence, the plaintiff moved the court to deny the application to amend the answer and for a reformation of the contract, on the ground that no mistake which could be corrected under the principles of equity was shown by the evidence. The court sustained this motion and refused to allow the defendant to amend the answer, or to proceed further with the proposed defense.

The contention of the defendant was that the phrase "opening printed prices," in the clause above quoted, did not correctly state the meaning which the parties mutually desired to express; that the idea sought by both parties to be expressed was that the Cutting Company would reduce the prices named in the contract, so as to make the selling prices equal to the opening market prices which the California Fruit Canneries Association should fix and declare for the season of 1908, whether the prices so fixed were printed or announced by other methods.

The contention of the plaintiff was that there was no mistake between the parties with respect to the words which were to be inserted in the contract, and that they, in

effect, selected the very words used as the best expression of their intention, according to their understanding of the conditions at that time. The evidence showed that there was no mistake in the selection of the words, and it appears that the court below directed the verdict upon the theory that if the mistake was not with respect to the selection of the words to be used there was no mistake shown, within the rule by which courts of equity will reform contracts.

The fact that the parties used the very words which they intended to use is not always sufficient cause for refusing relief of this character. There may be no mistake as to the words used or to be used, and at the same time there may have been a mutual mistake as to some other matter or fact, affecting the meaning or application of the words, and by reason thereof the contract may not truly express the real intention of both parties; and in that case it may be revised and reformed at the instance of the aggrieved party and enforced accordingly, although the words were carefully chosen. Civ. Code, §§ 3399, 3401, 3402. We now state the facts shown by the evidence on this subject.

At the time the contract was made, and for many years prior thereto, the California Fruit Canneries Association had packed so large a part of the canned goods of the state that when it declared its opening prices for such goods all other producers and dealers at once conformed thereto. In other words, that association fixed and controlled the market prices of those goods. It had regularly and habitually in preceding years announced its prices at the opening of the season by printing and distributing generally to the trade a circular containing its established price list for "futures" for that season. The parties to this contract did not personally meet. The contract was negotiated by Mr. Oliphant, a broker, who acted as go-between or mutual agent of the parties, representing the Cutting Company when talking with Peterson, and Peterson when talking with the officers of the Cutting Company. The association had not at that time announced or declared its prices for the coming season; but both parties believed and expected that it would do so in a short time, and that the announcement would be made in the usual manner; that is, by a printed circular distributed to the trade. When the prices named by the Cutting Company were discussed between Oliphant and Peterson, the latter said he would not agree thereto, unless the contract contained a clause guaranteeing him against the opening prices for the season, to be thereafter fixed by said association. By this it was meant and understood by both parties that, if the association's prices were lower than the prices named in the agreement, then the association's prices should be those upon which the sales under



the contract should be made. This requirement of Peterson was communicated to the Cutting Company by Oliphant, and that company thereupon agreed that the contract should contain a provision to that effect. The association sometimes made lower prices to particular customers, and the Cutting Company insisted that the guaranty should not extend to such special prices, but only to the general prices fixed. This was agreed to by Peterson. Having thus brought the parties to an agreement, Oliphant drew the contract for the purpose of expressing the agreement so made, and to provide for the guaranty required he inserted the clause above quoted and submitted the contract to both parties. It was satisfactory to both as a correct expression of their intention, and each thereupon signed it.

It is apparent from this evidence that the object to be secured by the clause in question was to put Peterson on an equal footing with other dealers in canned tomatoes, in case the association's opening prices and the general market prices thereby fixed should be less than those named in the contract. The printing of the price list by the association was wholly immaterial to this purpose; but both parties, assuming that such price list would be printed as usual, and desiring to use language that would exclude occasional or special prices as a standard, accepted the words "opening printed prices" as a good description of the standard intended. The words would clearly have accomplished that purpose, if the event had occurred in the manner each expected it would. When the season opened, however, the event proved that the expectation that there would be a printed announcement of association prices was a mistaken one. There can be no doubt from the evidence that this expectation was entertained by both parties; that the mistake in that respect was mutual; and that by reason thereof the contract failed truly to express the intention of the parties.

[2] The case comes clearly within the sections above cited. Section 3399 declares that when, through a "mutual mistake of the parties," a written contract "does not truly express the intention of the parties, it may be revised on the application of the party aggrieved, so as to express that intention." The fact that no word was inserted which the parties did not intend to insert, and none omitted which they did intend to insert, or supposed had been inserted, does not prevent the application of the rule, nor make it any the less a case of mistake. It was the mutual mistake in expecting a thing to happen in the future which did not occur that led to the insertion of the word "printed." This word, if taken literally in connection with the fact that the price list for that season was not printed, would operate to frustrate the real intent. Section 3401 covers this point precisely. It is as follows:

"In revising a written instrument, the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be." It was shown that both parties intended the legal consequences of the contract to be that the opening market prices of the season as established by the association should be the prices for which the goods should be sold to Peterson, and that the language chosen to effect that object was so chosen because of the mistake as to the manner of announcing such prices.

[3] We do not understand that relief from the consequences of a mutual mistake is confined to cases where the mistake was with reference to a past event, or to the present existence of some fact or thing. No sound reason appears why the doctrine should not equally apply where both parties by mistake expect a future event to occur and describe the subject-matter by words which make the intent clear if the event does happen as expected, but which defeat the real intent if the event does not happen precisely in the manner expected. We think this case comes clearly within the doctrine.

There was no substantial conflict in the evidence on this subject. The president and secretary of the Cutting Company each testified that the wording of the contract was exactly as he intended it should be, and that he intended to guarantee Peterson precisely as the clause provided. There was no contention that they did not intend this, as they understood the facts and conditions and effect of the words used. This was not the essence of the mistake. Neither of them disputed nor denied that he then expected that the opening prices of the association would be printed as usual, or that he approved the words in consequence of that erroneous belief and expectation.

[4] If they had declared that they did not then expect that the price list would be printed, and that they approved the wording with that idea, it would be a virtual confession that they believed that the guaranty would be nugatory and intended to perpetrate a fraud upon the defendant if a lower price was fixed by the association without printing the price list. The mistake would then come within the class of mistakes described in section 3399 as "a mistake of one party, which the other at the time knew or suspected." The evidence shows that Oliphant informed the Cutting Company's officers that Peterson insisted upon a protection against the possibility of being bound to pay a price higher than the opening prices fixed for the trade generally by the association. They do not deny this evidence. Hence they would be chargeable with knowledge that Peterson expected that the price list would be printed; and if they did not expect the



same thing themselves the case would come under the second class of mistakes mentioned in the said section. The use of the word "printed" of itself indicates such expectation. The court below should have allowed the defendant to amend his answer, and, upon the proof made, should have reformed the contract so as to make it express the real intention of the parties. There was evidence to the effect that the association did fix opening prices for that season for the goods in question, and that they were lower than those named in the agreement; the difference making the amount which Peterson refused to pay for the goods delivered. The matter of the reformation of the contract was therefore an important one to the parties, and the judgment is prejudicial to the defendant.

The order is reversed.

164 Cal. 14

In re DONNELLAN'S ESTATE.

TRACY et al. v. REILLY et al. (S. F. 6,079.)

(Supreme Court of California. Sept. 27, 1912.)

1. WILLS (§ 491\*)—CONSTRUCTION—QUESTION OF LAW.

The doubt as to the meaning of a will must be resolved by construction, which is a question of law, by application of legal rules governing construction, either to the will alone, or to properly admitted evidence to explain testator's intention.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1058; Dec. Dig. § 491.\*]

2. WILLS (§ 400\*)—QUESTIONS REVIEWABLE—QUESTIONS OF LEGAL CONSTRUCTION.

Where there is a conflict in the extrinsic evidence admitted to explain doubtful language of a will, a determination of the conflict is a finding of fact; and the court, on appeal, will only determine whether or not a wrong construction has been reached in view of the findings.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 869-873; Dec. Dig. § 400.\*]

3. WILLS (§ 400\*)—QUESTIONS REVIEWABLE—QUESTIONS OF LEGAL CONSTRUCTION.

Where the extrinsic facts, proved to explain doubtful language in a will, are without conflict, the propriety of the court's application of the facts in its construction of the will is reviewable as a legal proposition.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 869-873; Dec. Dig. § 400.\*]

4. WILLS (§ 486\*)—CONSTRUCTION—EXTRINSIC EVIDENCE—ADMISSIBILITY.

Where extrinsic evidence is admissible to aid in the construction of doubtful language of a will, the evidence is limited to such purpose; and, under Civ. Code, § 1340, it may not show a different intent or a different object from that disclosed by the will itself.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1016-1022; Dec. Dig. § 486.\*]

5. WILLS (§ 489\*)—CONSTRUCTION—EXTRINSIC EVIDENCE.

Where there are two or more persons or things measuring up to the description and conditions of a will or where no person or thing exactly answers the declarations and de-

scriptions, but there are two or more persons or things answering in part, extrinsic evidence is permissible to remove the ambiguity; and in the first case resort is had to determine the person or thing to whom or which the language of the will is to operate, and, where the person or thing has once been determined as a matter of law, the construction follows; and in the second case, where errors in description or designation are found, the construction results in rejecting some part of the designation or description as erroneous and as not expressing testator's intent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1037-1046; Dec. Dig. § 489.\*]

6. WILLS (§ 493\*)—CONSTRUCTION—NAME—DESCRIPTION.

The court, in construing a will, ambiguous in the designation of a beneficiary named and described, will not prefer the name to the description; but where a correct name is given, coupled with an erroneous description, the person of that name takes, while where there is no one who answers to the name, but there is one who answers to the description, the latter may take.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1077; Dec. Dig. § 493.\*]

7. WILLS (§ 493\*)—CONSTRUCTION—NAME—DESCRIPTION.

The court, to ascertain whether there is a description in a will which is not consistent with the name of the beneficiary, will consider the whole will, and in such case, the person intended must be ascertained by a consideration of all the circumstances of the case to arrive at testator's intention.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1077; Dec. Dig. § 493.\*]

8. WILLS (§ 489\*)—CONSTRUCTION—DESIGNATION OF BENEFICIARY—EXTRINSIC EVIDENCE.

Testatrix gave a part of her residuary estate to her "niece Mary, a resident of New York, said Mary being the daughter of my deceased sister Mary, the name of my niece Mary I do not know as I understand she is now married, nor am I sure of niece Mary's maiden name, as her mother, my sister Mary, was twice married, but I believe my niece's maiden name was Mary Donohoe." Testatrix, a native of Ireland, came to the United States, but left in Ireland a sister, Mary, who had two daughters, Annie, who came to the United States and resided in the state of New York, and Mary, who married and continued to live in Ireland. Testatrix left Ireland before either of the daughters of her sister was born, and she had never seen either of them. There was nothing to show that the testatrix knew of more than one niece. She thought that her name was Mary; but she knew that such niece came to the United States and was living in New York. She had written to relatives in Boston to learn the whereabouts of the niece who had come to the United States. Held, that the niece Annie was the niece designated; the words "resident of New York," being the correct description, while the name was erroneous.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1037-1046; Dec. Dig. § 489.\*]

9. EVIDENCE (§ 183\*)—WITNESSES (§ 37\*)—SECONDARY EVIDENCE—INSUFFICIENT FOUNDATION.

One may not testify to the contents of a letter without proof, either of the destruction of the letter, or that the witness had ever read it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 605-637; Dec. Dig. § 183; Witnesses, Cent. Dig. §§ 80-87; Dec. Dig. § 37.\*]

10. EVIDENCE (§ 317\*)—HEARSAY EVIDENCE. The testimony of a witness as to statements made to him by another of the contents of an instrument is inadmissible as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.\*]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Catherine Donnellan, deceased. From a decree of distribution awarding to Mary Smith a part of the residuary estate pursuant to a provision in the will of the deceased, Jane Tracy and others appeal. Reversed, with directions.

Wm. S. McKnight, of San Francisco, for appellants. T. E. K. Cormac and John C. Quinlan, both of San Francisco, for respondents.

HENSHAW, J. Catherine Donnellan died testate in the city and county of San Francisco, and her will was there probated. The tenth clause of her will is as follows: "The one-fourth of the rest and residue of my property I will, devise and bequeath to my niece Mary, a resident of New York, said Mary being the daughter of my deceased sister Mary, the name of my niece Mary I do not know as I understand she is now married, nor am I sure of niece Mary's maiden name, as her mother, my sister Mary, was twice married, but I believe my niece's maiden name was Mary Donohoe."

Upon petition for distribution, Annie Sheridan, appellant herein, and Mary Smith, respondent herein, each claimed distribution as the person meant in the paragraph above quoted. The court's decree favored Mary Smith. As has been said Annie Sheridan appeals, and so, also, do certain heirs at law, who insist that the latent ambiguity disclosed to exist in paragraph 10 has not been removed by extrinsic evidence; wherefore the bequest fails and the property descends to them as heirs at law.

The evidence showed that Catherine Donnellan, born Catherine Riley, the testatrix, came to San Francisco from Ireland about 55 years ago, and there died, after the death of her husband, without issue. At the time she left Ireland, she had a sister Mary, who remained in Ireland. This sister, by her marriage to Michael Cook, had two daughters, Annie and Mary. After the death of Cook, she married John Donohoe. The daughter Mary married a man by the name of Smith, and lives in Ireland with the testatrix's brother Thomas Riley. Mary has never been in the United States. The other daughter, Annie, married a man by the name of Sheridan, came to the United States about 25 years ago, and at the date of the will lived and still lives in Brooklyn, state of New York. The testatrix left Ireland before either of the daughters of her sister Mary was born, never saw either of the

daughters, and, being unable to write, never personally wrote to either of them. This statement discloses the latent ambiguity and uncertainty as to the person whom the testatrix intended to indicate by the tenth paragraph of her will. Both Mary and Annie were her nieces, both were the daughters of her sister Mary, and both were the stepdaughters of John Donohoe, the second husband of testatrix's sister. If the testatrix intended the niece Mary, then there is a grave error in description; for the niece Mary was never a "resident of New York." If the testatrix meant to designate the niece who was a resident of New York, then that niece was Annie, and not Mary.

Extrinsic evidence was taken, as was proper, to explain this latent ambiguity, and that evidence was this: In May, 1909, testatrix gave instructions to her attorney to draw her will. This he did, and was a witness to it. The testatrix told her attorney that she had a sister named Mary, who had a daughter named Mary; that she did not know where the daughter was. She thought she was in New York. She did not know what her name was. "In fact," concludes Mr. Quinlan in his testimony, "everything that she told me about Mary I concluded in the description as she gave it to me and put it in the will as closely as I could adhere to her general statements to me." Still further the testatrix explained to her attorney that she would not make provision so that another branch of her family, "the Boston Rileys," would take the share allotted to the niece, in the event that Mary could not be found, because "she had made inquiries from the Riley family in Boston as to the whereabouts of this party, and that they had refused to give her information, and she thought that if they were interested in this portion of the estate that they would not make any endeavor to find or locate this person." The further testimony was that Annie was the elder sister; Mary the younger. Thomas Riley, a nephew of the deceased, living in Boston, Mass., testified that he received a letter from the testatrix in her lifetime, which letter was appended to the deposition, and in which the following inquiry was made, "Let me know about my sister Mary's daughter;" that he had written to Catherine Donnellan in answer to this letter, and in so writing wrote about the niece Annie Sheridan, who was the only niece of Catherine Donnellan who ever lived in New York. Annie Sheridan deposes that her father died when she was about six years of age, and at that time the testatrix, living in San Francisco, wanted her (Annie) to come to San Francisco to live with testatrix; that she (Annie) had been called Mary when she first came to America, and had been so called by Margaret Riley, an aunt by marriage at Boston, where she (Annie Sheridan) first lived.



Over objection and exception, the court admitted in evidence from the deposition of Mary Smith the following: "I remember my mother getting a letter from the decedent over 20 years ago, in which she asked my mother to send me out to her home in California, as the decedent stated that all her family were dead." And also the following from the deposition of Thadeus Doyle: "Mary Riley, the deceased [mother of Annie Sheridan and Mary Smith], told me several times that her sister Catherine [the testatrix] was married to a man named Donnellan, and that she received letters from America, and that Catherine Donnellan wanted Mary Riley's daughter, the present Mary Smith, to be sent to her in America." This is, in substance, all of the extrinsic evidence given to relieve from the latent ambiguity and to aid in the construction of the will. It will be noted that it presents absolutely no conflict.

[1-3] It is a fundamental and indisputable proposition that wherever doubt arises as to the meaning of a will, such doubt is resolved by construction, and that construction is one of law. It is an application of legal rules governing construction, either to the will alone, or to properly admitted facts to explain what the testator meant by the doubtful language. In those cases where extrinsic evidence is permissible, there may be a conflict in the extrinsic evidence itself, in which case the determination of that conflict results in a finding of pure fact. But when the facts are thus found, those facts do not solve the difficulty. They still are to be applied to the written directions of the will for the latter's construction, and that construction still remains a construction at law. In such cases, where the evidence of the facts is in conflict, it is permissible for the court, or for the jury, to find the facts; and those findings, under firmly established principles, will not here be disturbed. But the application to the will itself of the facts found, admitted, or established without conflict presents a question of legal construction, which is as purely a question of law as is a construction of the will without resort to extrinsic evidence. Therefore, if the facts have been found by the court upon conflicting evidence, this court, accepting the findings, will still review the construction of the court in probate and determine whether or no a wrong construction at law has been reached. If the facts are admitted or established without conflict, the justness of the application which the court made of those facts in its construction will equally, as a legal proposition, be the subject of review.

[4] Again, it is fundamental that in all cases where extrinsic evidence is admissible to aid in expounding the will the evidence is limited to this single purpose. It is considered for the purpose of explaining and in-

terpreting the language of the will, and is never permitted to show a different intent or a different object from that disclosed, though, perhaps, obscurely, by the language of the will itself. 6 Wigmore, Ev. 2472-2474. So it is declared by section 1340, Civil Code: "When, applying a will, it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence; but evidence of the declarations of the testator as to his intentions cannot be received."

[5] Broadly speaking, there are two classes of wills presenting latent ambiguities, for the removal of which ambiguity resort to extrinsic evidence is permissible. The one class is where there are two or more persons or things exactly measuring up to the description and conditions of the will, as "to my niece, daughter of my sister, Jane, residing in Alameda county," when there are two or more nieces, daughters of his sister Jane, so residing; or a devise "of my ranch in Alameda county," when the testator owns two or more ranches in that county. The other class is where no person or thing exactly answers the declarations and descriptions of the will, but where two or more persons or things in part, though imperfectly, do so answer. To this latter class belongs the case under consideration. The very apparent distinction between the two classes is this that in the first class resort is had to extrinsic evidence to determine the person or thing upon whom or which the language of the will is to operate. That person or thing once being determined, as matter of law, the construction follows so much as matter of course that the legal aspect of it is sometimes regarded as negligible. And thus in some cases it is said that under circumstances such as this the court or the jury determination of the intent of the testator is one of fact. Logically this is not true; for always must the intent of the testator be determined by the will itself, and that determination is a conclusion of law. But the person or thing which is the matter in doubt being decided upon as matter of fact, the application of the intent of the will that that person should receive the property, or that the property should go to such a person, presents absolutely no difficulty. For that reason, as has been said, the fact that there still remains to the court the duty of construing the will in this particular is sometimes lost sight of. Thus a will gives a legacy "to my niece, daughter of my sister Jane, in San Francisco." It is disclosed that the testator has a sister Jane, who lives in San Francisco, and who had two nieces. Extrinsic evidence is admitted to show that at the time of the making of the will the sister Jane had but one daughter; that the testator knew this niece; that before the birth



of the second niece he departed from the state, was never thereafter in communication with his sister, and did not know of the existence of the second niece. Here the finding of fact would clearly be that the testator had in mind the elder niece. This finding at once removes the only difficulty in the way of construction; but, nevertheless, legally and logically, no matter how simple may be the construction which follows, there is the necessity of construction in the declaration by the court that the testator by his will did bequeath a legacy to the elder niece.

Much more apparent is this legal construction in the second class of cases, where errors in description or designation are found, so that, however the will may be construed, the construction results in rejecting some part of such designation or description. Here, manifestly, the construction is one of law, because it necessarily results in striking from a written instrument some words or phrases contained therein as being erroneous and not expressing the true meaning and intent of the testator. To these propositions, which we think to be very plain, it is unnecessary to do more than cite *Taylor v. McCowen*, 154 Cal. 798, 99 Pac. 351; *Estate of Dominici*, 151 Cal. 181, 90 Pac. 448; *McKeough's Estate v. McKeough*, 69 Vt. 41, 37 Atl. 275; *In re Welch's Will*, 78 Vt. 16, 61 Atl. 145; 2 *Underhill's Law of Wills*, § 909 et seq.; 2 *Woerner Am. Law of Admin.* p. 893; *Wigram on Wills* (O'Hara's Ed.) 142; *Charter v. Charter*, 7 H. L. 364; *Hiscocks v. Hiscocks*, 5 M. & W. 362.

In the case before us the court is called upon to do this precise thing. It becomes its duty to declare, either that the use of "Mary" as the name of the devisee was error, or that the use of the phrase "a resident of New York" is erroneous description, and should therefore be rejected; or, finally, to declare that the doubt raised by the latent ambiguity cannot be resolved, and the devise must lapse. If the name is rejected as error, then the devise is a perfectly clear and intelligible one—"to my niece, a resident of New York, said niece being the daughter of my deceased sister Mary." If the description be rejected, the devise becomes equally clear and intelligible and is "to my niece Mary, said Mary being the daughter of my deceased sister Mary." As has been said, the evidence was without conflict, and the court by its construction adopted the theory that the name controlled, and that the description was erroneous and should therefore be rejected. But if, as respondent implies, the court adopted the maxim "*Veritas nominis tollit errorem demonstrationis*" as controlling, and the declaration of Redfield that, "where persons are correctly named, any amount of false description will be rejected as surplusage, and even a great degree of certainty will not

induce a court to give the devise of a person named to one described, but not named" (Redfield [3d Ed.] 404), it unduly extended the application of the maxim and the meaning of the text-writer.

[6, 7] There is no rule in the construction of wills which prefers a name to a description. The matter is clearly expounded in Theobald on Wills, page 268. He says: "Sometimes a correct name is given, coupled with an erroneous description. There is a person of that name, but no one to whom the description applies. The person of that name takes. '*Veritas nominis tollit errorem demonstrationis*.' On the other hand, if there is no one who answers to the name, but there is a person who answers to the description, the latter may take. '*Nihil facit error nominis cum de corpore constat*.' There is more difficulty where a person is indicated by name and description, and there is no one who answers both name and description, but there is some one who answers the name and some one who answers the description. For the purpose of ascertaining whether there is a description which is not consistent with the name, the whole will must be looked at. \* \* \* In these cases the person intended must be ascertained by a consideration of all the circumstances of the case. It has been said that 'there are more instances in which the demonstration prevailed than in which the name prevailed.'" See, also, 1 Jarman on Wills (6th Ed.) pp. 379 and 381; *Abbott's Trial Evidence*, p. 176; *Drake v. Drake*, 8 H. L. Cas. 172. Thus, if a testator should give a devise "to my nephew John, who is and for many years has been a member of my family," and it should prove that his nephew James, and not John, had been such inmate, it would be ridiculous to allow the name to prevail over the description. In every case the court seeks to arrive at the testator's intent; and the application of general rules are but aids, and sometimes but feeble aids, to that endeavor.

[8] What, then, fairly appears by the uncontradicted evidence in this case? First, that the testatrix knew that she had one niece, the daughter of her sister Mary. Nothing in the evidence from the beginning to the end points to knowledge upon her part of the existence of more than one such niece. Second, she thought this niece's name was Mary; but she knew that the niece whom she had in mind had come to America and was living in New York. She even wrote to her Boston relatives to learn the exact whereabouts of this niece, whom she knew had come to America. All of the evidence of her inquiries concerning the whereabouts of this niece, her refusal to will over to the Boston Rileys the share bequeathed to the niece, in case the niece should not be found, points irresistibly to

the conclusion that she had in mind the niece who was in America. All of this evidence is absolutely unexplainable upon the theory that the niece she meant was the one who was living with her mother in Ireland, and who had never left her home. Still less possible is it to explain the theory that Mary was meant, if credit be given to the hearsay evidence admitted by the court; for, whatever else that evidence shows, it establishes knowledge upon the part of the testatrix that Mary was not and had not been in America, because she desired Mary to come to America. Again, it appears affirmatively that the testatrix did know that her niece was in America, and (bearing in mind that she knew of the existence of but one niece) it further appears that she wrote to the Boston Rileys to learn the exact whereabouts of the niece in America. Balancing, then, the probabilities of error, and considering that Mary was the mother's name, and the name which it would not be unlikely her daughter would bear, it appears to us that the inference that the niece in America, the one "resident in New York," was intended is overwhelming, and that the error was an error in name and not in description. Rejecting from the consideration the evidence above quoted, which, without question, was improperly admitted, and the inference becomes well-nigh irresistible.

[9, 10] Treating, for a moment, the evidence improperly admitted. The first is the declaration of the niece Mary, as follows: "I remember my mother getting a letter from the decedent over 20 years ago, in which she asked my mother to send me out to her home in California, as the decedent stated that all her family were dead." The witness purported to give the contents of a written instrument—a letter—without proof either of the destruction of the letter, or that the deponent had ever herself read the letter. The second is the declaration of Thadeus Doyle, also as to the contents of letters, whose destruction was not proved, which Doyle never asserts that he read, and the contents of which he was testifying to upon statements of those contents made to him by another. Here was hearsay upon hearsay, and it needs no citation of authority to support the statement that such evidence was inadmissible.

Finally, it should be added, as to the appeal of those contending that the devise lapses because the ambiguity is not removed by parol evidence, that what this court has already said is a declaration that the extrinsic evidence is sufficiently explicit to solve the ambiguity and points to the niece Annie as the one meant by the testatrix.

Therefore the appeal is sustained, and in the indicated particulars the decree is reversed, with directions to the trial court

that if there be no other or further evidence presented upon the rehearing of the matter section 10 of the will shall be construed to apply to and to mean the niece Annie.

We concur: LORIGAN, J.; MELVIN, J.

(164 Cal. 51)

SBARBORO et al. v. JORDAN, Secretary of State. (S. F. 6,346.)

(Supreme Court of California. Oct. 4, 1912.)

1. ELECTIONS (§ 131\*)—DELEGATES TO CONVENTIONS—POWERS OF.

A delegate regularly elected to a political convention may vote any way he pleases on any question, whatever might be his motive, without affecting his legal right to remain therein.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 120; Dec. Dig. § 131.\*]

2. UNITED STATES (§ 25\*)—NOMINATION OF PRESIDENTIAL ELECTORS—FILING OF CERTIFICATES—POWERS OF DELEGATES TO POLITICAL CONVENTIONS.

Where a convention of a political party is regularly called and organized, its nominees and not those of a convention made up of a minority of the delegates, who withdrew from the regular convention, are entitled to have their certificates filed by the Secretary of State, although the delegates repudiated the actions and platform of the national convention and nominated as candidates for the office of presidential electors men who were pledged to vote against the nominees of the national convention.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 16; Dec. Dig. § 25.\*]

In Bank. Original application by Andrea Sbarboro and others for writ of mandate to issue against Frank C. Jordan, as Secretary of State. Denied.

Clayberg & Rose and Samuel M. Shortridge, all of San Francisco, Leroy A. Wright, of San Diego, and Walter R. Bacon, of San Francisco, for petitioners. U. S. Webb, Atty. Gen., for respondent.

PER CURIAM. This is an application by A. Sbarboro and 12 others for a writ of mandate requiring the Secretary of State to place their names on the general election ticket to be used at the general election on November 5, 1912, as the candidates of the "Republican party" for electors of President and Vice President of the United States, and to omit from said ticket the names of 13 other persons who claim to be and whose names have been certified to said Secretary of State as the candidates of such Republican party for such office. The Secretary of State, it is alleged, will place the names of such other persons on such ticket as such candidates, instead of the names of these petitioners, unless this court orders otherwise. The facts upon which petitioners rely are fully set forth in their petition, and the question is whether upon these facts they are entitled to the relief sought.

Under our law for the nomination of candi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



dates for electors of President and Vice President of the United States by political parties (Stats. 1911, Ex. Sess. p. 83), the candidates of any such party at the next election are required to be nominated by a convention composed of the so-called "hold-over" state senators belonging to such party, and the nominees of such party for state senator and assemblyman throughout the state, selected at the direct primary election of such party held on September 3, 1912. Such a convention of the "Republican party" was held at the time and place appointed by the law therefor, 114 persons participating therein as members. It is not disputed that all the persons attending said convention and participating as members in its proceedings were entitled under the law to which we have referred to participate therein as members; each of them being either a "holdover" senator elected as and registered as a member of the "Republican party" or a nominee of such party for senator or assemblyman. We say this is not disputed; for, although it is alleged that of the 114 persons participating as members in said convention, only 13 were "Republicans" and the remaining 101 were not affiliated with the Republican party, and were mere intruders in the convention, it is subsequently alleged that each of said 114 persons who were nominees for the senate and assembly (being 100 of the 114) were nominated at the primary election held September 3, 1912, as Republicans, and that each had duly made and filed the affidavit required by law in which he stated that the name of his party is the Republican party, and that he intended to affiliate with said Republican party and vote for a majority of the candidates of said party at the next ensuing general election. There is no pretense that the same is not true as to the 14 "holdover" senators participating. Each and all of those participating were qualified to participate in the convention as Republicans, so far as any test prescribed by the law is concerned. The sole basis of any claim that 101 of the persons participating as members of said convention were not affiliated with the Republican party, and were disqualified from acting as members of the convention, is substantially that as members of such convention they repudiated the action of the convention of the national Republican party held at Chicago in June of this year by adopting a resolution directly and positively repudiating the platform and nominees of such national Republican convention, and declaring it to be their intent and purpose to support the national platform and candidates of a new party known as the Progressive party, and by nominating as candidates for electors of President and Vice President of the United States persons pledged in the event of their election to vote for the nominees of said Progressive party for President and Vice President of the United States. Such a res-

olution was, in fact, adopted by the votes of said 101 members, against the protest of the remaining 13 members, and by the vote of the same 101 members, 13 candidates for elector of President and Vice President of the United States were nominated as the candidates of the Republican party for that office, who are pledged to vote against the nominees of the national Republican party for President and Vice President. The 13 protesting members thereupon organized as a convention, claiming to be the only rightful members of the Republican convention called for by the law, adopted a platform ratifying the platform adopted by the national Republican convention at Chicago, and nominated these petitioners as the Republican candidates for electors of President and Vice President.

No question is raised by this proceeding as to the constitutionality of the statute prescribing the manner of nomination by political parties of candidates for elector of President and Vice President of the United States. The petitioners seek the relief asked by them solely as the alleged nominees of the convention provided for by such statute. They set forth no other alleged source of right or title as candidates of the Republican party for such office, and they do not allege any matter entitling them to oppose the printing on the general election ticket of the names of the other set of nominees of said convention, as the candidates of the Republican party, in the event that they, petitioners, are not the rightful nominees under said statute. For all the purposes of this proceeding, then, the statute must be regarded as being free from objection on the ground of violation of any constitutional provision.

[1] Assuming the statute to be in all respects valid, we are satisfied that the petitioners cannot prevail in this proceeding. There is no ground for holding that any member of the convention lost his legal right to participate therein by reason of his attitude or vote on any question coming before the convention. Each member measured fully up to the statutory requirements for election to the convention and participation in the proceedings thereof, and his legal right to continue therein as a member to the adjournment of the convention could not be affected by his attitude or vote on any question, whatever might be his motive therein. In this respect he occupied no different position in principle from that occupied by a delegate to a nominating convention under our old system of nomination of candidates.

[2] As to such a convention, we have direct authority in this state, in the case of *Hutchinson v. Brown*, 122 Cal. 189, 54 Pac. 738, 42 L. R. A. 232. A state convention of the People's party, then a regular political party of this state, had been regularly called and convened for the nomination of candi-



dates of such party for state officers. There were about 160 delegates actually present. By a majority vote a plan of fusion with the Democratic and Silver Republican parties was agreed upon, and Judge James G. Maguire, a Democrat, was nominated as the People's party candidate for Governor. Fifty-three delegates protested against this proceeding, and withdrew and at once organized another convention as the real People's party convention and nominated a full state ticket. The majority completed their ticket. Each faction presented its ticket for filing to the Secretary of State as the regular People's party ticket, and the question before this court was, which was entitled to be filed as the ticket of the People's party? It was unanimously held that the ticket nominated by the majority of such convention was the regular People's party ticket, and it was said, among other things, Chief Justice Beatty writing the opinion: "It is conceded that both certificates are regular in form, duly authenticated, and that all the conditions of the statute relative to their presentation have been fully complied with. The only question is, Which emanated from the regular and authorized convention of the party? Upon this point we are satisfied that the respondent erred in his conclusion. It is clear that the full convention was regularly called and organized, and that only about one-third of its members withdrew after the nomination of Judge Maguire. The withdrawal of a minority of the delegates present did not dissolve the convention or destroy its identity. It remained as before, the people's convention, with full authority to nominate a ticket to be voted for at the election. The fact—if it be a fact—that some or all of the delegates who remained were violating pledges or sacrificing party interests in nominating Judge Maguire and adopting the plan of fusion presents a question with which neither the Secretary of State nor the court has the slightest concern. That is a matter to be settled between them and their constituents. *Delegates to political conventions are no doubt trustees in a large sense of the word, but they discharge a trust with which the courts do not meddle. They obey or disobey instructions as they see fit, and the only remedy for their disobedience is the censure of the people expressed at the polls. This is true, at least so far as the ballot law is concerned.* All the filing officer has to determine is whether the certificate offered for his acceptance emanates from the regular convention of the party. It is no concern of his whether the delegates to the convention have nominated members of their own party or of other parties, whether the nominees are there to stay or to be taken down." The italics are ours.

The views thus announced are applicable here, and they obviously dispose of petitioners' application. They are not the nominees

of the Republican party convention for electors, but are simply the choice of a minority thereof, the 13 others whose names they seek to prevent respondent from placing on the ticket having been legally nominated by a majority vote of such convention as the candidates of the Republican party of this state for that office.

For the reasons stated, the court from the bench ordered that the application for a writ of mandate be denied.

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163 Cal. 736

**LEMOORE CANAL & IRRIGATION CO. v. McKENNA.** (Sac. 1,933.)

(Supreme Court of California. Sept. 23, 1912.)

**1. CORPORATIONS (§ 93\*)—PURCHASE BY CORPORATION OF STOCK FOR NONPAYMENT OF ASSESSMENTS—STATUTORY PROVISIONS.**

An agreement between a corporation and a director that the latter should purchase stock at public sale for nonpayment of assessments if no other bidder should offer the amount of the assessments, costs, and charges, that he should hold the stock in trust for the corporation and should pay assessments thereon, and that the corporation would repay his expenditures, with interest, is absolutely void because in violation of Civ. Code, §§ 343, 344, providing that a corporation purchasing its stock for want of bidders at a sale for nonpayment of assessments must transfer the stock to it on its books and the amount of the costs, assessments, and charges must be credited on the books as paid in full, and the stock, while remaining the property of the corporation, is nonassessable, etc., and because contrary to public policy as declared by the statutes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 390-402; Dec. Dig. § 93.\*]

**2. CORPORATIONS (§ 376\*)—POWERS OVER STOCK—STATUTORY PROVISIONS.**

The powers given corporations with reference to their own stock are wholly statutory.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1530; Dec. Dig. § 376.\*]

**3. CORPORATIONS (§ 93\*)—POWERS OVER STOCK—STATUTORY PROVISIONS.**

The purpose of Civ. Code, §§ 343, 344, authorizing a corporation to purchase stock for want of bidders at a sale for nonpayment of assessments, but providing that the amount of the assessments, costs, and charges shall be credited as paid on the books of the corporation, that the stock shall be transferred to the corporation on its books, that, while the stock remains the property of the corporation, it shall not be assessable nor entitled to dividends; and that the stock shall be held subject to the control of the stockholders, who may dispose of the same in accordance with the by-laws or vote of the majority of the remaining shares, is to prevent boards of directors from continuing themselves in power by secret manipulation of the stock through trustees, and an agreement between a corporation and a director whereby the latter should purchase stock at public sale for nonpayment of assessments, if no other bidders appeared, and hold the stock in trust for the corporation, and whereby the corporation should reimburse him for the expenditures, cannot be sustained on the ground that no such sinister use of the stock was intended.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 390-402; Dec. Dig. § 93.\*]

**4. PLEADING (§ 8\*)—COMPLAINT—ALLEGATIONS OF FACT.**

An averment on information and belief that there is an understanding and agreement between a corporation and one of its directors that the latter shall hold stock in trust for the corporation is not a sufficient allegation of a fact of an agreement on the part of the corporation which can be reached only by legal action of its officers.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.\*]

Department 2. Appeal from Superior Court, Kings County; John G. Covert, Judge.

Action by the Lemoore Canal & Irrigation Company against Emma E. McKenna, as executrix of Richard E. McKenna, deceased. From a judgment for defendant, plaintiff appeals. Affirmed.

Houghton & Houghton, of San Francisco, for appellant. F. J. Walker, of Lemoore, for respondent.

MELVIN, J. Appeal from the judgment entered after a demurrer to plaintiff's amended complaint had been sustained without leave to amend further. The action was one to declare a trust in defendant's decedent, and in defendant as his executrix, and to enforce such trust by the transfer to the Lemoore Canal & Irrigation Company of one-half of a share of its own stock, upon payment to Richard E. McKenna's estate, with interest, of the amount expended in the purchase of the said stock and in assessments thereon. According to the allegations of the complaint, the one-half share of stock which is now sought by the plaintiff corporation was duly sold in January, 1907, because of the failure of the owner to pay a certain assessment. McKenna, who was then, and until a short time prior to his death in July, 1908, a director of the corporation plaintiff, bought the stock. The really important allegations of the complaint are all upon information and belief. "It was understood and agreed," according to the complaint, by and between the Lemoore Canal & Irrigation Company, its board of directors, and said R. E. McKenna, that he should purchase the stock at the public sale, if no other bidder should offer the amount of assessment, costs, and charges due thereon; that he should hold it in trust for the plaintiff corporation; that he should pay the assessments thereon; that the corporation pledged itself to repay his expenditures in that behalf, together with interest; and that said McKenna accepted the trust. It appears that several assessments had been paid by McKenna in his lifetime and by his executrix after his death before the corporation did anything toward enforcing the alleged trust in its favor.

[1] Conceding, without deciding, that allegation upon information and belief of essential facts which should be peculiarly within the knowledge of the plaintiff is sufficient, still the complaint falls far short of stating a cause of action. The trust which plaintiff seeks to enforce is one which the directors of the Lemoore Canal & Irrigation Company were powerless to create, and was, moreover, one in violation of sound public policy.

[2] The powers given to corporations with reference to their own stock are purely statutory. Section 343 of the Civil Code provides what must be done after the purchase of stock for the corporation by its president, secretary, or a member of its board of directors. The amount of the costs, assess-

ments, and charges must be credited upon the books of the corporation as paid in full. The stock must be transferred to the corporation on its books; and finally the stock, while it remains the property of the corporation, is nonassessable. According to the complaint, all of these provisions were violated. The stock was reissued to McKenna in his own name, assessments were levied against it, and we must assume, wanting averment upon that subject, that no transfer of the stock to itself was made but that the corporation's books correctly showed the issuance of the one-half share to the purchaser individually. Confronted with these matters, plaintiff declares that, even conceding the violation of the law by its directors, the defendant should be declared a trustee de son tort holding the stock for the benefit of the stockholders. This might be true if the directors had merely acted in violation of a directory statute, but the attempted trust was absolutely void. The provisions of section 343, Civil Code, are not merely directory, but are themselves the measure of the corporation's power to acquire its own stock sold for failure to pay assessments. Hence the alleged contract was void as being in violation of express statute. It was further void as against public policy.

[3] The very purpose of section 343, Civil Code, is to prevent boards of directors from continuing themselves in power by secret manipulation of the stock through trustees. If such were not the object of that statute a board of directors might secretly purchase, through a trustee, enough stock to give them, when added to that openly theirs, the balance of power whereby they might accomplish their own selfish ends, and then, having enjoyed the positive voting strength of the stock held in trust, in disobedience not only to the provisions of section 343, but also of section 344 of the Civil Code, by giving such stock equal value with that of other owners in fixing the majority necessary to control a stockholders' meeting, they might repurchase the stock from the trustee with the corporation's moneys. It is no answer to this conclusion to say that no such sinister use of the stock appears here. We are dealing with the policy of the law which makes contracts like that set forth in this pleading absolutely void. The law looks to the tendency of such an agreement, not to the results in a given case.

[4] The statement of the existence of a contract between the corporation and McKenna is not sufficient. An averment upon information and belief that there is an "understanding and agreement" between a corporation and one of its directors that the latter shall hold certain stock in trust is about as tenuous as a pleading well could be. The only method by which a corporation reaches an "understanding" is by the legal

action of its duly authorized officials. No such action is pleaded. A complaint alleging the bare conclusion that there is such "understanding" in existence is not sufficient. The judgment is affirmed.

We concur: HENSHAW, J.: LORIGAN, J.

(163 Cal. 530)

**PHILLIPS v. PHILLIPS** (two cases).  
(L. A. 2,764, 2,774.)

(Supreme Court of California. Aug. 16, 1912.  
On Rehearing, Sept. 14, 1912.)

**1. HUSBAND AND WIFE (§ 138\*)—HUSBAND'S AGENCY.**

Defendant is chargeable with knowledge of the contents of an agreement procured by her husband as her ostensible agent for extension of a mortgage on her separate property, especially where she was put on inquiry by the particular circumstances.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 524-537; Dec. Dig. § 138.\*]

**2. PRINCIPAL AND AGENT (§ 166\*)—RATIFICATION OF ACTS.**

A principal who has constructive notice of his assumed agent's acts is presumed to ratify them by acting under them.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 627-633; Dec. Dig. § 166.\*]

**3. PLEADING (§ 122\*)—DENIAL—SUFFICIENCY.**

Denial on information and belief that plaintiff delivered an agreement to defendant and her husband, and positive denial that it was delivered to them or to defendant at her request, do not amount to a denial of delivery to her husband acting for her.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 249-252; Dec. Dig. § 122.\*]

**4. LIMITATION OF ACTIONS (§ 13\*)—ESTOPPEL.**

Defendant having accepted the benefits of a contract by plaintiff with her husband as her agent for an extension of mortgage indebtedness is estopped to deny the validity of the contract, in order to make a plea of limitations available.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 56-58; Dec. Dig. § 13.\*]

**5. MORTGAGES (§ 490\*)—TAXES AND INSURANCE—RIGHT TO REIMBURSEMENT.**

On foreclosure of mortgages which entitle the mortgagee to reimbursement for taxes, etc., he is entitled to reimbursement on account of money sent the mortgagor to pay taxes and street assessments.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1431-1433; Dec. Dig. § 490.\*]

In Bank. Appeals from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Actions by Thomas W. Phillips against Jane M. Phillips. From judgments for plaintiff and from orders denying new trials, defendant appeals, and plaintiff appeals on the ground of insufficiency of the judgments. Affirmed on defendant's appeal; reversed, with instructions as to plaintiff's appeal.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Gibson, Trask, Dunn & Crutcher, of Los Angeles (Edward E. Bacon, of Los Angeles, of counsel), for appellant in No. 2,774 and for respondent in No. 2,764. J. W. McKinley, of Los Angeles, for respondent in No. 2,774 and for appellant in No. 2,764.

MELVIN, J. These are actions to foreclose two certain mortgages. Judgments in favor of the plaintiff were rendered in the trial court, but the court declined to include in said judgments a certain amount claimed on account of advances made by plaintiff for taxes, street assessments, insurance, and the like due upon the mortgaged premises. Defendant's appeal is from the judgments and from an order denying her motion for a new trial. Plaintiff appeals from that part of the judgments which is unfavorable to his claim for advances.

The whole controversy with respect to defendant's appeal has reference to the alleged bar of the statute of limitations. On November 20, 1888, Jane M. Phillips and Charles M. Phillips, her husband, executed a note in favor of plaintiff, Thomas W. Phillips, a brother of said Charles, for \$5,000 secured by a mortgage on certain realty in Los Angeles county described as "lots numbered ten (10), eleven (11), and the south half of lot seven (7), all in block 'P' San Pasqual tract, lands of the Lake Vineyard Land & Water Association, as per map of said San Pasqual tract as the same is recorded in book 3, page 315, Miscellaneous Records of Los Angeles County, California." The note was by its terms made payable on or before two years after date. Later, another note supported by a mortgage was executed by the same parties for \$14,000. This note and the mortgage were both dated September 30, 1893, but were in reality executed somewhat later. The complaint alleged a written agreement between the parties also dated September 30, 1893, whereby plaintiff promised not to enforce the collection of either of these obligations for at least a period of 10 years, and not even then to commence foreclosure proceedings unless the real and personal property of Charles M. and Jane M. Phillips should at that time be of a value of more than \$60,000 above the indebtedness evidenced by the said notes and mortgages, and that, if at the end of 10 years from the date of the execution of the agreement of forbearance the wealth of the mortgagors should fall below the value indicated, then a further period of 5 years was to be allowed for the payment of the debt, at the end of which time, if the property of the mortgagors was still insufficient to leave them at least \$60,000 after the full satisfaction of the notes and mortgages, then only so much of the debt was to be collected as would allow Mr. and Mrs. Charles M. Phillips to retain \$60,000 worth of real and personal property.

The uncontradicted evidence shows that in 1893 Charles M. Phillips visited his brother,

the plaintiff herein, at the latter's home in Pennsylvania. At that time Charles and his wife were indebted to the plaintiff in a sum exceeding \$16,000, \$5,000 of which was secured by one of the mortgages here in suit. The remainder of it was unsecured, \$8,000 of the indebtedness being represented by the promissory note of Charles M. Phillips and his wife payable to the wife of Thomas W. Phillips. While Charles M. Phillips was at his brother's home, the agreement of forbearance was drawn in duplicate, was signed by plaintiff, and one copy thereof was delivered by him to Charles M. Phillips, among whose papers it was found after the latter's death in 1908. The agreement, which was signed by plaintiff only, was in the form of a contract between him as party of the first part and Charles M. and Jane M. Phillips, as parties of the second part. It recites the execution of the note and mortgage of even date to secure the sum of \$14,000, and the prior note and mortgage for \$5,000, but states that of the larger note only \$11,000 had been actually paid; the balance being for future advancements. The considerations mentioned for the execution of the contract of forbearance are one dollar and "brotherly love and affection." On the return of Charles M. Phillips to California, he and his wife executed the note and mortgage for \$14,000, dating it September 30, 1893. In the three years succeeding such execution plaintiff advanced to defendant and her husband sums aggregating the \$3,000 necessary to make up the principal sum of the note, and thereafter continued to make further loans to them. The complaint contains the allegation that at the expiration of the 15 years contemplated by the contract of forbearance the property of Mrs. Jane M. Phillips exceeded by more than \$60,000 her indebtedness to plaintiff, but that it had not been worth that much money when the 10-year period was completed. Defendant did not deny the alleged value of her possessions at the time of the ending of the period of 15 years. On the contrary, she alleged that on September 30, 1903, 10 years after the date of the contract of forbearance, she possessed property worth more than \$60,000 above the debts secured by the mortgages in suit, but as no oral testimony was adduced with reference to this matter, as her allegation was on information and belief, and as plaintiff's positive averments that on September 30, 1903, the combined wealth of his brother and Mrs. Jane M. Phillips was less than \$60,000 in excess of the mortgage debts, while on September 30, 1908, his brother's widow was possessed of more than that amount of property, stand without contradiction, it follows that the finding of the court in favor of plaintiff on this subject is fully supported.

Appellant advances three general statements for our consideration. These are that (1) the agreement dated September 30, 1893,

never became effective because not signed by the parties of the second part; (2) said agreement was void because executed without consideration; and (3) knowledge of the existence of said supposed agreement had never been brought home to defendant by the proof in this case. From these premises defendant concludes that the agreement of September 30, 1893, never suspended the operation of the statute of limitations, and that, therefore, the bar of said statute is available as a defense in this action.

[1] It is not disputed that the note for \$8,000 was surrendered to Charles M. Phillips for himself and his wife, and that with that note in his possession, as well as with plaintiff's written agreement to make further advances and to extend the time for the enforcement of the mortgage liens, defendant's husband returned from Pennsylvania to California. Very shortly thereafter he and his wife executed the note and mortgage for \$14,000. Defendant probably had opportunity to see the contract as her husband kept it until the time of his death. But, even if she never actually saw it, she was charged, under the circumstances, with knowledge of it and its contents. The land in question was her separate property. This is alleged in the complaint, is not denied in the answer, and is found by the court to be true. Therefore in the negotiations with his brother her husband acted as her ostensible agent. While they lived together in Pasadena her husband continued to borrow money from his brother, and to apply it to the payment of debts standing against this land. The unchallenged evidence shows that she, with her husband, executed a mortgage for more money than she had then received, and this mortgage was antedated to correspond with a date when Charles M. Phillips was at his brother's home in Pennsylvania. Surely these facts would put her on her inquiry. By asking she would then have learned from her husband, who had acted as her agent, that the mortgage was given in part for future advances and that the mortgagee had formally agreed to postpone for a term of years the collection of the indebtedness secured by the mortgages. Having knowledge of circumstances which were sufficient to put a prudent person upon inquiry she had constructive notice of the existence of the agreement of September 30, 1893. Section 19, Civ. Code.

[2] Where such constructive notice exists as that which appears from the facts proven in this action, the party who received such notice is held to have ratified the acts of an assumed agent. *Ballard v. Nye*, 138 Cal. 594, 72 Pac. 156.

[3] Neither in her pleading nor at the trial did defendant assert ignorance of the agreement of forbearance or of its contents. She denied in her answer on information and belief that plaintiff made, executed, or

delivered to herself and her husband the agreement in question, but positively denied that plaintiff delivered it to her or to her and Charles M. Phillips at her request. These allegations do not amount to a denial that the document was delivered to her husband acting for her, and therefore in law to both of them, nor do such averments negative in any way the presumption of her full knowledge of the transaction.

[4] Aside from all questions regarding the consideration for the contract of forbearance and the sufficiency of its execution, defendant is prevented from setting up the bar of the statute of limitations upon clear principles of estoppel. She accepted the benefits of the contract. Her actions and those of her husband, as her agent, lulled the plaintiff into assumed security and caused him to postpone foreclosure until the expiration of the period mentioned in the agreement. Consequently she cannot now pursue the advantage ordinarily available to a litigant under the statute of limitations. *Smith v. Lawrence*, 38 Cal. 27, 99 Am. Dec. 344; *State Loan & Trust Co. v. Cochran*, 130 Cal. 249, 62 Pac. 466, 600; *Quanchi v. Ben Lomond Wine Co.*, 17 Cal. App. 565, 120 Pac. 427 (No. 870), decided by the District Court of Appeal for the First District, November 29, 1911.

[5] We pass now to a consideration of plaintiff's appeal. The later of the two mortgages securing the note for \$14,000, dated September 30, 1893, contained the following provision: "And the mortgagors promise to pay said note according to the terms and conditions thereof, and in case of default in payment of the same, or of any installment of interest thereof, when due, the mortgagee may foreclose this mortgage and may include in such foreclosure a reasonable counsel fee to be fixed by the court together with all payments made by the mortgagee for taxes and assessments on said premises excepting taxes on the interest of the mortgagee therein by reason of this mortgage." The complaint alleged, the evidence showed, and the court found that plaintiff, at the request of his brother, had sent to Charles M. Phillips various sums of money aggregating about \$3,400 for payment of taxes and assessments on the mortgaged premises, and that with such amounts so sent the claims against the property had been discharged. Notwithstanding these findings, the court concluded that plaintiff could not recover for such advances and the judgment was entered accordingly. The only question presented by plaintiff's appeal, therefore, is whether or not the findings show payment by him of the taxes and assessments according to the tenor of the mortgage. Plaintiff does not assert that he actually made the payments and received the tax receipts. He insists that his brother acted as his agent in settling these matters,



We think this theory is correct. It is true that plaintiff, who was evidently very generous to his brother, often sent money to the latter for the payment of household expenses, cost of maintaining the property and other debts, exacting no security for such advances, and it was doubtless the conclusion of the lower court that the amounts of money forwarded by Thomas W. Phillips for the settlement of taxes and the like differed in no respect from these other loans, but we must remember that in each instance Charles M. Phillips requested an advance of money from his brother to pay the taxes or assessments due. Thomas W. Phillips advanced the money in response to such request, and Charles M. Phillips on receipt of the necessary amount applied it to the intended purpose. Such request and such compliance with it made Charles M. Phillips his brother's agent and charged him with the duty of executing his undertaking to apply the money when received to the settlement of the particular indebtedness for which it was sent. We see no difference between each of these transactions and the payment of the obligations through a third person having no interest in the mortgaged property. If Thomas W. Phillips had sent the money to such an agent, and that person had obeyed instructions, no one would question that payment was made according to the tenor of the mortgage by plaintiff through his agent. Therefore we are of the opinion that the superior court erroneously reached a contrary conclusion. The fact that Jane M. Phillips is not shown by the record to have been cognizant of these payments is not material. The mortgage does not provide that notice should be given to either of the mortgagors in case the taxes or assessments were paid by the mortgagee.

The judgment and order appealed from are affirmed, except that that part of the judgment from which plaintiff appeals is reversed with instructions to the court below to amend its conclusions of law in accordance with the view above expressed.

We concur: LORIGAN, J.; ANGELLOTTI, J.; SHAW, J.; HENSHAW, J.

On Rehearing.

MELVIN, J. By the petition for rehearing it has been brought to our attention that the evidence and the findings are uncertain in this, that it cannot be determined therefrom how much of the amounts paid by Thomas W. Phillips was applied to taxes upon the mortgagor's interest and what part went to the payment of his own taxes as mortgagee. Let the opinion heretofore rendered be amended therefore by striking out the final paragraph and inserting in lieu thereof the following:

It does not appear, however, from the evi-

dence, nor consequently from the findings, what portion of the moneys advanced by Thomas W. Phillips for taxes was applied to the payment of taxes upon the interest of the mortgagee and it is fair to conclude from the evidence that some part of it was used for that purpose, because his brother Charles, who was acting for him with reference to these matters, always in his requests for money to pay taxes referred to "our taxes." This matter is easily capable of solution and the case should be therefore retried upon these issues (after amendment of the pleadings if found necessary by the trial court) so that findings may be entered based upon evidence showing the exact amounts of the taxes and assessments on the property correctly chargeable to Jane M. Phillips under the terms of the mortgage, duly "excepting taxes on the interest of the mortgagee therein."

The judgment and order from which defendant appeals are affirmed. The judgment from which plaintiff appeals is reversed with instructions to the superior court to retry the issues mentioned in the last preceding paragraph hereof in the manner there indicated.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.

(19 Cal. App. 587)

**SUISUN LUMBER CO. v. FAIRFIELD SCHOOL DIST. (Civ. 967.)**

(District Court of Appeal, Third District, California. Sept. 5, 1912. On Petition for Rehearing, Oct. 5, 1912.)

**1. JUDGMENT 551\*)—BAR OF CAUSES OF ACTION—IDENTITY OF CAUSES OF ACTION.**

A judgment in an action at law, brought by a subcontractor after filing a notice of lien as provided in Code Civ. Proc. § 1184, against the general contractor, a school district, and its trustees to recover a sum claimed to be due from the general contractor and enforce payment thereof by the school district by reason of the failure of its trustees to require the contractor to give a bond, was a bar to a subsequent action against the school district alone to enforce the subcontractor's lien for the same debt involved in the first action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 995, 996; Dec. Dig. § 551.\*]

**2. JUDGMENT (§ 584\*)—BAR OF CAUSES OF ACTION—IDENTITY OF PARTIES—"SAME PARTIES."**

A judgment for or against a party will operate as a bar to another action against him alone, although other parties were joined with him in the first action and the subject-matter of the action adjudicated as to all such parties, the phrase "the same parties" in connection with the rule of *res adjudicata* not meaning that all the parties plaintiff and defendant to the first action must be joined in the later action to render the plea of estoppel available, but where the action is against a number of defendants and the merits litigated and adjudicated as to all, and the same plaintiff subsequently proceeds against one, the later action



being between the "same parties" within the meaning of the rule.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063-1065, 1067, 1079, 1081, 1083, 1086, 1087, 1096, 1097, 1123, 1125, 1137; Dec. Dig. § 584.\*]

For other definitions, see Words and Phrases, vol. 7, p. 6325.]

### 3. JUDGMENT (§ 551\*)—BAR OF CAUSES OF ACTION—IDENTITY OF CAUSES OF ACTION.

A judgment in an action at law may be pleaded as a bar to a subsequent suit in equity; the subject-matter of the action and not the form of the remedy being the test determinative of the applicability of the plea of res adjudicata.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 995, 996; Dec. Dig. § 551.\*]

### 4. MECHANICS' LIENS (§ 125\*)—NOTICE TO OWNER—OPERATION AND EFFECT.

The notice of lien prescribed by Code Civ. Proc. § 1184, operates as an equitable garnishment or an assignment pro tanto of the money due from the owner to the lienor, and subrogates him to the rights of the general contractor therein.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 172; Dec. Dig. § 125.\*]

### 5. JUDGMENT (§§ 592, 713\*)—BAR OF CAUSES OF ACTION—MATTERS CONCLUDED.

Where a matter is the subject of litigation in and adjudication by a court, the parties, except under special circumstances, must bring forward their whole case, and will not be permitted to bring a new action in respect to matter which might have been brought forward in the first action, but which was omitted through negligence, inadvertence, or accident, the plea of res adjudicata applying except in special cases, not only to points on which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which belonged to the subject of the litigation and which the parties, by exercising reasonable diligence, might have brought forward in the first action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1107, 1234-1237, 1239, 1241, 1247; Dec. Dig. §§ 592, 713.\*]

On Petition for Rehearing.

### 6. APPEAL AND ERROR (§ 867\*)—EXTENT OF REVIEW — APPEAL FROM ORDER DENYING NEW TRIAL.

The question of whether a finding that a cause of action declared on in a former action was not the same as that relied on in the present action is supported by the evidence may be reviewed on an appeal from an order denying a new trial, although no appeal from the judgment was taken in time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476-3486; Dec. Dig. § 867.\*]

Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by the Suisun Lumber Company against the Fairfield School District. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Appeal from judgment dismissed, and order denying new trial reversed on rehearing.

W. U. Goodman, of Fairfield, for appellant. T. T. C. Gregory, of Fairfield, and Theodore W. Chester, of San Francisco, for respondent.

HART, J. The defendant, through its board of trustees, entered into a written con-

tract with one C. C. Foy on the 4th day of January, 1908, for the construction of a grammar school building, for the sum of \$16,000 in cash and the old school building at the agreed value of \$1,000. Under the stipulations of the contract said building was to be completed by the 1st day of August, 1908. The plaintiff prior to the 21st day of September, 1908, furnished the said Foy certain materials which, according to the averments of the complaint, "were to be used and were used in the construction of the school-house building described in the said contract, and on the said date there was due and unpaid from the said C. C. Foy to the plaintiff the sum of \$2,400.28 for the materials furnished as aforesaid." On the said 21st day of September, 1908, so the complaint alleges and the evidence shows, "the plaintiff delivered to and served on the said Fairfield school district, and on each of said trustees personally, a certain written notice" in accordance with the following provision of section 1184 of the Code of Civil Procedure: " \* \* \* Any of the persons mentioned in section eleven hundred and eighty-three, except the contractor, may at any time give to the reputed owner a written notice that they have performed labor or furnished materials, or both, to the contractor, or other person acting by authority of the reputed owner, or that they have agreed to do so, stating in general terms the kind of labor or materials, and the name of the person to or for whom the same was done or furnished, or both, and the amount in value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both. \* \* \*" This action is prosecuted by plaintiff under the authority of the foregoing provision of the section of the Code mentioned. The answer, in addition to specific denials of the averments of the complaint, sets up a number of special defenses, among which is the following, using the language of the answer: "And answering further the complaint of plaintiff, and as a further and separate defense, defendant alleges that on or about the 27th day of October, 1908, the said plaintiff commenced an action in the above-entitled court against the Fairfield school district, in the county of Solano, state of California, Roy D. Smith, James N. Watson, James Lackie, and C. C. Foy, defendants, which action was for the same cause of action as that set forth in the complaint herein; that on the 30th day of March, 1909, at Fairfield, in said action commenced as aforesaid, and for the same cause of action as set forth in the complaint herein, a judgment was duly given, made, and entered, a copy of which judgment is hereto attached, marked Exhibit 'A' and made a part hereof, to which judgment reference is hereby made; that said judgment has never been appealed from and is still in full force and effect." Smith, Wat-

kins, and Lackie, mentioned as defendants in the action referred to in the foregoing allegations of the answer, were, at the time said action was instituted and tried and judgment rendered and entered therein, members of and constituted the board of trustees of the defendant.

The other special defenses pleaded in the answer are that the plaintiff, prior to the commencement of its action, at no time presented to the defendant its alleged claim against the district, "or any claim based upon the items set forth in said complaint; that at no time has the said plaintiff ever presented to said district in the manner and form required by law an itemized statement of any amount due from said district to plaintiff"; that the plaintiff prior to the 21st day of September, 1908, being unable to complete the building described in the contract, sublet, with the consent of the district, the contract for painting said building and the contract for furnishing and installing blackboards therein to other parties, named in the answer; that said last referred to parties completed said work, and that Foy assigned to them, in the respective amounts to which they were entitled for said work, his claim under said contract for the money due for said work; that said assigned claims, with other like assignments for other work done by other parties, were presented to and accepted by said school district before the 21st day of September, 1908, and that "there was nothing due, owing, or unpaid to said C. C. Foy from the said Fairfield school district on the said 21st day of September, 1908; that the payment of said assigned claims exhausted the funds of said district which it had on hand for the construction of said building." The court's findings are adverse to all the material claims made by the defendant and, accordingly, judgment was rendered and entered in favor of the plaintiff. This appeal is by the defendant from said judgment and the order denying it a new trial.

[1] We think that the plea and proof of the judgment in the former action, instituted by the plaintiff upon the claim upon which it declares in this action, constitute a complete and conclusive bar to its right to maintain the present action. It will therefore be unnecessary to consider at length other points made by the appellant, although we are convinced, from a careful examination of the record, that the findings of the court that Foy completed the building, according to the terms of his contract, before the 21st day of September, 1908, and that he was personally paid money on the contract after the service of the notice prescribed by section 1184 of the Code of Civil Procedure, are not supported by the evidence. The undisputed testimony of Foy discloses that he did not so complete the building, and that he himself never did complete it. The evidence without conflict further shows that Foy having dis-

covered before the 21st day of September, 1908, that he would be unable to carry out the terms of the contract, according to the plans and specifications by which the building was to be erected and completed, so announced to the board of trustees of the defendant. Without passing upon the competency of the evidence by which arrangements were entered into with others to do certain work called for by Foy's contract, we feel warranted in saying that none can read the record without being forced to this conclusion: That Foy practically abandoned the contract prior to the 21st day of September, 1908, and that the board of trustees of the defendant thereupon, with the voluntary acquiescence of Foy, entered into contracts with others for the completion of the portions of the contract left uncompleted by Foy; that at the meeting of the board of trustees at which the claims were allowed for the work so performed—that is, for the work by the "subcontractors"—Foy and said subcontractors were present by the request of the board, in order that Foy might immediately by his own act approve the allowance of the claims to said subcontractors. In other words, since the contract for erecting the building was with Foy and in his name, the board conceived it to be legally necessary to allow the claims in Foy's name, although he was not entitled to them, and therefore as a matter of protection to itself or against the probability of being required to pay said claims the second time insisted upon the presence of all the parties, so that Foy, upon the allowance of the claims, might immediately assign the same to the subcontractors, who were the real owners thereof. This is precisely what was done at said meeting; Foy at no time laying any claim to the claims so allowed by the board and by him assigned to the "subcontractors." Objection was made to the testimony from which the foregoing facts are reasonably deducible upon the ground that it was incompetent, and the court reserved its rulings on many of the questions so objected to until the argument of the case upon the merits. It is probable that the court finally concluded that the testimony thus allowed was not competent, and therefore did not consider it in making its findings. But, assuming such to be the case, the question whether the court thus committed prejudicial error need not, as stated, be inquired into, in view of the conclusion at which we have arrived as to the effect of the pleaded judgment in the former action upon the right of the plaintiff to maintain the present action.

The judgment roll in the former action was introduced and received in evidence. It is expressly admitted by counsel for the respondent that said action was instituted on the 27th day of October, 1908—subsequent to the date of the service of the notice on the defendant under section 1184 of the



Code of Civil Procedure. Although the defendant here and the members of its board of trustees were, with the contractor, made defendants in the former action, and although the first of the two distinct causes of action set up in the complaint in said action was for damages for a breach of the contract between the defendant here and Foy, it is clear from the averments of the complaint in said action that the subject-matter thereof is precisely the same as the subject-matter of the present action. The complaint in the former action, as does the complaint here, sets out the contract between Foy and the defendant, and alleges that the plaintiff furnished certain materials to Foy to be used in the construction of the school building under said contract between Foy and the defendant, and further alleges, after disclosing that certain payments had been made by Foy on the original amount due plaintiff for the materials so furnished to Foy, that the plaintiff has been damaged in the sum of \$2,400.28, precisely the sum which it is alleged in the complaint in the present action is due from Foy to the plaintiff. But it is, in effect, admitted by counsel for the plaintiff that both actions were founded on or originated out of the same transaction. The point made by the plaintiff is that the judgment in the former action, for reasons which will hereafter be noted, cannot be made to operate as an estoppel here.

In the present action the court made the following finding relative to the judgment in the former action: "On or about the 27th day of October, 1908, plaintiff commenced an action in the above-entitled court against the Fairfield school district in the county of Solano, state of California, Roy D. Smith, James N. Watson, James Lackie, and C. C. Foy, defendants. Said action was not for the same cause of action as that set forth in the complaint herein, but the cause of action set forth was an entirely separate and distinct cause of action. The cause of action set forth in the present action was not under a claim arising out of the transaction set forth in the former complaint. The present action does not affect all the parties to the former action, or any of them, except the Fairfield school district." It is further found that the judgment in the former action has never been appealed from, and is still in force and effect, and that "said judgment is not a bar to the present action."

The foregoing findings are to a great extent mere conclusions of law, and are in line with the theory upon which the respondent argues against the contention of the appellant that the effect of said judgment is to estop the maintenance of the present action, the position of the respondent being that the cause of action of the former action is not the same as the cause of action here for two reasons, viz.: (1) That the

parties to the former are different from or not the same parties as those to the present action. (2) That the former action was an action at law for damages for breach of the contract between Foy and the defendant and for the neglect of the defendant in not exacting the statutory bond from the contractor, and that the present action is a suit in equity the purpose of which is, in effect, to enforce a lien. Both positions are obviously untenable.

[2] There could be, it seems to us, no proposition less debatable than that, where an action is commenced against a party and a judgment entered for or against him, such judgment, after becoming final, will always operate as an estoppel or bar against the maintenance of another action thereafter brought against such party alone for the same cause, notwithstanding that other parties might have been joined with him in such action, and the subject-matter of the action is adjudicated as to all the parties thereto. In other words, it cannot possibly be true that where, as here, a cause of action has been adjudicated as to all the defendants to an action the judgment therein cannot be successfully set up in bar of an action thereafter commenced for precisely the same cause of action against one of such defendants. By the phrase, "the same parties," we do not understand it is meant that all the parties plaintiff and parties defendant to the former action must be joined in the later action to render available the plea of the judgment in the first action as an estoppel in the subsequent action. Where the action is against a number of defendants and the merits have been litigated and adjudicated as to all, and the same plaintiff thereafter proceeds in a subsequent action against one of said defendants for identically the same cause of action, then the later action is between the "same parties" as those to the former in the sense that the plea of *res adjudicata* may with perfect legal propriety be set up, for, as between the plaintiff and the party defendant to the later action, the merits as to the same cause of action have been as definitively adjudicated as if such defendant were the only party defendant to the first action.

[3] The position that the judgment in the former action cannot be pleaded in this because the one was an action at law and the other a suit in equity is without any sound reason for its support. To sustain that position would be to declare that it is not the subject-matter of the action, but the remedy by which a party may seek, judicially, to assert a right that is the test determinative of the applicability of the plea of *res adjudicata*; but obviously the remedy is not nor could it be made the criterion without upsetting the very object of pleas in estoppel by judgment. If, for example, a county should proceed by the extraordinary legal remedy of



mandamus to compel a county official to turn over to the public treasury certain moneys which, it was charged, he had collected in his official capacity and should lose out on the merits, could not such county official, in an ordinary action at law thereafter brought by the county to recover the same money, interpose with success the plea of estoppel based upon the judgment in mandate? The question answers itself.

These views are not inconsistent with anything that is said in *Lillis v. Emigrant Ditch*, 95 Cal. 553, 558, 30 Pac. 1108, *Parnell v. Hahn*, 61 Cal. 131, 132; *Hall v. Susskind*, 109 Cal. 203, 205, 41 Pac. 1012, *Newhall v. Hatch*, 134 Cal. 269, 272, 66 Pac. 266, 55 L. R. A. 673, *McCormick v. Gross*, 135 Cal. 302, 304, 67 Pac. 766, or *Laguna Drainage Dist. v. Martin Co.*, 5 Cal. App. 166, 169, 89 Pac. 993, cited by the respondent. To the contrary, the cases mentioned very clearly announce the rule as we understand it, and think that it ought to be construed and applied here. Conceding that the present action is one in equity, and we find a striking counterpart of the proposition which is presented here in the case of *Parnell v. Hahn*, supra. There, in the first action, Hahn proceeded against Parnell and several others in a suit to quiet title to a certain piece of land belonging to him, and, to that end, to have it determined that said parties did not have an equitable estate or interest therein by reason of the terms of a certain contract for the sale of said land. Parnell alone answered the complaint, and, as a defendant, asked, as affirmative relief, specific performance of said contract of sale. The court's decision in that case on all the issues was in favor of Hahn. Thereafter Parnell brought an action for damages for the nonperformance of the same contract upon which he founded his defense, and asked affirmative relief in the former action. The judgment in the former action was pleaded in the subsequent action as an estoppel by Hahn. The court said: "The facts which constitute the causes of action in both are therefore the same; and the parties to the former action were the same as in the present action, for, although the complaint was filed against Parnell, Hill, and Corcoran, yet Corcoran had no interest whatever in the contract between Hahn and Parnell. Hill acted only as the agent of Parnell, and the latter was the only one who answered the complaint and claimed to be the sole equitable owner of the land under the contract of sale. The matter in issue in the former action involved the validity and legal effect of the contract of sale, and the issue in this action involves the same question."

[4] Now, the effect of the service of the notice mentioned in section 1184 of the Code of Civil Procedure upon the defendant by the plaintiff was to subrogate the latter to the

right Foy had to any money held by the defendant as part of the contract price for the erection of the building. The notice, in other words, operated as an equitable garnishment, or as an assignment pro tanto of the money due from the defendant to the plaintiff. *Bates v. Santa Barbara Co.*, 90 Cal. 543, 547, 27 Pac. 438. The service of said notice was the only means by which the defendant could be bound to pay the plaintiff on its claim any money due the contractor from the defendant. It is, of course, correct to say that no cause of action could have accrued against the defendant in favor of the plaintiff on account of the materials furnished by the latter to the contractor until such notice had been served on the defendant, and that consequently, in the absence of the service of such notice, no valid or binding judgment in favor of the plaintiff as against the defendant could have been rendered. Whether, had no notice been served on the defendant prior to the commencement of the former action, the judgment in favor of the defendant could be successfully pleaded in bar of the present action, we need not stop to inquire. Nor need we examine the question whether, in order to bind the defendant by a judgment in the former action, said action not being directly based upon the garnishment of which the service of the notice was the effect, it was necessary to serve such notice.

[5] It is sufficient to know that if the notice was necessary to support a judgment in said action against the defendant, such notice having been in fact served prior to the commencement of said action, and although not pleaded in the complaint therein, it was the duty of the plaintiff, in order to have found the defendant by any judgment it might have obtained against the former, to have pleaded and relied upon the notice in said action, having made the defendant one of the parties defendant thereto, and thus have fully put in issue and litigated in one and the same action all the matters which might have been necessary to a definitive determination of the whole case—that is, of all matters which might have materially affected any or all the parties to the action as to the subject-matter thereof. On the other hand, if the notice was not necessary in order to bind the defendant in that action, then all the matters materially affecting the defendant as to the subject-matter of that action were litigated and adjudicated. In this connection, it may be parenthetically observed that the second cause of action set out in the complaint in the former action was based upon the alleged failure of the defendant and its board of trustees to exact from the contractor the bond required by the statute to indemnify those furnishing labor and materials for a building, in case the contractor failed to pay for the same. It is plainly evident that the plaintiff in that ac-

tion thus sought, in preference to pleading and relying upon the notice prescribed by section 1184 of the Code of Civil Procedure, which it had previously served on the defendant, to enforce pro tanto, against the defendant, if thus it could be done, any judgment that it might obtain against the contractor and the defendant in said former action for the former's alleged breach of the contract. In other words, it is manifest that the object of the second cause of action set out in the complaint in the former action was, in effect, to subserve the purpose, if thus it could be accomplished, that the notice prescribed by section 1184 is designed to effectuate for a party furnishing materials for or performing labor on a building to be erected under a contract between the owner of the land and the contractor. But, however that may be, it is very clear, as before declared, that, although the recovery sought in and by the former action was one at law and the action ex delicto in character, said action nevertheless originated out of and was founded upon precisely the same transaction as that upon which the present action is predicated. It, in other words, involved the litigation and determination of identically the same question as that involved here, and, although the plaintiff failed in said former action to plead and rely upon the notice which it had served upon the defendant, in compliance with section 1184 of the Code of Civil Procedure, we cannot bring ourselves to the belief that it was not its duty to have done so, if necessary to bind the defendant by any judgment which might have been obtained against it and the contractor in said action, to the extent of its indebtedness to the contractor. We are therefore unable to dissuade ourselves from the conviction that the judgment in the former action is conclusive as to the ultimate question involved here as between each and all the parties to said former action.

The rule as here applied is in perfect harmony with the theory upon which estoppels by judgment proceed. In *Woolverton v. Baker*, 98 Cal. 632, 33 Pac. 732, the rule is given as follows: "Where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as a part of the subject in contest, but which was not brought forward only because they have through negligence, inadvertence, or even accident, omitted part of their case. [Italics ours.] The plea of res adjudicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly

belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have put forward at the time." See, also, *Flynn v. Hite*, 107 Cal. 455, 40 Pac. 749; *Crew v. Pratt*, 119 Cal. 149, 51 Pac. 38; *Silverston v. Mercantile Trust Co.*, 122 Pac. 976.

In *Quirk v. Rooney*, 130 Cal. 505, 510, 62 Pac. 825, 826, the court says: "We do not think it the policy of the law to allow as many different suits between the same parties in regard to the same subject-matter as there might be different modes of establishing title to property."

The foregoing authorities seem to us to be decisive of the case here upon the question of estoppel.

The judgment and order are therefore reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

#### On Petition for Rehearing.

HART, J. In the petition for rehearing of this cause before this court, counsel for the respondent, while conceding that there is an appeal from the order denying the defendant's motion for a new trial, insist, as they originally insisted, that there is no appeal from the judgment. The judgment was entered on October 4, 1911. The notice of motion for a new trial was served and filed on the 14th day of October, 1911, from which circumstance it is assumed that the defendant must have had actual notice of the rendition and entry of judgment at that time. We think this assumption is correct, and that the defendant must necessarily have had such notice of the fact of the entry of judgment; otherwise, the intention to move for a new trial would not have been noticed. The appeal from the judgment was taken on February 1, 1912, a little over 4 months after the date of the entry of the judgment. Under section 941b of the Code of Civil Procedure the appeal from the judgment is required to be taken within 60 days from the notice of the entry of judgment. It has been held that, under said section, neither a notice of the appeal from the judgment to the adverse party nor an undertaking on appeal is required. *Estate of McPhee*, 154 Cal. 385, 392, 97 Pac. 878; *Mitchell v. California, etc., S. S. Co.*, 154 Cal. 731, 733, 99 Pac. 202. But it is very clear that, if the defendant sought to take its appeal from the judgment under that section, it failed in its attempt to do so, since it is a requirement of said section that such appeal must be taken within 60 days after notice of the entry of judgment.

By section 939 of the Code of Civil Procedure—one of the sections prescribing the former exclusive method of taking an appeal from a judgment, and which method of so appealing may still be resorted to—it is provided that an appeal from the judgment



may be taken within 6 months after the entry of judgment. Section 940 of the same Code provides, however, that an appeal so taken "is ineffectual for any purpose, unless within five days after service of the notice of appeal, an undertaking be filed," etc., "to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof," etc. Section 941, Id. The appellant having failed to file an undertaking as prescribed by those sections, it is claimed that, if its appeal from the judgment was attempted under the old method, it has also failed in such attempt.

No substantial reason at present occurs to us why there should be such a wide difference as to the time within which such appeals may be taken between the two methods of appealing from the judgment. Nor are we now able to perceive any sound reason why in the one case an undertaking on appeal should be necessary, while in the other it is not necessary, according to the legislative judgment. We are not, however, prepared to say that, so far as an undertaking is concerned, the provisions of sections 940 and 941, requiring and pointing out the requisites of such obligation on the part of the appealing party, should not be observed in order to render an appeal from the judgment available to such party. We shall, therefore, treat the attempted appeal from the judgment here as futile, and consequently not reviewable.

[6] But the question whether the findings are supported by the evidence may be reviewed on the appeal from the order, and a review of that question is all that is involved in the decision of this court on this appeal. In the former opinion we held that the evidence does not support the finding that the cause of action declared upon in the first action by the plaintiff against the defendant here was not the same as the cause of action relied upon in the present action, but that, to the contrary, the evidence disclosed that the cause of action stated in both the complaints was the same, although the remedies through which said cause of action was sought to be asserted were different. It is thus plainly apparent that, as stated, the sole question discussed and decided by the former opinion was whether certain findings, vital to the judgment, were sustained by the proofs, and, as declared, such question is obviously one that is reviewable on an appeal from the order.

Upon the main question, this court has been unable to take any other view than that the facts as disclosed by the evidence present clear grounds for the application of the rule of *res adjudicata*. In accordance with the views herein set forth, the judgment heretofore entered herein will be and

the same is hereby amended, so that it will read: "The appeal from the judgment is dismissed, and the order denying defendant's motion for a new trial is reversed."

The petition for rehearing is denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

19 Cal. App. 628

HARRON, RICKARD & McCONE v. SISK.  
(Civ. 960.)

(District Court of Appeal, Third District, California. Sept. 6, 1912. Rehearing Denied by Supreme Court Nov. 4, 1912.)

1. SALES (§ 441\*)—EXPRESS WARRANTY—BREACH—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a finding of breach of express warranty in the sale of an engine.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1277-1283; Dec. Dig. § 441.\*]

2. SALES (§ 425\*)—BREACH OF EXPRESS WARRANTY—RIGHTS OF BUYER.

A buyer, though he may rescind for breach of express warranty, may affirm the sale and sue on the warranty, or rely on the breach when sued for the price, unless the contract expressly confines his remedy to rescission.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1207, 1208; Dec. Dig. § 425.\*]

3. SALES (§ 120\*)—BREACH OF WARRANTY—REMEDY OF BUYER—RESCISSION.

Under Civ. Code, §§ 1689, 1691, authorizing a rescission of a contract for failure of consideration in whole or in part, a breach of warranty in the sale of an article authorizes a rescission by the buyer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 294; Dec. Dig. § 120.\*]

4. SALES (§ 127\*)—BREACH OF EXPRESS WARRANTY—RESCISSION.

Where a buyer of an engine under an express warranty to deliver the rated horse power attempted to operate it about ten days after he received it, and he continued his trial for two weeks without success, and a few days later he notified the seller of the failure of the engine to deliver the required power, and about 10 days later the seller removed from the engine the friction clutch, and did not return it, and about 10 days later the buyer in writing notified the seller of his rescission of the contract and demanded damages from the failure of the engine in addition to a return of the price paid, the buyer elected to rescind the contract of sale and exercised his election promptly as required by Civ. Code, § 1691.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 318, 319, 321; Dec. Dig. § 127.\*]

5. SALES (§ 425\*)—ACTION FOR PRICE—DEFENSES.

A buyer, when sued for the price of an article sold under an express warranty, may rely on a breach of warranty as a ground for the rescission of the contract of sale, or as a ground for the recovery of damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1207, 1208; Dec. Dig. § 425.\*]

Appeal from Superior Court, Stanislaus County; L. W. Fulkherth, Judge.

Action by Harron, Rickard & McCone against John Sisk. From a judgment for defendant, plaintiff appeals. Affirmed.



L. L. Dennett, of Modesto, and Chickering & Gregory, of San Francisco, for appellant. W. H. Hatton, of Modesto, for respondent.

BURNETT, J. The action was brought to recover the balance due for the sale of what was known as a 40 horse power Foos type special horizontal engine. The agreed price was \$1,642.50, of which \$400 was paid at the time of the purchase. The defense, set forth in varying phraseology, is based upon the claim of a breach of warranty. The action was tried before a jury and a general verdict rendered for defendant in the sum of \$400. The appeal is from the judgment and the order denying a motion for a new trial.

[1] The first contention of appellant, worthy of notice, is that there was no implied warranty that the engine would do the work required of it. This proposition of law is urged by reason of the fact that the purchase was of a certain specified, well known, staple article from a seller who was not the manufacturer. There is a clear distinction between such transaction and the case where the purchaser relies upon the judgment of the seller for the selection or manufacture of an article suitable and adequate for a certain purpose. There are many decisions upon the subject among which is the carefully considered opinion of the Supreme Court of Kansas in the case of *Ehrsam v. Brown*, 76 Kan. 206, 91 Pac. 181, 15 L. R. A. (N. S.) 877, which may be consulted with profit. This diversity is also recognized by the provisions of our Civil Code found in sections 1763 et seq.

This feature of the discussion, however, may be dismissed, as respondent claims the breach of an express warranty contained in the following language of the contract of sale: "Guarantee: All Foos Engines are guaranteed to deliver their rated horse power at sea-level." Respondent's position is that the engine fell far short of this requirement, and that hence there was a substantial failure of consideration as set forth for a defense in the answer to the complaint. This is the occasion for the assertion of appellant, admittedly sound, that "defendant can recover, if at all, only upon showing some defect in the engine in question, which constitutes a breach of such warranty." And herein it is declared that "there is no evidence before the court that the engine in question was not what it claimed to be and did not actually deliver forty horse power. The sole defect in the engine complained of is directed to the clutch." As to this, we do not think it can be maintained that there is no substantial evidence from which a reasonable inference can be drawn that the engine was materially defective. It may be admitted that the evidence as to the infirmity of the clutch is more persuasive than that in reference to the engine proper, but, in consideration of all the circumstances as

we must view them, it is believed that the jury were warranted in the conclusion that there was a breach of appellant's guaranty. In this connection attention is called by respondent to the following facts disclosed by the record: In 1908 defendant used the same separator to thresh grain and the power was furnished by a 25 horse power gasoline engine which furnished all the power that was needed. The work done then was the same kind of work and under similar conditions as that attempted in 1909 with the use of the engine in question. After this "Foos" engine was received, defendant employed a crew of men to carry on threshing operations. He did all in his power to have the engine furnish the necessary horse power to operate his separator. He tried for 12 days to make the engine furnish sufficient power for this purpose, but he did not succeed, and he testified that it could not be made to furnish sufficient horse power to run his separator and enable him to conduct his threshing operations. He further declared that during said 12 days everything possible and everything necessary was done to cause the engine to deliver 40 horse power, but the engine would not, and did not, furnish it or sufficient power to run his separator. From the cross-examination of defendant's witnesses and from the testimony offered by plaintiff, it could be and it has been plausibly argued that the failure of the engine to furnish sufficient power for the purpose intended was due to the inability of the clutch and pulley to carry it to the separator and not to the want of development of the power, but, as we view it, the other inference is not unreasonable that the engine itself was incapable of measuring up to the guaranteed efficiency.

[2] Assuming, then, support for the asserted breach, what redress is open to defendant? He may undoubtedly set up either or both of two defenses: First, a rescission with its resulting restoration; and, second, damages that he has suffered for the violation of the contract. It is undoubtedly true that the fact that the buyer has a right to rescind does not compel him to resort to that remedy. He may still, if he so elect, and if the contract does not expressly confine his remedy to a rescission, affirm the sale and maintain an action on the warranty for damages, or rely upon the breach of the warranty when sued for the price. 30 Am. & Eng. Ency. of Law, 195. In some jurisdictions rescission is not allowed except for fraud, and in others a distinction is made between executed and executory contracts. *Id.* 190.

[3] In this state the statute designates the grounds for rescission, and provides how it may be effected. Sections 1689 and 1691, Civil Code. One of these grounds is the failure of the consideration in whole or in part, and it is well settled that the breach

of an express warranty in sales of personal property comes within the purview of this provision and authorizes rescission or claim for damages. In *Polhemus v. Heiman*, 45 Cal. 579, involving the sale of wool with an express warranty that it should not be in an unmerchantable condition by reason of dirt and burrs, the Supreme Court said: "Having a warranty, the defendants were not required to return or offer to return the wool. If it was not what it was warranted to be they might have done so, and thus have rescinded the contract, but they were at liberty to retain it and bring an action for the breach of the warranty, or plead the breach in reduction of damages in any action brought by the vendors for the purchase money." In *Hoult v. Baldwin*, 67 Cal. 610, 8 Pac. 440, in an action to recover the purchase price of a harvesting machine, the defendant set up a warranty of the machine, a breach of the warranty, and a prompt offer to return the machinery to the plaintiffs after he discovered its insufficiency. The Supreme Court said: "Having taken the machine then under a warranty, whether it be that expressed in the writing or provided by the Code, or both, the defendant had the right, if there was a breach of the warranty—that is, if in any respect the machine was not what it was warranted to be—to rescind the sale by returning or offering to return it to the plaintiffs."

[4] The familiar requirement of the Code (section 1691, *supra*) is that the one seeking to take advantage of its provisions must rescind promptly, upon discovering the facts which entitle him to rescind, and he must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same, upon condition that such party shall do likewise. By the allegations of his answer there is no doubt defendant brought himself clearly within the terms of the statute. It appears that on the 13th day of July he received the engine; that, about 10 days later, he attempted to operate it and continued his trial for two weeks without success; that on or about the 10th of August he informed plaintiff of the failure of the engine to deliver the required power; that on or about the 20th of August plaintiff removed from the engine the friction clutch, and did not return it; that on or about the 30th of August following the defendant in writing informed and notified plaintiff of his rescission of the contract. It is true that in his written notice he demanded the payment of the amount of damages caused by the failure of the engine, in addition to the return of the \$400, but this was not made a condition precedent to the redelivery of the engine, the notice stat-

ing: "The engine is here at your disposal," and "I hereby offer to return to you the engine and all accessories thereof and everything connected therewith received by me from you which has not already been returned to you." This written offer is admitted by appellant to have been received, and, upon the assumption of a breach of warranty, the offer was sufficient to place appellant in default and to authorize the restoration of the parties to their former position. This, of course, would include the return to defendant of the \$400 paid as part of the purchase price of the engine.

[5] As we look at the record, then, impressed with all the intendments in favor of the action of the jury and the court below that the law enjoins, we find a sale under an express warranty, the payment of part of the purchase price, a breach of the warranty, a prompt rescission of the contract after the discovery of the failure of the consideration, and a verdict and judgment in favor of the purchaser for the return of the money paid. Appellant's answer is that "an issue of rescission was not made," and, furthermore, in the closing brief, that "under the issues as tried in this case, and as made by the pleadings the action to rescind was abandoned and defendant relied upon his claim for damages for breach of warranty." But we do not so read the record. Both defenses were set up, as they might well be, and, if upon either theory we find sufficient legal support for the verdict, the result must be an affirmance. It is true that the attention of the court and jury seems to have been occupied largely with the consideration of the claim for damages and the instructions are devoted entirely to that theory, but there was no necessity for proof of the rescission in view of the admission in appellant's pleading and the absence of any instructions on the subject of rescission is probably due to explanations and admissions in the argument. At any rate, while it is doubtful whether there is sufficient evidence to support the verdict upon the theory of an affirmance of the contract, it is believed that it is not unsupported upon the other ground.

It is assumed that defendant will not attempt to withhold the engine from appellant if it has not already been restored. None of the alleged errors, most of which, indeed, affect the theory of damages, can be held sufficiently erroneous to overthrow the verdict, sustainable, as we believe it is, on the hypothesis that the contract of sale was rescinded for breach of warranty.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.





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**GROOVER v. PACIFIC COAST SAVINGS SOCIETY et al. (L. A. 2,750.)**(Supreme Court of California. Oct. 18, 1912.  
Rehearing Denied Nov. 16, 1912.)**1. BUILDING AND LOAN ASSOCIATIONS (§ 42\*)  
—INSOLVENCY—BORROWING MEMBERS—SET-  
TLEMENT.**

Where a building association was authorized to apply the value of a borrowing member's stock to pay his obligation to the association, but there was nothing in the member's note or mortgage or in the association's by-laws entitling such member to have the value of his stock, etc., credited on his loan, the securities representing the loan having been assigned to a trustee to secure bonds of the association, and, it having become insolvent, the member was not entitled to have his payments on the stock deducted from the amount due on his loan as against the trustee and the association's creditors.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 63, 66, 86-88; Dec. Dig. § 42.\*]

**2. BUILDING AND LOAN ASSOCIATIONS (§ 42\*)  
—BORROWING MEMBER—DUAL RELATION.**

Where the obligations of a borrowing member of a building association only authorized the latter, at its option, to apply the member's stock payments in liquidation of his loan, such member sustains the dual relation of borrower and stockholder to the association, which relations are separate and distinct, so that, on the association becoming insolvent, the member is bound to pay his full debt to the association, and, while not thereafter required to make further payments on his stock, he is entitled only to receive his proportionate share of the assets of the association distributable to stockholders after the debts of the association are satisfied.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 63, 66, 86-88; Dec. Dig. § 42.\*]

**3. BUILDING AND LOAN ASSOCIATIONS (§ 42\*)  
—INSOLVENCY—WITHDRAWAL OF STOCK-  
HOLDERS.**

A stockholder of a building association cannot withdraw after the association has become insolvent.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 63, 66, 86-88; Dec. Dig. § 42.\*]

In Bank. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by J. F. Groover against the Pacific Coast Savings Society and others. Judgment for plaintiff and defendant the California Title Insurance & Trust Company appeals. Reversed and remanded.

Olney, Pringle & Mannon and Page, McCutchen, Knight & Olney, all of San Francisco, for appellant. C. M. Fickert, of San Francisco, for respondent.

LORIGAN, J. A rehearing was granted on this appeal after decision in department. That decision, written by Justice ANGELLOTTI and concurred in by Justices SHAW and SLOSS, is as follows:

"This action was brought by plaintiff to obtain the delivery up and cancellation of,

and the execution of a good and sufficient release of, a promissory note for \$800 executed March 10, 1899, by plaintiff to defendant Pacific Coast Savings Society, and a mortgage given by plaintiff to said defendant on the same day, to secure payment of said note, as well as all other indebtedness of the mortgagor to the mortgagee. Defendant and appellant California Title Insurance & Trust Company is the assignee of said note and mortgage, as well as the certificate of stock in the Pacific Coast Savings Society mentioned therein, by assignment made January 9, 1900. The appeal by said last-named company is from a judgment granting plaintiff the relief asked upon payment by him of \$386.99.

"The case was submitted to the lower court for decision upon an agreed statement of facts, upon which appellant, in addition to claiming that plaintiff was not entitled to the relief asked, moved for relief in accordance with the prayer of its cross-complaint, viz., that the amount due under the note and mortgage be ascertained, that the same be declared a lien on the mortgaged property, and that the mortgaged property (including the certificate and shares of stock) be sold to pay the same, and attorney fees and costs. This motion was denied.

"The trial court reached its conclusion as to the amount due on the note and mortgage, \$386.99 (which amount plaintiff duly offered to pay appellant long prior to the commencement of his action), by deducting from the amount of principal, \$800, what would be the cash surrender value of plaintiff's said stock, 'if computed in accordance with the by-laws (of the Pacific Coast Savings Society), and as appears from the rules of computation as stated on the face of the stock itself,' viz., \$413.01. The surrender value of such stock is made up, of course, of the installments paid in by the holder on account of the purchase price, and such profits as are allotted to the stock. Whether or not plaintiff was entitled to any credit on his note and mortgage for the amounts paid by him on account of the purchase price of his stock, or for the surrender value thereof, is practically the only question presented by the briefs on this appeal.

"The Pacific Coast Savings Society was incorporated in January, 1891, which was prior to the enactment of the statutes of 1891 relating to building and loan associations, and never elected to continue its existence thereunder. Some of its purposes, as stated in its articles of incorporation, were generally to accumulate a fund from contributions of its stockholders, advance payments, proceeds of sale of debentures, and profits from investments; to purchase real estate and erect buildings thereon for

its members, and to make loans to its members; to issue and sell first mortgage debenture bonds and to borrow money, and to secure the capital stock to be paid into the treasury on the basis of monthly installments, or otherwise. By its by-laws various classes of stock were provided for, with only one of which we are here concerned, viz.: 'Class "A," ordinary installment shares.' This stock was to be paid for in monthly installments of 60 cents per share, and was payable at its face value, in cash, when the amount paid in and the pro rata share of profits in excess of expenses and membership fees and any losses which may occur equal \$100. Each holder of such stock desiring it was entitled to receive for each share of his stock a loan of \$100 from the society upon proper application therefor, assignment of his stock, and execution of such mortgage on real estate as the directors might deem sufficient security for the loan. The rate of interest on such loans was to be not less than 6 per cent., and such premium as might be fixed. There was no provision in the by-laws relative to loans to be made on such stock which would make the relation of the borrowing stockholder and the company in so far as the loan was concerned, in regard to any matter material in this case, anything other than that of borrower and lender of money, whose respective rights and obligations must be determined by the stipulations of the note and mortgage given and accepted upon the making of the loan. In other words, while the by-laws were expressly made a part of the mortgage given by plaintiff, there was nothing in said by-laws to modify or affect the express provisions of both note and mortgage as to the nature and extent of the obligation assumed by the borrower, in so far as any matter material to this case is concerned. The by-laws authorized the directors to issue and sell debenture bonds, and secure the payment of the same with a portion or all of the securities owned by the society. In 1895 \$100,000 of such bonds were issued and sold, appellant being made the trustee to hold the securities furnished for the payment of the amounts due thereon, and in January, 1900, plaintiff's note and mortgage, together with his pledged certificate of stock, were regularly assigned to appellant for the purpose of such security. In February, 1905, in an action brought by the Attorney General of the state, the Pacific Coast Savings Society was regularly adjudged to be insolvent, and trustees in liquidation were appointed. The affairs of said society are still in course of liquidation by the trustees under the direction of the court. The judgment of insolvency, which has become final, forbade the transaction of further business by the society. The debenture bonds secured by the assignment of various mortgages, including plain-

tiff's, are still unpaid to the extent of \$36,356.70.

'The terms of the note and mortgage given by the plaintiff, constituting the contract between the parties, are such as, in our judgment, to preclude any credit to plaintiff of installments paid by him on account of the purchase price of his stock, or by reason of any profits earned by the society which are apportionable to such stock.

'The note is a simple promissory note for \$800, payable 'seven years after date,' with interest at the rate of 6 per cent. per annum payable monthly in advance, the interest to become part of the principal if not paid, and to bear interest at a specified rate. The only other provisions of the note are those substantially providing that if the monthly interest be not paid within a certain time after it becomes due, or if the monthly installments due upon 10 shares of stock of the payee 'pledged as security for the payment' of the note are not paid when due, or if the 'monthly premium due on said loan amounting to the sum of \$4.80 per month' payable monthly in advance is not paid when due, then the whole of said principal sum of \$800 and the interest thereon shall become forthwith due and payable at the option of the holder, and the recital that the note is secured by mortgage bearing even date and the pledge by the mortgagor of 10 shares of the capital stock of the mortgagee.

'The mortgage, covering certain land in Los Angeles county, recites that it is made as security for the payment of this note, which is set out in full therein, and also as security for all further advances and other indebtedness of the mortgagor to the mortgagee that may exist, arise, or be contracted for, before the satisfaction hereof, not exceeding at any time the sum of \$80, exclusive of interest. It provides that the mortgagor 'as a further security for the payment of said promissory note, and the interest to accumulate thereon, and the said par value of said shares of capital stock, has pledged and he does hereby pledge to said mortgagee all of the aforesaid shares of the capital stock,' and gives the mortgagee the right in case of a foreclosure, or nonpayment of the note, etc., to apply at its option to such payment, the cash surrender value of said stock, and thereupon become the absolute owner of such stock. The mortgagor promises that he will pay to said mortgagee the par value of said stock in monthly installments of 60 cents per share on the 1st day of each month until such shares are fully paid by the said payments and the dividends and accumulations thereon, and, further, 'to pay the monthly premium of \$4.80 on said loan on the 1st day of each and every month during the continuance thereof.' It is further provided that 'all covenants by the



mortgagor are intended to run to the mortgagee, its successors and assigns.'

[1] 'There is absolutely nothing in note, mortgage, or by-laws or in plaintiff's certificate of stock, which certainly comprehend all of the written contract entered into by the parties, that warrants the conclusion that payments of installments on account of the purchase price of the stock may, under any circumstances, be applied to the credit of the plaintiff on account of his note, or that the transactions so far as the stock was concerned was anything more than a mere pledge by way of security for the payment of the note, to which the mortgagee might resort 'at its option' in the enforcement of plaintiff's obligation. The features which in some cases involving contracts between building and loan associations and borrowing members have been held to show that the arrangement between the parties was nothing more nor less than the advancement by the association of the par value of the borrower's stock, upon the undertaking of the borrower properly secured, that he would pay not only interest thereon, but also installments on the purchase price of his stock until such time as, by reason of such payment and the profits thereon, such stock becomes fully paid for, when, by reason of such payments, the indebtedness is to be considered discharged and the stock canceled, are absent from the transaction here involved, so far as the same is evidenced by the writings constituting the contract between the parties. By the terms of that contract, plaintiff was bound to pay in money the amount stipulated in the note, with interest at the rate of 6 per cent. per annum, and payments on account of his stock were not, and cannot now be, held to have been payments on account of his indebtedness. The fact that, if the society had continued a solvent concern and he had continued to make payments on account of his stock until the same had attained its par value of \$100 per share, he would have been able to discharge his indebtedness with the amount then due him on account of the stock, is of no consequence in determining what the contract between these parties was.

'The distinction between this case and that of *Hale v. Barker*, 129 Cal. 419, 62 Pac. 168, so far as the stipulations of the agreement between the parties are concerned, is very marked, and it was expressly recognized by the learned writer of the opinion in that case that it is impossible to lay down any 'hard and fast' rule that shall apply in all cases, 'not only because of the difference in the mode and rules of business adopted by different associations, but because of the different conditions inserted in mortgages and the varying allegations in complaints.' In that case, according to the opinion, *Barker*, the borrower, applied for

the advancement of \$1,500 by way of loan or anticipation of the value of his shares at their maturity, the bond given by him recited that the loan was 'an advancement to him by said association of one thousand five hundred dollars, by way of anticipation of the value at their maturity, of thirty shares of the capital stock of said association, now owned by said John A. Barker,' and the mortgage purported to secure the continued monthly payment of the interest on the \$1,500, and the monthly dues on the stock, until it matured and should be of the value of \$100 per share, and also the surrender of said stock at its maturity in payment of said advancement and the premium bid. The court said that it was part of the contract between the mortgagor and the association that, when the stock should be fully paid up and of the value of \$100 per share, the mortgagor should surrender the stock to the association in full payment and discharge of the mortgage. The association having become insolvent, it was said that the 'contract as to the time and manner in which the mortgage was, by its terms, to be satisfied became impossible of fulfillment.' By reason of the insolvency, it was impossible for the association to continue business and bring the stock to its par value of \$100 per share, and therefore impossible to complete the scheme established by the contract, of discharge of the indebtedness by a surrender of the fully paid-up shares of stock. Of course, that situation does not exist in this case, for no such scheme is established by the terms of the contract. As put by appellant, 'the only connection here between the note and mortgage and the stock, is that the stock is assigned as collateral security, with the usual covenant on the part of the borrower that he will keep the collateral good.' Assuming *Hale v. Barker*, supra, to have been correctly decided, in view of the particular contract there involved, we do not think that it warrants a similar decision upon the contract presented in this case.

'The dual relation to a building and loan association occupied by a borrowing stockholder, and the fact that payments made by him on account of his stock are not payments on account of his debt, are fully recognized by two decisions of this court in bank, each more recent than *Hale v. Barker*, supra, a department case. In *Henry v. Continental Building & Loan Association*, 156 Cal. 667, 105 Pac. 960, where the terms of the note were substantially the same as in the case at bar, the court held that the lower court erred in allowing as credits on the note payments which the agreement into which plaintiffs entered expressly provided should be exclusively applied to the payment of the premium and to the extinguishment of the obligation arising by reason of the purchase of the shares of stock



required to be bought as a prerequisite to the exercise by plaintiff of the privilege of securing the \$800 loan. It was said, quoting approvingly from *McNamara v. Oakland, etc., Ass'n*, 131 Cal. 336, 63 Pac. 670: 'He (the borrower) occupied the dual relation to the corporation of borrower and stockholder, each of which was distinct from the other. Under the scheme, he could not be a borrower without becoming a stockholder, but he could be a stockholder without being a borrower. \* \* \* That the relations of borrower and stockholder are separate and distinct, in associations such as defendant's assignor, seems to be well settled. And it is general law that payments on account of collaterals are not payments on account of the debt they secure. The pledging of shares as collateral security for the payment of a debt is a recognition of the distinct character of the member as a member and a debtor.' It was further said: 'So, in the case at bar, it is clear, from the evidence, that the stock of the respondents had not matured at the time of the commencement of this suit, and consequently the payments made on said stock could not, under the terms of the contract of the parties, be lumped with payments for other agreed purposes and the total sum thus produced made to extinguish the principal sum of the note.' See, also, *McNamara v. Oakland, etc., Ass'n*, supra.

[2] "It is true that in neither of the cases just cited had the association become insolvent, with the consequent result that the shares of stock could never mature. But these cases do emphatically hold that the dual relations of stockholder and borrower occupied by a borrowing stockholder under such a contract as we have before us are entirely separate and distinct. It would seem to follow necessarily that, under such a contract as we have before us, the fact that the association becomes insolvent cannot affect the obligation of the borrower so far as the necessity of paying in full the amount of his loan and interest thereon is concerned, and the payments made by him on account of the purchase price of the stock cannot be credited as payments made on account of his loan. This is held by the overwhelming weight of authority. The reasoning of the cases so holding appears to us to be unanswerable. As substantially stated in *Curtis v. Granite State, etc., Ass'n*, 69 Conn. 6 [36 Atl. 1023, 61 Am. St. Rep. 17], the borrowing stockholder stands in a double relation to the association; he is a member—investor—as well as a borrower. As a member, he is bound to contribute to the losses and expenses of the common enterprise. If the amount of dues paid in by him as a member is credited back to him as a debtor, he will receive in full the amount paid upon his stock, while the other members who have not become borrowers may receive only a small percentage of the amount paid in by them.

Where such a company becomes insolvent, nothing remains but to wind it up in such a manner as to do equity to the creditors and between the members themselves. As regards the latter, care should be taken to adjust the burdens equally, and not to throw either upon borrowers or nonborrowers more than their respective shares. 'That result may be reached by requiring the borrower to repay what he actually received with interest. He would then be entitled, after the debts of the corporation are paid, to a pro rata dividend with the nonborrower for what he has paid upon his stock. He will thus be obliged to bear his proper share of the losses.' And in *Coltrane v. Blake*, 113 Fed. 785 [51 C. C. A. 457], it was said: 'The rule in the United States is that the capital stock of a corporation is impressed with a trust for the payment of the creditors of the corporation [citing cases]. Especially is this the case with insolvent corporations. The capital stock of a building and loan association is composed of the subscriptions to it, either by cash or dues. If any part of those dues is diverted from the claims of creditors generally, and used for the benefit of a single stockholder by way of credit on a debt due by him to the corporation, it is a misuse of trust funds, and so unlawful.' See, also, *Towle v. American, etc., Society* [C. C.] 61 Fed. 446; *Weir v. Granite, etc., Ass'n*, 56 N. J. Eq. 234, 38 Atl. 643; *Taylor v. Clark*, 74 Ark. 220 [85 S. W. 231]; *Hale v. Cairns*, 8 N. D. 145 [77 N. W. 1010, 44 L. R. A. 261, 73 Am. St. Rep. 746]; *Dooling v. Smith*, 89 Ill. App. 26; *Clark v. Lopp*, 80 Mo. App. 542; *Strohen v. Franklin, etc., Ass'n*, 115 Pa. 273 [8 Atl. 843]; *Rogers v. Hargo*, 92 Tenn. 35 [20 S. W. 430]. While there are some decisions not in accord with this view, we are satisfied that, upon the question of the application in payment of the loan of amounts paid on account of stock, the views stated in the opinions cited are clearly correct, at least in cases where the terms of the contract between the borrower and the association are substantially the same as those in the case at bar. As to such a case as this, viz., one where the borrower's mortgage has passed by assignment to one from whom the association has borrowed money and to whom it has transferred members' obligations as security, Mr. Endlich in his work on *Building Associations* (2d Ed.) § 531, says: 'In such cases, \* \* \* when the society has become insolvent, the right of the outside creditor to be paid speedily requires that the borrowing member pay at once what his mortgage then stands for, to wit, the amount actually received with unpaid interest, without credit for his stock payments, and that he be relegated to the final distribution of the corporate assets for his dividend upon the latter.' In view of what we have said, it is clear that plaintiff was not entitled to have the note and mortgage canceled upon the payment by him of \$386.99."

It is earnestly insisted by respondent on this rehearing that the rule declared and adopted in the foregoing opinion as governing the settlement of the indebtedness of a borrowing stockholder to a building and loan association of which he is a member is contrary to the decided weight of prevailing American authority. Under this insistence, we have given that matter further consideration. It is conceded in the department decision that there are some authorities which declare a rule different from the one there adopted, and it is this line of decisions which counsel for respondent claims announces the more equitable rule to be applied in the adjustment of indebtedness between the borrowing member and the insolvent association and is the one which he further insists is sustained by the decided weight of authority.

The growth of building and loan associations throughout the Union in recent years has been attendant with a vast amount of litigation and the decisions of the courts have not been harmonious with respect to the rule to be applied in settlements between the association and its borrowing members. This diversity has arisen in a large measure through differences in statutory provisions governing the associations in the several states, differences in the rules or by-laws of respective associations and the varied forms of contracts which have been entered into between the association and its members, and have come before the courts for construction. No great difficulty has been experienced in applying an equitable rule of settlement where the questions have arisen between a borrowing member and an association which is solvent. It has arisen principally where the association has become insolvent and in an effort by courts under such circumstances to formulate a rule which may be applied so as to operate equitably as to the creditors and likewise between the borrowing and non-borrowing members of the association. It is well settled by all the authorities that, when insolvency intervenes, the borrowing members must pay up their mortgage indebtedness to the insolvent association at once, notwithstanding such debts by the contract of loan have not matured. It is to such a situation that the courts in the different states have endeavored to apply a rule which would be equitable under the changed conditions produced through the insolvency, and it is in such an endeavor that the inharmony arose in the decisions. This diversity of opinion resulted in the early formulation and application in different jurisdictions of two general rules referred to in the authorities as the Maryland and Pennsylvania rules, respectively; the former so called because laid down by the Supreme Court of Maryland, the latter because announced by the Supreme Court of Pennsylvania.

The Maryland rule as early declared in that jurisdiction and which to a limited extent has been applied in other states is that

on the insolvency of the association the borrowing member should be charged with the amount loaned him by the association with interest thereon, and credited with all sums paid as dues upon his stock and the premium and interest paid upon his loan. It is this Maryland rule which respondent contends should be applied here and which he insists is sustained by the weight of authority. In support of this claim he cites a line of cases from Maryland of which *Waverly v. Buck*, 64 Md. 338, 1 Atl. 561, will alone be particularly mentioned. *Buist v. Bryan*, 44 S. C. 121, 21 S. E. 537, 29 L. R. A. 127, 51 Am. St. Rep. 787; *Butson v. Home Sav. & Trust Co.*, 129 Iowa, 370, 105 N. W. 645, 4 L. R. A. (N. S.) 98, 113 Am. St. Rep. 463; *Cook v. Kent*, 105 Mass. 246; *Randall v. Natl. Building Ass'n*, 42 Neb. 809, 60 N. W. 1019, 29 L. R. A. 133; *Building Ass'n v. Tinsley*, 96 Va. 322, 31 S. E. 508; *Snyder v. Fidelity Sav. Ass'n*, 23 Utah, 291, 64 Pac. 870; *Interstate S. & L. Socy. v. Cairns*, 16 Wash. 215, 47 Pac. 509; *Hale v. Stenger*, 22 Wash. 516, 61 Pac. 156; *Fidelity Sav. Ass'n v. Shea*, 6 Idaho, 405, 55 Pac. 1023; *Western Sav. Bank v. Houston*, 38 Or. 377, 65 Pac. 611; *Brownlie v. Russell* (Eng.) H. L. 8 App. Cas. 235.

A number of cases from the federal courts are also cited by respondent, but of these cases it may be said (and this will apply equally to a number cited from said courts by appellant) that they need not be considered, as they follow the decisions of the state courts in applying either rule as it is adopted by the higher courts of the states, and, as the decisions of these state courts are cited and relied on by either side, the federal cases, therefore, can aid nothing in determining the prevailing rule.

It will be observed on an examination of the authorities cited by respondent from Nebraska, Utah, Washington, Oregon, and Idaho that in none of the cases in those jurisdictions (save *Hale v. Stenger*) was there any question as to what rule should be applied between borrowing members and insolvent associations. The question whether the Maryland rule or the Pennsylvania rule shall be applied can only arise when the association has become insolvent. In these Western cases cited the actions were either brought by the association to foreclose mortgages accompanied with assignments of their stock given to the association by borrowing members, or were suits brought by such members seeking a cancellation of their mortgages under a claim that a credit on their loans of the withdrawal value of their stock in the association, but which the association refused to make, was sufficient to satisfy their indebtedness. In all those cases the association was solvent, and, as is common to building and loan associations, it was provided in the by-laws that a member thereof might at any time upon the payment of his indebtedness to the association surrender his



stock and be paid its withdrawal value. The right to have such withdrawal value applied on the loan was the question involved in these cases; the claim of the association being that the borrowing members by forfeiture of their stock through nonpayment of dues or for other reasons had lost their interest in the stock, and hence were not entitled to have such withdrawal value applied on their indebtedness. The courts held that these claims of the association which were directed against the right of ownership of the stock by the borrowing members were untenable, and that, as the latter had a right according to the by-laws of the association to be paid the withdrawal value of their stock, they were entitled to have it applied in payment on the loan. There was no discussion of the Maryland rule or any other equitable rule to be applied in cases of insolvency of the association. Of course, where the association is solvent and a member who obtains a loan partially secured by an assignment of his stock is accorded under the rules of the association the right of severing his membership therewith at any time on payment of his indebtedness and to be paid the actual value of his stock, there ought to be little room for questioning but that he has the right to have all that he has paid in—at least the dues on his stock—which goes to make up its withdrawal value applied in satisfaction of his loan, and this is all that the cases in the various states referred to, decided. But where the association becomes insolvent a different situation is presented.

[3] A stockholder may not then withdraw. All that remains to be done is to wind up the affairs of the association. The actual value of its shares cannot be determined until this has been done, its assets collected, and its indebtedness paid. Until then it cannot be said that the stock has any withdrawal value. It is to such a situation as this, proceeding from the insolvency of the association, that the courts have endeavored to apply some equitable rule with a view to fairly conserving the rights of creditors of the association and adjusting the rights of its borrowing and nonborrowing members between themselves which has resulted in the formulation of the respective Maryland and Pennsylvania rules, and only cases which involve the insolvency of the association and where one or the other of these views have been considered and applied can be of any value in determining which rule is sustained by the better reasoning and is the one more generally applied. In this view the authorities just referred to as they deal solely with the right of borrowing members in solvent associations can aid nothing in determining that question.

As to the other authorities cited by respondent, they do, as claimed by him, announce and apply the Maryland rule in cases of insolvency, but an examination of those authorities will disclose that the contract of

loan was essentially different from that involved in the case at bar. Either the loan was an advancement in anticipation of the value of the member's stock at maturity and was to be satisfied by a surrender of such stock when it matured, or the contract of loan in express terms or the by-laws which were made part of the contract, provided that the monthly payments on the mortgage loan and the monthly payments on the stock assigned as collateral security should be made until the stock matured, and that upon such maturity the stock should be surrendered to the association in payment and cancellation of the debt.

In *Buist v. Bryan*, *supra*, the contract of loan provided that interest and dues should be paid until the shares of stock matured and said shares were then to be surrendered to the association in satisfaction of the loan. In *Waverly B. & L. Ass'n v. Buck*, *supra*, and *Butson v. Home Sav. & Trust Co.*, *supra*, the contracts called for the extinguishment of the loan upon the maturity of the shares of stock. In *Cook v. Kent*, *supra*, the contract provided that the borrowing member was to pay dues "until the payment of the dues amounted to the principal sum of the loan." In *Hale v. Stenger*, *supra*, it does not appear what the particular contract was, the court saying that "the loan was made in the usual terms and conditions common to loans by building and loan associations to their subscribers." In *Brownlie v. Russell*, *supra*, the contract provided that the dues should be credited on the loan and the House of Lords in that case, while conceding that the contract was clearly to the advantage of borrowing members and hard upon the nonborrowing members, sustained a right to the application of the dues to the payment of the indebtedness because "it was the contract."

It was the existence of these express contractual relations as to the loan and its repayment which doubtless entered as an important factor in inducing the Maryland court to the original announcement of the rule by it and its acceptance in the limited number of jurisdictions which have followed it; the reasoning of the American courts being that as the payment of the mortgage debt was by the contract between the borrowing member and the association to be accomplished only by the maturity of the shares, and this was rendered impossible through the insolvency of the association, the contract between them was abrogated *ab initio* and, that being so abrogated, the simple relation of debtor and creditor between the borrowing stockholder and the association existed from the beginning, and the former was entitled accordingly under the rule of partial payments to a credit on his loan for all payments made to the association prior to the insolvency.

But in the case at bar we have no such peculiar contract as was involved in the sev-



eral cases just referred to. In the case here under consideration, there is nothing in the note or mortgage, the certificate of stock assigned as collateral security, or the by-laws of the association which, as is said in the department decision, comprehended all the written contract between the parties, which provided that the payment of dues on the stock should be applied to the credit of the loan, or that the stock was anything else than a pledge as collateral security for the payment of the amount borrowed. This is clearly pointed out in the department decision, and, if it be conceded that the Maryland rule for which respondent contends should prevail, even to the extent that it has been applied to particular contracts such as were under consideration in the cases which adopted or followed it, it certainly is not the more generally prevailing or accepted rule which governs contracts and loans between borrowing members and associations such as here involved.

While it is contended by appellant that the Maryland rule is in toto opposed now to the current of recent authority, we perceive no occasion for determining that matter. The whole subject is discussed and considered in many of the cases presently to be cited. That rule certainly has not been extended so as to apply to a contract such as we have here.

In more recent years, as building and loan associations have largely expanded throughout the United States, they have become a source of extensive litigation, their objects and purposes have been more plainly understood, and the courts in the large field of litigation which they have afforded have had occasion to more thoroughly consider than in earlier years the rights of creditors and the relation of borrowing and nonborrowing members to the association and between themselves when a condition of insolvency, which was never anticipated, has occurred. As a result the great weight and prevailing current of authority is that where insolvency occurs the dual relation which the member occupies to the association—that of stockholder and borrower—should be kept separate and distinct. As a borrower he is required to pay back to the association the amount loaned him, with interest. As a stockholder he has subscribed for capital stock of the association upon which he has agreed to pay monthly dues, and has assigned such stock as collateral security for the loan. Under this contract of loan, the payment of dues on his stock is not credited as a payment on his loan. Such payment is on his purchase of the stock. In relation to such stock, he is a stockholder, and not a debtor. Upon the insolvency of the association, his contract to make further payments on his stock subscription has ended, but his relation as a stockholder continues until the liquidation of the association. What he has

paid in on his stock, in common with what has been paid in by the other members, with such other sources of revenue, have gone to make up the capital stock of the association which is a trust fund for the benefit of the creditors thereof. From this fund the debts of the association must be paid, and the value of the shares of the insolvent association will be just what the assets of the association amount to after liquidation, and cannot be ascertained until the debts and losses of the association are paid. As a stockholder the borrowing member is liable for his proportion of such outstanding indebtedness. Whatever losses are sustained must be borne by all the stockholders, both borrowing and nonborrowing members. If, however, the borrowing stockholders are to have credited on their loans as a payment thereon of the amounts which they have paid in as dues on their stock, such members escape the burden of paying any of the indebtedness or losses of the association. They get back the full benefit of everything they have paid in as a satisfaction toward their loans, while the nonborrowing members who have paid in the same dues bear all the losses and consequently get not only no benefit from the dues which have been paid in by the borrowing members, but necessarily, as in every case of insolvency, get less than they actually paid in as their stock dues. To prevent what would thus be obviously unfair, the courts have generally adopted as the equitable rule to be applied in such cases the one early announced by the Supreme Court of Pennsylvania. Under that rule of settlement, the borrowing stockholder of the insolvent association must repay to it at once the amount loaned with interest. Payments of dues on his stock will not be allowed as credits on his loan. As to stock payments he is to be treated as a nonborrowing member. After the assets are collected and the indebtedness of the association paid, the fund which may remain is to be distributed pro rata among all the stockholders on the basis of the amounts paid by them, respectively, as dues on their stock, whether they are borrowing or nonborrowing stockholders. Under this rule, the rights of the creditors of the association are protected and the members, both borrowing and nonborrowing, are placed upon an equally equitable footing. In laying down this rule it is said in *Strohen v. Ass'n*, 115 Pa. 273, 8 Atl. 843 (from which decision the rule is known as the Pennsylvania rule): "The insolvency of the company puts an end to its operation as a building association. To a certain extent it also ends the contracts between it and its members and nothing remains but winding it up in such manner as to do equity to the creditors and between the members themselves. As regards the latter, care should be taken to adjust the burden equally, and not throw upon either the borrowers

or nonborrowers more than their respective shares. This result may be reached by requiring the borrower to pay what he actually received with interest. He should then be entitled, after the debts are paid, to a pro rata dividend with the nonborrower of what he has paid on his stock. He will thus be obliged to bear his proper share of loss. To allow him to credit upon his mortgage his payments on his stock would enable him to escape responsibility for his share of the losses and throw them wholly upon the nonborrowers. In other words, the borrower would escape without loss. It will not do to administer the affairs of an insolvent corporation in this manner." The rule as thus laid down is now generally accepted by the text-writers and in the adjudicated cases as sustained by clear equitable considerations. It is the rule laid down in Endlich on Building Associations (2d Ed.) § 477, and Thompson on Building Associations (2d Ed.) § 171, p. 344, where the author declares that the rule laid down in Buist v. Bryan, supra (the case principally cited in support of the Maryland rule), is "an exception to the recent trend of authorities," and which he further declares is against allowing dues on the stock to be credited on the loan as an unjust preference. Several cases are cited in the department decision sustaining this rule in its application to the case at bar which it would be unnecessary to again cite save as an orderly enumeration of the decisions in the several states showing how extensively the rule is being adopted and applied. These authorities are B. & L. Ass'n v. Anneston L., etc., Ass'n, 101 Ala. 582, 15 South. 123, 29 L. R. A. 120, 46 Am. St. Rep. 138; Taylor v. Clark, 74 Ark. 220, 85 S. W. 231; Curtis v. Granite P. Ass'n, 69 Conn. 6, 36 Atl. 1023, 61 Am. St. Rep. 17; Ottensoser v. Scott, 47 Fla. 276, 37 South. 161, 66 L. R. A. 346, 110 Am. St. Rep. 137, 4 Ann. Cas. 1076; Dooling v. Smith, 89 Ill. App. 26; Wohlford v. Ass'n, 140 Ind. 662, 40 N. E. 694, 29 L. R. A. 177; Marion Trust Co. v. Trustees, 153 Ind. 96, 54 N. E. 444; Rogers v. Rains, 100 Ky. 295, 38 S. W. 483; King v. Brewer, 121 Mich. 343, 80 N. W. 238; Clark v. Scott, 80 Mo. App. 542; Gary v. Verity, 101 Mo. App. 586, 74 S. W. 161; Knutson v. N. W. L. Ass'n, 67 Minn. 201, 69 N. W. 889, 64 Am. St. Rep. 410; Weir v. Granite State, etc., 56 N. J. Eq. 234, 38 Atl. 643; Meares v. Duncan, 123 N. C. 203, 31 S. E. 476; Hale v. Cairns, 8 N. D. 145, 77 N. W. 1010, 44 L. R. A. 261, 73 Am. St. Rep. 746; Anselme v. American B. & L. Ass'n, 63 Neb. 525, 88 N. W. 665; Monier v. Clark, 12 N. M. 118, 75 Pac. 35; People v. New York B. & L. Ass'n, 101 App. Div. 484, 92 N. Y. Supp. 62; Eversmann v. Schmitt, 53 Ohio St. 174, 4 N. E. 139, 29 L. R. A. 184, 53 Am. St. Rep. 632; Strohen v. Franklin, etc., L. Ass'n, 115 Pa. 273, 8 Atl. 843; Car-

penter v. Richardson, 101 Tenn. 176, 46 S. W. 452; Price v. Kendall, 14 Tex. Civ. App. 26, 36 S. W. 810; Leahy v. National B. & L. Ass'n, 100 Wis. 555, 76 N. W. 625, 69 Am. St. Rep. 945; Young v. Bldg. Ass'n, 48 W. Va. 512, 38 S. E. 670; B. & L. Ass'n v. McPhlamy & Hawks, 81 Miss. 61, 32 South. 1001.

All these cases just referred to deal with the rule of settlement to be applied where the association has become insolvent, and, in connection with those cited in the department opinion, fully sustain the conclusion there reached that respondent was not entitled to have his mortgage debt credited with the dues paid on his stock pledged as collateral security for the loan.

The judgment is reversed, and the cause remanded for a new trial.

We concur: ANGELLOTTI, J.; SHAW, J.; MELVIN, J.

(164 Cal. 53)

**TITLE INS. & TRUST CO. v. CALIFORNIA DEVELOPMENT CO. et al. (DUNCAN, Intervener). (L. A. 2,651.)**

(Supreme Court of California. Oct. 18, 1912.  
Rehearing Denied Nov. 16, 1912.)

**1. MORTGAGES (§ 469\*)—FACT OR CONCLUSION—MORTGAGE FORECLOSURE—RECEIVERS—INSUFFICIENT PROPERTY.**

The allegation of the complaint in an action to foreclose a mortgage that the property is probably insufficient to discharge the mortgage debt, without a statement of the value of the property or of facts indicating it, is not a sufficient allegation of fact to justify the appointment of a receiver under the clause of Code Civ. Proc. § 564, subd. 2, permitting it in such action where "the property is probably insufficient to discharge the mortgage debt."

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1376-1381; Dec. Dig. § 469.\*]

**2. MORTGAGES (§ 468\*)—FORECLOSURE—RECEIVERS—INJURY TO PROPERTY—SHOWING.**

The purpose of Code Civ. Proc. § 564, subd. 2, providing that a receiver may be appointed in an action for foreclosure of a mortgage, where it appears the mortgaged property is in danger of being lost, removed, or materially injured, being only to preserve sufficient of the security to discharge the debt, it is necessary for plaintiff, applying for a receiver only on the ground of danger of material injury, to show that the injury would so depreciate the value of the property that it would not thereafter afford adequate security.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1374, 1375; Dec. Dig. § 468.\*]

**3. MORTGAGES (§ 463\*)—FORECLOSURE—RECEIVERS—APPOINTMENT—DISCRETION.**

Though the appointment of a receiver under Code Civ. Proc. § 564, subd. 2, authorizing it in an action to foreclose a mortgage where it appears the mortgaged property is in danger of being materially injured is very largely in the discretion of the court, it is an abuse of discretion to order the appointment where the showing of apprehended injury fails to make it appear that the mortgagee's interests and security will be jeopardized by the injury.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1374, 1375; Dec. Dig. § 468.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



#### 4. RECEIVERS (§ 51\*)—BOND—EXECUTION—FILLING IN AMOUNT.

Though the undertaking required by Code Civ. Proc. § 566, where a receiver is appointed on ex parte application, and filed complete before the order of appointment, was blank as to the amount thereof when it was signed and acknowledged by the attorney in fact of the guaranty company, and such amount was filled in, when the attorney in fact was absent, by one authorized by him to do so, it was not invalid, if the power of attorney, as it might, empowered the attorney in fact to have this so done.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 85-88; Dec. Dig. § 51.\*]

#### 5. APPEAL AND ERROR (§ 934\*)—REVIEW—PRESUMPTION.

That the evidence established the authority for the filling in of the amount of an undertaking by a third person after it had been signed and acknowledged by an attorney in fact will be presumed in favor of the holding by the trial court of the validity of the undertaking; it having had before it the power of attorney and the authorization by the attorney in fact to the third person, and they not being in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781, 3782; Dec. Dig. § 934.\*]

#### 6. RECEIVERS (§ 51\*)—EX PARTE APPOINTMENT—UNDERTAKING.

Under Code Civ. Proc. § 566, providing that, "if a receiver is appointed on ex parte application, the court before making the order must require from applicant an undertaking to pay to the defendant" all damages he may sustain by reason of the appointment and the entry of the receiver on his duties, in case the appointment shall have been procured wrongfully, maliciously, or without sufficient cause, the undertaking must run to, or in favor of, all the defendants; and, the undertaking being only in favor of one of them, the appointment, so far as concerns the interests of other defendants, is improper.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 85-88; Dec. Dig. § 51.\*]

#### 7. RECEIVERS (§ 51\*)—EX PARTE APPOINTMENT—UNDERTAKING.

Where the undertaking given on appointment of a receiver on an ex parte application ran only in favor of one defendant, whereas, under Code Civ. Proc. § 566, it should have been in favor of all of them, and the court then ordered plaintiff to file a new undertaking running to all of them, ratifying and confirming the original, and providing that the liability on the new one should relate back to and cover all damages caused by the appointment from the time it was made, the new undertaking in accordance with the order validated the appointment, if not from the beginning, at least from the filing of the new undertaking; and also cured any defects in the manner of the execution of the original undertaking.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 85-88; Dec. Dig. § 51.\*]

#### 8. APPEAL AND ERROR (§ 1180\*)—REVERSAL—APPOINTMENT OF RECEIVER—REVERSAL AS TO SINGLE DEFENDANT.

The reversal on the ground of abuse of discretion of the order appointing a receiver in an action to foreclose a mortgage, being only on appeal of a single defendant, and that, too, an unnecessary party, it being a holder of a subsequent incumbrance, and not having possession or right of possession of any of the property, will not affect the validity of the appointment as to the other parties, or have any

effect on the proceedings, other than that such defendant will be entitled to have its incumbrance paid out of the proceeds of any foreclosure sale in preference to costs and expenses occasioned by the receivership.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4626-4631, 4656, 4659; Dec. Dig. § 1180.\*]

In Bank. Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Title Insurance & Trust Company against the California Development Company and others, Boaz Duncan intervening. From an order, defendant the New Liverpool Salt Company appeals. Reversed as to said defendant.

See, also, 159 Cal. 484, 114 Pac. 838.

Page, McCutchen, Knight & Olney, all of San Francisco, for appellant. Lee C. Gates, O'Melveny, Stevens & Millikin, Walter K. Tuller, and Valentine & Newby, all of Los Angeles, for respondents. J. W. McKinley, of Los Angeles, for receiver.

PER CURIAM. The appeal is from an order appointing a receiver. It is taken by the New Liverpool Salt Company alone.

The action was begun to foreclose the lien of a mortgage or deed of trust made by the California Development Company, to secure the payment of certain bonds issued by it. The order appointing the receiver was made ex parte, and was founded on the complaint and the affidavit of one Henry L. Lyon.

We find it necessary to consider but two objections urged against the regularity of the order: First, that the court abused its discretion in making the order upon the facts shown; and, second, that the order is void as to the New Liverpool Salt Company because it was made ex parte, without exacting any undertaking for the protection of that company, as required by section 566 of the Code of Civil Procedure.

[1] 1. We think the facts shown, though not sufficiently lacking in merit to make the order void for want of jurisdiction, were of so little force and effect that we must declare the making of the order an abuse of discretion. The plaintiff attempted to show the causes for appointing receivers set forth in subdivision 2 of section 564 of the Code of Civil Procedure. These are, first, "that the mortgaged property is in danger of being lost, removed, or materially injured"; and, second, "that the property is probably insufficient to discharge the mortgage debt."

The only attempt to establish the second ground mentioned consisted of an allegation in the complaint stating "that, as plaintiff is informed and believes and therefore avers, the aforementioned property is probably insufficient to discharge the mortgage debt aforesaid." Neither the value of the property, nor any facts indicating its value, are set forth in the complaint or in the affi-



davit. The decision in *Bank of Woodland v. Stephens*, 144 Cal. 660, 79 Pac. 379, is directly to the point that this is not a sufficient allegation of fact to justify the appointment of a receiver under this clause of the section.

[2, 3] The showing under the first clause is also insufficient. The right of a mortgagee to have a receiver take charge of the mortgaged property during the pendency of the action is founded upon the proposition that such action is necessary in order to preserve or protect the interest of the mortgagee. His only interest is the lien of his mortgage, and its extent is measured by the amount of the debt for which the lien is security. The debt is the substantial thing. Unless the security for its ultimate payment is in some way endangered or impaired, he cannot be prejudiced. The purpose of the subdivision in question is to provide the means for his protection against such danger. The second clause, which we have just noticed, is provided to enable him, when his debt is matured, to obtain and apply to its payment the rents, issues, and profits of the property, and it expressly declares that this may be done only when the mortgage is due, and when it appears probable that the property mortgaged is insufficient to pay the debt. The first clause covers different contingencies and dangers, but its purpose is the same, namely, to preserve sufficient of the security to discharge the debt. It covers the contingencies of loss, removal, and material injury. If all the mortgaged property is lost or removed from the jurisdiction, the entire security is gone, and the prejudice to the rights of the mortgagee necessarily ensues, for he is entitled to have such property remain accessible, whatever its value and although it may far exceed the mortgage debt. But, if the danger is only that it may be "materially injured," the relative value of the property, after such injury has been inflicted, and the amount of the debt, must be considered in order to determine whether or not the mortgagee's interests require the court to deprive the mortgagor of his lawful possession of his own property. If the injury, though considerable in extent, will still leave enough of the property remaining intact to be ample security for the debt, the court should not interfere. In such a case the mortgagee can suffer no injury to his interests. It was therefore necessary for the plaintiff, in applying for a receiver, to show, not only that the property mortgaged was in danger of material injury, but also that such injury would so depreciate its value that it would not thereafter afford adequate security for the payment of the outstanding bonds.

The complaint shows that the bonds issued and unpaid amount to \$477,920, with interest from July 1, 1908. The mortgaged property is of vast extent. It consists of 318 acres of land in Imperial county on the Colorado river, known as Hanlon's Head-

ing, a large canal, then in course of construction, to carry the water of the Colorado river from said Heading to a point in California over fifty miles distant, to be there sold to the Imperial Water Company and others, the said water company taking 400,000-acre feet per year at the yearly rate of 50 cents per acre foot; a right to take water from said river and also from Volcano Lake in Mexico to supply such purchasers; practically all of the capital stock of a subsidiary company organized under Mexican laws to hold the property and conduct the necessary operations of the system in Mexico, which said Mexican company also holds title to 100,000 acres of land in Mexico; the right to sell the entire capital stock of said Imperial Water Company at \$8.75 a share, and appropriate the proceeds to its own use, said company having a capital stock of 100,000 shares; also the easements pertaining to said water system, all buildings, structures, tools, and personal property used in connection therewith, and all lands, rights, franchises and property which the Development Company should thereafter acquire. This mortgage, or deed of trust, was made in 1900. The suit was begun on December 13, 1909. Whether or not the proposed water system had been completed, or how far it has been constructed, does not appear, except by inference. Nothing is said as to the value of this property, or any part thereof, nor as to the extent of the canal.

The only facts tending to show the danger of material injury were those stated in the affidavit of Lyon. From this it appears that somewhere on the Development Company's canal there is a place called "Sharp's Heading," that the "structures" at that heading "are wooden and are old and weak, and that there is imminent danger that said structures may be washed out at any time," unless the same are further protected, that "the only way for the protection of said canal and water system" is to put in new and permanent structures and collateral works, all of which would cost more than \$250,000. The affidavit then proceeds as follows: "That said structures at Sharp's Heading are the only suitable place for the handling or putting of the water of said canal into said irrigation system; that, if the same be washed out and destroyed, the irrigation system of said California Development Company would be in a condition that it would be useless, and that water could not be supplied to the Imperial Valley for many months because it would take several months to reconstruct the said structures; that there are other points in said system of irrigation works that are of temporary character of construction; that the same are in constant need of repair; that through flood or other natural causes the same are liable to displacement and destruction, and the effect thereof would deprive irrigators of water and residents of domestic water and materially injure the property;

that the only way for the protection of said canal and water system is the construction of permanent and new structures costing, with all collaterals, over \$500,000."

This shows that the new structures required to make the system secure against washouts would cost \$500,000. But it does not state the value of the existing structures, nor the value of the entire system, nor the value of the other property covered by the mortgage, nor how much that value would be reduced if the apprehended washouts and injuries actually occurred. The injuries from washouts would doubtless be substantial both in value and in character. But neither the extent, the present condition, nor the values of the remaining portions of a system of irrigation works which is probably larger than any other in the state, or of the property of the Mexican company, appears, and it may well be that, even with the injuries accomplished, the property remaining will far exceed the amount due on the bonds, and will constitute abundant security for the payment thereof. If so, there would be no necessity for the appointment of a receiver to incur additional expense to keep the system in operation. The water users would be interested in having that done for their protection, but the bondholders, being otherwise fully secured, would have no interest sufficient to justify such action. The decision of such matters is very largely within the discretion of the lower court. This court should be slow to interfere, with an exercise thereof. But where the showing of apprehended injury fails to make it appear that the mortgagee's or bondholders' interests and security will be jeopardized, it is a clear abuse of discretion to make such an order.

[4, 5] 2. Before the order appointing the receiver was made, the plaintiff, under the direction of the court, procured and filed an undertaking of the United States Fidelity & Guaranty Company in the sum of \$3,000, in form as provided in section 566 of the Code of Civil Procedure. This undertaking was dated December 13, 1909. It was signed by Catesby C. Thom as attorney in fact for the Guaranty Company, and it was acknowledged by him, as such, on that day in Los Angeles county, and was filed on the same day in Imperial county. At the time it was so signed, the amount of the obligation was not inserted therein. Before it was filed the words "three thousand dollars" were inserted in the appropriate place by a person authorized by said Thom to do so, the same being made at the courthouse in Imperial county, in the absence of said Thom. The person who wrote these words presented to the court written evidence of his authority to do so, and thereupon the undertaking was accepted and approved by the court and the order was made appointing the receiver.

These facts do not invalidate the undertaking. We have not before us the power of

attorney whereby Thom was made the attorney in fact of the Guaranty Company, nor the instrument purporting to authorize the other person, in his absence, to write in the amount. Both were sufficient to satisfy the court below of the validity of the undertaking. As error is not presumed, but must be affirmatively shown in order to warrant a reversal of the action of the lower tribunal and no such showing is made, the conclusion of the court on these points must stand. It is legally possible that Thom was empowered by the Guaranty Company to substitute another person as agent to write in the words aforesaid, and, in the absence of any showing to the contrary, it is to be presumed that the evidence presented to the court below established this authority.

[6] The undertaking was that the said surety "does hereby undertake and promise to and with the defendant, California Development Company," that plaintiff would "pay to said defendant all damages it may sustain," etc. It did not purport to run to or in favor of any other defendant. Section 566, Code of Civil Procedure, provides as follows: "If a receiver is appointed upon an *ex parte* application, the court, before making the order, must require from the applicant an undertaking, with sufficient sureties, in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause; and the court may, in its discretion, at any time after said appointment, require an additional undertaking." The purpose of this clause was to provide security to each defendant for the recovery of any damages he might suffer from the appointment of a receiver procured wrongfully, maliciously, or without sufficient cause. The undertaking should therefore be in such form that any defendant would have a right of action thereon if he is damaged by the appointment. Consequently the approval of the undertaking running to the California Development Company alone was irregular, and the effect is that the appointment, so far as the interests of the New Liverpool Salt Company are concerned, was improperly made.

[7] It appears that subsequently, on March 24, 1910, this defect in the undertaking was called to the attention of the court below, and that thereupon it ordered the plaintiff to procure and file a new undertaking in the same penal sum, running to all the defendants, ratifying and confirming the original undertaking, and providing that the liability on the undertaking last filed should relate back to and cover all damages caused by the appointment from the time it was made. This was immediately done. It is unnecessary to say whether or not this undertaking operated



to make the appointment of the receiver valid from the beginning. At all events it would operate to make it valid from the time of the filing of the second undertaking, and it would also cure any defects in the manner of the execution of the original undertaking.

[8] As the receivership is still pending in the court below and the receiver is, presumably, in charge of the property and operating it for the benefit of the other parties, it is proper to consider the effect of a reversal of the order appointing him when such reversal is upon the appeal of a single defendant. The New Liverpool Salt Company was not a necessary party to the action. The only interest it has, so far as the record shows, is its claim that it has some right or interest in the premises described in the deed of trust, which interest or right is subsequent and subordinate to the lien created by said deed. It is not claimed or suggested that it has either the possession or the right of possession of any of the said property. At the time the action was begun the California Development Company was in possession. A receiver to take charge and control of the property could, therefore, have been appointed without making the Salt Company a party to the action, or giving it any notice thereof. The result of the omission to do so would be that its rights or interests would not be bound for any costs or expenses occasioned by the appointment of the receiver or his proceedings thereunder. If, as appears to be understood, it is a holder of some of the bonds or of a subsequent incumbrance on a part of the property, it would have the right to have such incumbrance or bonds paid out of the proceeds of any foreclosure sale in preference to the costs and expenses occasioned by the receivership. The reversal of the order upon this appeal upon the grounds above mentioned will, therefore, not affect its validity as to the other parties to the action, or have any effect upon the proceedings other than as above stated. It will inure only to the benefit of the said Salt Company as its interests may appear.

The order is reversed, in so far as it affects the New Liverpool Salt Company, but not as to the other parties.

19 Cal. App. 622

PEOPLE'S WATER CO. v. LEWIS et al.  
(Civ. 946.)

(District Court of Appeal, Third District, California, Sept. 6, 1912.)

#### 1. APPEAL AND ERROR (§ 209\*)—SCOPE OF REVIEW—QUESTIONS NOT RAISED AT TRIAL.

Where, in ejectment, defendant did not object at the trial to any alleged infirmity in the proof of plaintiff's legal record title, defendant could not object on appeal that there was no proof that the railroad company under which plaintiff claimed the land which was

part of a railroad grant had complied with the terms of the grant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1290-1300, 1302½, 1303; Dec. Dig. § 209.\*]

#### 2. PUBLIC LANDS (§ 114\*)—PATENT—PRIMA FACIE CASE.

Where, in ejectment, plaintiff introduced proof of a conveyance of the land in controversy from a railroad company to which the land had been granted by an act of Congress, the patent constituted prima facie evidence that the railroad company had performed all the conditions of the grant so as to entitle it to a patent; the burden of proving the contrary being on defendant.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 314-322; Dec. Dig. § 114.\*]

#### 3. PUBLIC LANDS (§ 116\*)—RAILROAD LANDS—LAND GRANT—PATENT—EJECTMENT.

Where agricultural land was granted by the United States government to the Central Pacific Railroad Company, and, after the filing of the location of the road, was patented to it without reservation, the patent was a conclusive determination by the government that the land was subject to the grant and that the conditions had been complied with, unless it appeared that the patent was absolutely void on its face on the ground that it was issued without authority, was prohibited by statute, or that the land had been reserved from sale, or dedicated to a special purpose, etc.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 323, 325-328; Dec. Dig. § 116.\*]

#### 4. EJECTMENT (§ 86\*)—LEGAL TITLE—POSSESSION—PRESUMPTION.

Where plaintiff in ejectment established the legal title to property it would be presumed that he had possession of the land within the time required by law, and that defendant's occupancy was in subordination to plaintiff's legal title, which presumption could be overturned only by sufficient evidence that defendant held the property adversely for five years prior to the commencement of the action, provided by Code Civ. Proc. § 321.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 238-245; Dec. Dig. § 86.\*]

#### 5. ADVERSE POSSESSION (§ 86\*)—PAYMENT OF TAXES.

Where defendant in ejectment claimed land adversely and testified that he attempted to have the land assessed for taxes to him but failed and it appeared that he had neither paid nor tendered the taxes assessed on the land for the required five years he did not acquire title by adverse possession under the statute, providing that in no case shall adverse possession be considered established, unless it is shown that the claimant or his predecessors paid all the taxes levied and assessed on the land.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 504; Dec. Dig. § 86.\*]

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action by the People's Water Company against John Doe Lewis (Edward William Lues) and others. From a judgment for plaintiff, defendant Edward William Lues appeals. Affirmed.

P. M. Bruner, of Oakland, and F. W. Taft, of San Francisco, for appellant. Tom M. Bradley and Harry E. Leach, both of Oakland, for respondent.



BURNETT, J. The facts of this case are few and simple, and the law involved therein is plain and well settled. The complaint in ejectment was in the usual form. The answer denied to plaintiff ownership of any part of the property or any interest therein, admitted possession by appellant, set up title by prescription, and pleaded the statute of limitations. The appeal is from the judgment in favor of plaintiff.

At the trial, without objection, contest, or contradiction, the legal record title was shown to be in respondent. By mesne conveyances it was connected directly with a United States patent, embracing the land in controversy, issued December 21, 1901, to the Central Pacific Railroad Company. The only claim made by appellant in the court below was that he had acquired title by adverse possession.

[1] In this court there is an additional contention that there was an infirmity in the proof of the legal record title, inasmuch as it was not shown that the said railroad company had complied with the terms prescribed by the act of Congress as the condition upon which the land should be granted by the government. It would be singular, indeed if a litigant were permitted to keep his lips closed in the trial court and to speak loud enough to be heard in the appellate tribunal, and to maintain such an attack upon a patent issued with all the formalities of law. These solemn instruments of conveyance are surely entitled to greater consideration than is implied by appellant's argument.

[2] Even if the objection had been made at the trial, manifestly the patent would be at least prima facie evidence of the facts therein recited, and, if said recitals could be controverted at all in such proceeding as this, the law would impose the burden of proof upon the one assailing the integrity of the instrument.

[3] The effect of a patent to land issued by the government is fully discussed in *Standard Quicksilver Co. v. Habishaw*, 132 Cal. 115, 64 Pac. 113, and it is probably sufficient to refer to that case with the authorities therein cited. The aptness of the following quotation, therein made from *Gale v. Best*, 78 Cal. 235, 20 Pac. 550, 12 Am. St. Rep. 44, can hardly be disputed: "The rule is well settled by numerous decisions of the Supreme Court of the United States that, when a law of Congress provides for the disposal and patenting of certain public lands upon the ascertainment of certain facts, the proper officers of the Land Department of the general government have jurisdiction to inquire into and determine those facts, that the issuance of a patent is an official declaration that such facts have been found in favor of the patentee, and that in such a case the patent is conclusive in a court of law, and cannot be attacked collaterally."

\* \* \* Our opinion is that where a patent

issues for public land, under a law which provides for its disposal as agricultural land—either to a railroad company, or to pre-emption or homestead claimants—and there is no reservation in the law except a general one of mineral lands, and no reservation at all in the patent, then the patent must be considered as a conclusive determination by the government that the land is agricultural; and afterwards, in an action in a court of law, it is not competent to reopen the question of the character of the land." Of course, as pointed out in the *Habishaw* Case, there is a well-known exception to the foregoing doctrine recognized by the decisions where the department has no jurisdiction to dispose of the lands—"that is, if a patent be absolutely void upon its face, or were issued without authority or were prohibited by statute, or if the lands had been reserved from sale, or dedicated to special purposes, the patent may be collaterally impeached; that is, it may be shown by anyone to be void." It is clear that there is nothing disclosed here to bring the case within the exception, even if the point had been made in the court below. The fact is that it is made manifest by the recitals of the patent that the title to the property vested in the railroad company in 1870 as in that year the demands of the grant by the act of Congress had been fully met. It is said in *Southern Pac. R. R. Co. v. Whitaker*, 109 Cal. 272, 41 Pac. 1084, "that the grant to the railroad company was a grant in present, and operated to vest in the grantee a perfect title to the granted lands, when the map of the definite location of the road was filed in the office of the Commissioner of the General Land Office is no longer an open question. It has been so held by numerous decisions rendered in similar cases by the Supreme Court of the United States and by this court. And thereafter the grantee could have maintained an action for the possession of any such lands, without waiting for the issuance of a patent therefor. *Curtner v. United States*, 149 U. S. 675 [12 Sup. Ct. 985, 1041, 37 L. Ed. 890], and cases cited; *Forrester v. Scott*, 92 Cal. 402 [28 Pac. 575]; *Jatunn v. Smith*, 95 Cal. 154 [30 Pac. 200]."

[4] After proving as aforesaid the record legal title, plaintiff introduced evidence showing that the property was assessed from the year 1898 to 1910, inclusive, and then rested. From a judicial standpoint, then, this situation was presented: Plaintiff, having established a legal title to the property, is presumed to have been possessed thereof within the time required by law and the occupation of the property by defendant to have been under and in subordination to the legal title, and this presumption can only be overcome by sufficient evidence on the part of appellant that he had held and possessed the property adversely to such legal title for five years before the commence-

ment of the action. Section 321, Code Civ. Proc.; *Ross v. Evans*, 65 Cal. 440, 4 Pac. 443; *McNoble v. Justiniano*, 70 Cal. 395, 11 Pac. 742; *Southern Pacific Railroad Co. v. Whitaker*, supra; *Standard Quicksilver Co. v. Habishaw*, supra. The elements that constitute this "adverse" holding are quite familiar and need not be re-stated. Sec. 325, Code Civ. Proc.; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100.

As to these, it may be said that it would at least be a fair inference that appellant's occupancy was not under a claim of right in view of his testimony that "I went to the assessor's office, Henry Jones, and told him I was living on the land and I would like to have the land assessed to me, and he asked me if I had title to the land and I told him no, and he said he could not assess it to me then." It is no doubt true that the "acts and declarations of the party respecting his claim at any time while in possession before commencement of the action, whether within or after five years after the commencement of his possession would be admissible as tending to show the character in which he claimed during the whole time," and whether the possession is adverse must be determined from all the evidence in the case. *Cannon v. Stockton*, 36 Cal. 535, 95 Am. Dec. 205.

[5] This feature of the case, however, may be passed without further comment, as it is plain that the lower court was entirely justified in concluding that appellant had utterly failed to satisfy the requirement of the Code "that in no case shall adverse possession be considered established under the provisions of any section or sections of this Code unless it shall be shown \* \* \* and the party or persons, their predecessors and grantors, have paid all the taxes, state, county or municipal, which have been levied and assessed upon the land." Appellant testified: "I have known the lands for about 12 years. They were not occupied by an person when I first became acquainted with them, and I then settled upon them. I went to the land office and tried to file on it and they would not let me file on it. I went twice to file on it, and they would not let me file on them." He detailed also the improvements that he made on the land, and in the cross-examination the following questions and answers appear: "Did you ever pay any taxes on it? A. There was none assessed against me to pay on it. Q. Did you ever pay any taxes on it? A. There was none assessed on it to me, I couldn't pay it. Q. Did you ever pay any taxes? A. Not on the land I didn't." It is thus to be seen that appellant, in one vital respect, has fallen short of establishing his title by prescription. He attempts to excuse his failure on the ground that he was prevented from making the required payment. This explanation is sought to be shown by an affirmative answer to the

leading question of his counsel: "I understood you to say that you had offered to pay all taxes that were assessed?" But it does not appear in any manner when or to whom this offer was made or whether it was ever repeated. The witness probably referred to the occasion aforesaid when he requested that the property be assessed to him. No case has been cited, and it is believed none could be found in which it has been held that, under similar circumstances, there has been a compliance with the plain provision of the statute.

The decisions upon which appellant relies can afford him no comfort, and in their facts are so unlike this as to be hardly instructive. As pointed out by respondent, the sentence quoted by appellant from *McNoble v. Justiniano*, 70 Cal. 395, 11 Pac. 742, relates to a supposititious case different from the one before us. As to that, even, the Supreme Court ventured only the tentative suggestion that a different question "might" have been presented. It is hardly necessary to add that a legal doctrine cannot be safely anchored to a "perhaps" or "might have been." But the statement which seems to afford to appellant some satisfaction is preceded by the declaration of the necessity for the payment of the taxes by the defendant, and it was held that he was not relieved of the duty by reason of the fact that the property was assessed to others in with a larger tract, it being said that: "Under the circumstances the defendant was not relieved of the consequence of a failure to pay the taxes by the fact (if such be the fact) that after the assessment was made he could not pay the taxes on the land of which he claimed the possession without paying those assessed on the larger tract including such land."

In *Cavanaugh v. Jackson*, 99 Cal. 672, 34 Pac. 509, the claimant had paid the taxes as required by the statute, and the vital question was as to whether the payment by the owner of the record title rendered ineffective the payment by the defendant who claimed title by prescription, and the court held that "The fact that the owner of the land has also had the land assessed to him during the five-year period, and has paid the taxes levied thereon, does not affect the rights of the adverse possessor, who has continuously paid or tendered the taxes assessed to himself, regardless of the time or priority of payment of taxes by them respectively." In *Owsley v. Matson*, 156 Cal. 401, 104 Pac. 983, the taxes were also paid by the claimant for the term prescribed by the statute. The principal question involved grew out of the circumstances that there was a redemption of the property by the adverse possessor and also a double assessment of the property. It was rightly held by the Supreme Court that: "Where a tax on the land adversely possessed is allowed to become delinquent



and a sale has taken place, and, so far as appears, a redemption has been made thereof in good faith by the adverse possessor or his successor in interest while in undisturbed possession, such redemption operates as a payment of the tax, within the terms of the statute requiring the adverse possessor to pay the taxes upon the property claimed." As to the other question, the McNoble Case was followed in holding that it was immaterial that the land was also assessed to the owner of the record title and the taxes paid by him. In *Glowner v. De Alvarez*, 10 Cal. App. 194, 101 Pac. 432, the decision was against the adverse claimant for the reason that he had paid the taxes for only four years, and the levy for the fifth year was paid by the owner of the record title. Therein it was said that "title by adverse possession cannot be established by merely showing that the land has been occupied and claimed for five years continuously, when all taxes assessed against the property are paid by the possessor for four years only, and the taxes for the fifth year have been paid by the owner, though assessed against the possessor." It was properly held that the assessment for taxation is of the property, and not against the owner or possessor, and that "the adverse possessor must be as vigilant to pay all taxes assessed against the property as in holding the possession of the land, and, if he fails by reason of the payment of one tax by the owner before his title has accrued, he fails entirely."

In consonance with the plain terms of the law, there is no doubt that for five consecutive years the claimant must pay all the taxes assessed against the property or at least tender such payment during the same period.

To so hold is to affirm the judgment of the lower court, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

19 Cal. App. 600

MOORE v. WILLIAMS, County Auditor.  
(Civ. 1,021.)

{District Court of Appeal, Third District, California. Sept. 5, 1912. Rehearing Denied by Supreme Court Nov. 4, 1912.)

**1. INFANTS (§ 12\*)—DEPENDENCY—DELINQUENCY—APPLICATION OF STATUTE—PERSONS UNDER 21 YEARS OF AGE—"MINORS."**

The fact that Civ. Code, §§ 25, 27, defines minors as males under 21 and females under 18 years of age, did not deprive the Legislature of the right to pass Juvenile Court Law (St. 1911, p. 658), declaring that various acts shall constitute dependency and delinquency, and shall apply to all persons under 21, whether male or female.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 13; Dec. Dig. § 12.\*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4527, 4528.]

**2. CONSTITUTIONAL LAW (§ 48\*)—CONSTITUTIONAL PROVISIONS—VIOLATION.**

Before an act will be declared unconstitutional, it must be made clearly apparent that the act is violative of some provision of the Constitution and inconsistent therewith, since, if there is a reasonable doubt as to the validity of the act, its constitutionality must be upheld.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 46; Dec. Dig. § 48.\*]

**3. STATUTES (§ 109\*)—TITLE—SUBJECTS.**

Const. art. 4, § 24, providing that every act shall embrace but one subject which shall be expressed in its title, was designed mainly to prevent Legislatures and the public from being entrapped by misleading titles to bills, whereby legislation relating to one subject might be obtained under the title relating to another, so that, where the provisions of the act are generally germane to the title, it will not be held violative of such provision.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 136-139; Dec. Dig. § 109.\*]

**4. STATUTES (§ 111\*)—TITLE—JUVENILE COURT LAW.**

Juvenile Court Law (St. 1911, p. 658), entitled "An act to amend an act entitled 'An act concerning dependent and delinquent minor children, providing for their care, custody and maintenance until 21 years of age,' etc., and providing in the body of the act for jurisdiction over delinquent and dependent females until they arrive at the age of 21, or are married with the consent of the court, was not unconstitutional as containing matter not within the subject in violation of Const. art. 4, § 24, in that the title refers to all persons sought to be included in the act as minors, while females are declared, by Civ. Code, §§ 25, 27, to become adults at the age of 18 years.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 140; Dec. Dig. § 111.\*]

**5. STATUTES (§ 105\*)—TITLE.**

The title of an act is no essential part of it, and but for Const. art. 4, § 24, declaring that every act shall embrace but one subject which shall be expressed in its title, no title would be necessary.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 117, 118; Dec. Dig. § 105.\*]

**6. STATUTES (§ 78\*)—SPECIAL LEGISLATION.**

The Legislature having absolute power to classify persons by their age for the purpose of dealing with them as dependent or delinquent persons within a regulatory statute, Juvenile Court Law (St. 1911, p. 658) was not violative of Const. art. 4, § 24, as special legislation, in that there was no natural, intrinsic, or constitutional distinction justifying the classification by making such act applicable only to persons under 21 years of age.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 83; Dec. Dig. § 78.\*]

Application for a writ of mandate by Mrs. J. H. Moore against L. P. Williams, as county auditor of Sacramento county. Writ granted.

W. H. Devlin, of Sacramento, for petitioner. R. Platnauer, of Sacramento, for respondent.

CHIPMAN, P. J. Mandamus. The petition shows that plaintiff is and at all times herein mentioned she was the duly appointed and acting assistant probation officer of the county of Sacramento, with a salary fixed by law at \$100 per month, as provided by sec-



tion 10f of the act of the Legislature approved April 5, 1911 (Stats. 1911, p. 658); that, by reason of the provisions of said act, she was entitled to receive a warrant from defendant on the 1st day of July, 1912, for the sum of \$100 for her services as such officer for and during the month of June, 1912; that the county of Sacramento is a county of the sixth class, as provided in said act; that defendant is the duly qualified and acting auditor of said county and as such it is his duty, on the 1st of each month, to issue a warrant, drawn on the county treasurer of said county, to each person holding an office therein in payment of his or her salary as fixed by law; that on July 1, 1912, plaintiff demanded of defendant a warrant for said sum in payment of her said salary for June, but defendant refused to issue the same on the ground that said act is unconstitutional and furnishes no authority to comply with said demand; that there are funds in the treasury of said county available for the payment of said warrant to which plaintiff is entitled.

The constitutionality of the act referred to is raised by a general demurrer to the petition and is challenged on two grounds: First. The subject-matter thereof is not expressed in its title, as required by section 24, article 4, of the Constitution. Second. The act, in so far as it creates a class amenable to its provisions, namely, persons under the age of 21 years, is special legislation, and is in contravention of section 25 of article 4 of the Constitution. Third. It is also contended that the provisions of the act creating the office of assistant probation officer and fixing the salary of such office cannot stand, if the provisions relating to "delinquent and dependent persons" are unconstitutional.

1. The "Juvenile Court Law," as it is designated by the act of 1911, is in all its essential features, and in respect of its principal objects and purposes, substantially the same as the act of 1909 (Stats. 1909, p. 213), of which it is a re-enactment, except in this particular, namely, section 1 of the act of 1909 provides that it "shall apply to children under the age of eighteen years" while section 1 of the act of 1911 provides that the act "shall apply only to persons under the age of twenty-one years." In section 1 of the act of 1909 it is provided that: "For the purposes of this act, the words 'dependent child' shall mean any person under the age of eighteen years," who is found doing certain enumerated acts or who is in a certain defined condition, set forth in sixteen different subdivisions of the section; and, by the same section, it is provided that, "The words 'delinquent child' shall include any person under the age of eighteen years," who violates any law of the state or ordinance of any city, county or town, defining crime. The act of 1911 contains some amendments of the act of 1909, increasing the number of

assistant probation officers in some counties, changing the salaries of officers, leaving some unchanged and adding some counties to the list of counties classified in respect of the number of officers and their salaries; but, in its general scope, in its scheme, and in the provisions of the various sections for the betterment of the class of persons sought to be dealt with and to promote the general welfare, the act of 1911, in no essential respect, which can in the slightest degree affect its constitutionality, differs from that of 1909, except in the one particular above pointed out. And in this particular the only objection made is that the act embraces females over 18 years and under 21 years, whereas the title of the act, as is claimed, refers only to "minor children." The argument is that these terms must necessarily mean minors as defined by the Civil Code; that is, males under 21 and females under 18 years of age (Civ. Code, §§ 25, 27), and hence follows the violation insisted upon.

The title of the act of 1909 is repeated in the title of the act of 1911, which latter is as follows: "An act to amend an act entitled 'An act concerning dependent and delinquent minor children, providing for their care, custody and maintenance until twenty-one years of age; providing for their commitment to the Whittier State School and the Preston State School of Industry, and the manner of such commitment and release therefrom, establishing a probation committee and probation officers to deal with such children, and fixing the salaries of probation officers; providing for detention homes for said children; providing for the punishment of persons responsible for, or contributing to, the dependency or delinquency of children; and giving to the superior court jurisdiction of such offenses, and repealing inconsistent acts,' approved March 8, 1909." The act of 1909 has been before the appellate courts of the state in the following cases: *Nicholl v. Koster*, 157 Cal. 416, 108 Pac. 302; *In re Sing*, 13 Cal. App. 736, 110 Pac. 693; *In re Sing*, 14 Cal. App. 512, 112 Pac. 582; *In re Magennis*, 43 Cal. Dec. 187, 121 Pac. 723. The principal question now presented, however, did not arise in any case, so far as we have discovered. But the purposes and objects aimed at by the act were before the courts and were clearly stated. These juvenile courts, which are in fact but an extension of the jurisdiction of the superior courts, are the creation of modern philanthropic endeavor and are designed to and in fact do provide a most excellent means of restraining and reforming wayward persons who, unchecked, may become a menace to society. Mr. Justice Shaw, in *Nicholl v. Koster*, 157 Cal. 416, 110 Pac. 693, said: "The main purpose of the act is to provide for the care and custody of children who have shown, or who from lack of care are likely to develop, criminal tendencies, in order to have them trained to good habits and

correct principles. To accomplish this, it gives additional jurisdiction and power to the superior courts of the state and provides officers necessary for the execution of that jurisdiction and power. It is an exercise of the police power of the state, through the judicial department. It is a matter which concerns the whole state as much as any other exercise of the judicial system. These have been held to be matters of state policy." All this is equally true of the act of 1911 in so far as it applies to males under the age of 21 years, and in so far also as it applies to females under the age of 18, for they are minors, as above defined, and it is conceded that if the act of 1911 had been limited to the sexes of these ages, respectively, the act would have been valid.

[1] Putting aside for the moment the statutory definition of minority, we do not doubt the power of the Legislature, as we shall endeavor to show further along, to make the provisions found in this act equally applicable to males and females under the age of 21 years, for, when we come to consider what the act declares shall constitute "dependency" and "delinquency," it will be seen that the sex of the person or, for that matter, the age, is a negligible quantity. Briefly, as appears by section 1, in case of a "dependent person," he is any person (1-2) found begging; (3) or is a vagrant; (4) or is found wandering without any settled abode or any proper guardianship; (5) or who has no parent or guardian, or none capable or willing to exercise parental control; (6) or who is destitute; (7) or whose home, by reason of neglect, cruelty or depravity of his parents or guardian, or person having care of him, is an unfit place; (8) or who frequents the company of reputed criminals, vagrants or prostitutes; (9) or who is found living in a house of prostitution; (10) or who visits, habitually, saloons without parent or guardian; (11) or who persistently refuses to obey the reasonable orders of parents or guardian; (12) or who is incorrigible—that is, beyond the control of parent or guardian by reason of the vicious conduct or nature of such person; (13) or whose father is dead or has abandoned his family or is a habitual drunkard or such person is destitute and without a suitable home or means of making an honest living, or is in danger of leading a dissolute and immoral life; (14) or is an habitual truant, within the meaning of a certain designated law; (15) or who habitually uses intoxicating liquor as a beverage, or habitually smokes cigarettes or habitually uses opium, cocaine, morphine or other drug without the direction of a physician; (16) or who from any cause is in danger of growing up to lead an idle, dissolute or immoral life. In the case of a "delinquent person," he is any one who violates any law of the state, or ordinance of any city, town, or county defining crime.

These provisions of the law are mentioned at this point to show that sex has little to do with the purpose of the act and that they are equally applicable to males and females of like age.

It seems to us that the general aim and purpose of the legislation must be kept in view when we approach the precise question now under discussion on which the defendant relies. It is important to remember that this aim and purpose were the same in both acts with the single exception that the class of persons on whom the law was to operate was slightly enlarged.

Section 24, art. 4, of the Constitution, is as follows: "Every act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be referred to in its title, such act shall be void only as to so much thereof as shall not be expressed in its title."

[2, 3] Before the courts will declare an act unconstitutional, it must be made clearly apparent that the act is violative of some provision of the Constitution and inconsistent with it. If there is a reasonable doubt as to the validity of the act, its constitutionality must be upheld. *Deyoe v. Superior Court*, 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73. This provision of the Constitution has had frequent examination by our Supreme Court. In the recent case of *In re Maginnis*, 121 Pac. 723, Mr. Justice Sloss quoted from *Abeel v. Clark*, 84 Cal. 226, 24 Pac. 383, as follows: "The constitutional provisions with respect to titles of acts were designed mainly to prevent Legislatures and the public from being entrapped by misleading titles to bills whereby legislation relating to one subject might be obtained under the title to another." The importance of the question justifies our referring to its more elaborate treatment in *Ex parte Liddell*, 93 Cal. 633, 29 Pac. 251. The act in that case was entitled: "An act to establish a state reform school for juvenile offenders, and to make appropriation therefor." We quote: "The object of the provision is to prevent legislative abuse—to prevent the passage of acts bearing deceitful and misleading titles. It is intended to protect the members of the Legislature, as well as the public, against fraud; to guard against the passage of bills the titles of which give no intimation to the members of the Legislature or to the people of the matters contained therein. \* \* \* In *Abeel v. Clark*, 84 Cal. 229 [24 Pac. 383], we held it was not necessary that the title of the act should embrace an abstract of its contents. The cases cited therein show that such is the view taken by the courts of other states; and, on reflection, it must appear that this conclusion is based upon the soundest principles of constitutional construction. It certainly was not intended that the title should be a repetition of the provisions found in the



body of the bill. The object was to prevent deception by the inclusion of matters incongruous with the subject specified in the title. If the title contains a reasonable intimation of the matters under legislative consideration, the public cannot complain. It has always been the custom to state the subject of a bill in general terms and with the fewest words, and the framers of the Constitution doubtless intended the Legislature to conform to that custom. [Citing cases.] Numerous provisions having one general object fairly indicated by the title may be united. When the general purpose of the act is declared, the details provided for the accomplishment of that purpose will be regarded as necessary incidents. \* \* \* The title of the act clearly shows what the Legislature intended to accomplish, and the provisions referred to simply conduce to that object. They are auxiliary to and promotive of the main purpose of the act, and have a 'necessary and natural connection' therewith. They are germane to the subject stated in the title of the act. There is no attempt to conceal the purpose or scope of the act; and no attempt in the act itself to blend diverse and independent subjects. It is admitted that the constitutional provision under consideration has always been given a liberal construction; and this must be so, because the Constitution itself does not define the degree of particularity with which a title shall specify the subject of a bill. The matter must therefore be left largely to legislative discretion. [Citing authorities.] While it is the duty of the court to place such a construction upon this constitutional provision as will prevent mischievous and vicious legislation, we should guard against such a rigorous interpretation of the language as will impale upon its sharp points the good with the bad." Mr. Black says: "It is sufficient if the title is comprehensive enough to reasonably include, as falling within the general subject, and as subordinate branches thereof, the several objects which the statute assumes to effect." Again: "But the courts in dealing with a question of this kind will not be solicitous to overthrow the statute. On the contrary, they will give the Legislature the benefit of every doubt, and will endeavor to so read the title and the act as to make the one adequate to express the subject of the other. \* \* \* Hypercriticism is utterly out of place, the only requirement being that the title of the statute shall express its object in a general way, so as to be intelligible to the ordinary reader"—citing cases. Black on Constitutional Law, p. 329. With these rules as a guide, let us look at the title and the body of the act, for both are to be consulted.

[4] The stress of defendant's argument is placed upon the use of the words "minor children," and the fact that only children "under the age of 18" are dealt with in the

act of 1909, i. e., minors. But the title expressly states that the act concerns "dependent and delinquent minor children, providing for their care, custody and maintenance until twenty-one years of age." And section 20 of both acts provides that the court "shall retain the jurisdiction of any person who is found delinquent until such person attains majority, or if a girl, until she attains the age of twenty-one years, unless she is married with the consent of the court, or until said court is satisfied that said person has fully reformed and that further direction and supervision under this act are unnecessary for said person's reformation." Similar provision is found in the act creating the Whittier State School. Act March 11, 1889 (St. 1889, p. 111), and amendatory acts. Amendment April 19, 1909 (St. 1909, p. 988) §§ 16, 16a. The act of 1909 clearly contemplated that, when the court had once obtained jurisdiction of a female, it could retain that jurisdiction beyond the period of minority, for, as we have endeavored to show, the chief object of dealing with delinquents was reformation. If jurisdiction could be thus retained of a female beyond the period of minority we can see no reason why, under the same title, the Legislature might not in the first instance give the court jurisdiction and extend it beyond the period of minority. The act shows by its title that it had for its subject the conferring upon the superior court new and important jurisdiction over new and important matters, to wit, the power to commit persons to certain reformatory institutions then in existence—the Whittier State School and the Preston State School of Industry, providing for detention homes for persons, establishing a probation committee and probation officers to deal with the persons affected by the act. It is true that the title mentioned dependent and delinquent minor children as one of the subjects of the act, but even this did not include all minor males, for the act of 1909 applied only to persons under the age of 18 years. We cannot see how members of the Legislature or ordinary readers could justify a claim that they were misled or hoodwinked into the belief that the title concerned only minors as defined by the Code, and, relying on this supposed fact, looked no further and offered no opposition. The title gave warning that these subjects of the act—minor children—including females, were to be cared for, taken into custody and maintained until 21 years of age. Thus the title was specific enough to notify all persons that it was proposed to exercise some sort of supervision over females until 21 years of age. But the title also embraced other important subjects which challenged notice and forbade the legislator from withholding his attention on the bare assumption that the proposed act related



only to minors as defined by the Code and hence need not interest him.

[5] The title to an act is no essential part of the act, and but for the constitutional provision would not be necessary at all. The Constitution makes it necessary to give the act a title, and it is for the purpose above shown. We are not to exalt the title to a dignity and importance beyond its purpose reasonably regarded. We are not permitted to select a single word in the title and ignore the remaining subjects in order to build up a theory on which to declare the act void, but we must look at the entire title to discover whether the Legislature or the public were entrapped by its misleading language, and were thus led to permit legislation to pass unchallenged which was incongruous with the subjects specified in the title. We think it may be safely said of the provisions of the act in question as was said of the state reform school act, in *Ex parte Liddell*, supra: "The title of the act clearly shows what the Legislature intended to accomplish, and the provisions referred to simply conduce to that object. They are auxiliary to and promotive of the main purpose of the act, and have a 'necessary and natural connection' therewith. They are germane to the subject stated in the title of the act. There is no attempt to conceal the purpose or scope of the act, and no attempt in the act itself to blend diverse and independent subjects." Plaintiff suggests that the word "minors," as used in the title, may be rejected as surplusage. This we are not permitted to do; but we are permitted to regard it in its relation to the other subjects of the title and to the general purpose and scope of the act, in order to determine whether it was misleading to such extent as to render the entire act void. We are authorized "to so read the title and the act as to make the one adequate to express the subject of the other," and to see whether "the title of the statute shall express its object in a general way, so as to be intelligible to the ordinary reader." *Black on Const. Law*, supra. Defendant, on the other hand, would read the title of an act of the Legislature as though it were a contract to be strictly construed regardless of the rules of construction applicable in ascertaining the force which must be given to this provision of the Constitution, and regardless of the purpose which commentators and the courts have uniformly held to be the object to be attained by it. We think the subject of the act is sufficiently expressed in its title to meet the requirements of the Constitution.

[6] 2. The objection that such a law is violative of section 25, art. 4, of the Constitution, as special legislation, is based on the assumption that there is no natural or intrinsic or constitutional distinction justifying such a classification. It is admitted that a classification based on the age of minor-

ity of the sexes would not violate the Constitution, as has been held, at least inferentially, in sustaining the act of 1909. But it cannot be doubted that the Legislature may enact that any person, male or female, under the age of 21 years, is a minor, and, if such were the law, it is conceded that this act could stand. It is illogical, therefore, to say that the Legislature can deal with a person as a delinquent or dependent who has been declared by the Legislature to be a minor of the age of 21 years, but cannot deal with a person of that age as a dependent or delinquent who has not been declared to be a minor. Such a position is wholly untenable for the reason that whether the person is or is not a legally declared minor is beside the question. The natural or intrinsic distinction which must characterize the classification in the case here is doubtless much the same as exists as the basis for classifying persons as minors. This distinction the Legislature has said, and its constitutionality is not doubted, exists as to females at the age of 18 and as to males at the age of 21. It is not necessary to explore the reason for this distinction or the reason for the difference in age between the sexes. Suffice it to say that there is not, physiologically or otherwise, a difference which would forbid our holding that a female may be dealt with as a dependent or delinquent under the age of 21 equally with a male. The road to ruin is as accessible to a female under the age of 21 as it is to a male. To accomplish the beneficent objects of the law, the state may properly reach out its saving hand to rescue males and females alike who are on the downward path. No sound reason can be suggested why the state may not do this to save a female under the age of 21 if it may do so to rescue and save a male of that age. There is no sound reason why a female of equal age with the male may not be declared to be a "delinquent" for violating a state law defining crime. A female at the age of 19 or 20 years cannot be said to differ much from the day she was 18, and at 18 she is about the same as she was the day before. It cannot be said that the Legislature, in fixing the maximum age at 21 at which it would deal with persons for "dependency" or "delinquency," was acting any more arbitrarily than in fixing the limit at 18. The period of majority for both male and female is a matter within the legislative discretion to determine. We can see no reason why the Legislature may not classify persons by their age for the purpose of dealing with them as dependent or delinquent persons within the provisions of a regulatory statute such as the juvenile court law.

The Legislature has placed the age of consent by the female at 16 years. She becomes an adult at 18. She cannot vote until she is 21. She may become a party to the

violation of her chastity at 16 and the sharer in her undoing escape punishment for what would have been a crime the day before she had reached that age. She may enter into contract at 18, but she cannot, by her vote, aid in making laws or in selecting officers to administer them until she is 21 years of age. It is idle to speculate as to the reasons for these distinctions. They are made and the power to make them is no longer disputed. It would be equally idle to speculate as to the reason impelling the Legislature to place delinquent and dependent females on the same footing with males and fixing the limit of age of both at 21 years.

Counsel for defendant has ably presented his points, and it must be admitted that his view has much force. We think, however, that it rests upon a too technical application of the rules of construction and overlooks the broader interpretation of those rules which should be resorted to in upholding laws admittedly of great public importance.

Inasmuch as we find no ground for holding the law to be unconstitutional it becomes unnecessary to consider defendant's third point. Clearly, the Legislature had the power to provide all the officers necessary for the due execution of the law. Ex parte Liddell, supra; Nicholl v. Koster, supra.

Let the writ issue.

We concur: HART, J.; BURNETT, J.

(19 Cal. App. 612)

TUBBS et al. v. DELILLO (KRAMER et al., Interveners).

TUBBS v. DELILLO. (Civ. 958, 954.)

(District Court of Appeal, Third District, California, Sept. 6, 1912. Rehearing Denied by Supreme Court Nov. 4, 1912.)

# 1. CONTRACTS (§ 312\*)—BUILDING CONTRACT—CONSTRUCTION—BREACH.

Where a building contract provided for payments as the work progressed, and that, if the owner delayed in making any payment for more than five days after it became due, such delay, at the contractor's option, should be deemed a prevention by the owner of the performance of the contract, and it appeared that at the time the fifth installment was demanded a considerable portion thereof, in addition to the amount paid thereon, was payable both on the contract and for extras, the owner's refusal to make further payment of such installments placed him in default, and entitled the contractor to recover the balance due for the work performed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1279½; Dec. Dig. § 312.\*]

# 2. CONTRACTS (§ 316\*)—BUILDING CONTRACT—BREACH BY OWNER—WAIVER.

Where a building contract was breached by the owner's refusal to make payments as provided for, the contractor's continuance of the work for a few days after the time for such payment expired was a mere favor to the owner, and did not waive the contractor's right

to treat the owner's failure to pay as a breach of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1382-1387, 1395, 1398-1400, 1480-1491; Dec. Dig. § 316.\*]

# 3. APPEAL AND ERROR (§ 1033\*)—FINDINGS—PREJUDICE.

Where a building contractor testified as to the value of various items of extras, all of which amounted to \$643, the owner was not prejudiced by a finding that they were only of the value of \$577.20, which was the sum allowed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.\*]

# 4. ARBITRATION AND AWARD (§ 10\*)—DEMAND FOR ARBITRATION—EFFECT.

Where a building contract provided that any dispute respecting the valuation of extra work done or work omitted should be referred to and decided by arbitrators, and, on the owner's breach of contract, the contractor made and repeated a written demand for arbitration, which was ignored, the arbitration provision was no objection to the contractor's right to sue.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 30½; Dec. Dig. § 10.\*]

# 5. WORK AND LABOR (§ 14\*)—EXPRESS CONTRACT—BREACH—AMOUNT RECOVERABLE.

On breach of a building contract by the owner, the contractor is entitled to recover the reasonable value of the work done and material furnished, without regard to the contract price.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 29-33; Dec. Dig. § 14.\*]

# 6. APPEAL AND ERROR (§ 1040\*)—RULING ON PLEADINGS—DEMURRER TO COMPLAINT.

An order overruling a demurrer to a building contractor's complaint against the owner for uncertainty, in that it was not averred whether the contract was written or oral, was without prejudice, where the contract was pleaded in the cross-complaint, and was received in evidence without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.\*]

# 7. CONTRACTS (§ 335\*)—BUILDING CONTRACT—ACTION—PLEADING.

In an action by a building contractor for work, labor, and materials seeking to recover against the owner only a personal judgment for the reasonable value thereof, independent of lien, the complaint was not defective for failure to allege that the materials furnished were actually used in the construction of the building, or that it had been completed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1664-1676; Dec. Dig. § 335.\*]

# 8. APPEAL AND ERROR (§ 187\*)—SCOPE OF REVIEW—QUESTIONS NOT RAISED AT TRIAL.

An alleged defect of parties could not be successfully urged on appeal when it was not presented to the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1184-1189; Dec. Dig. § 187.\*]

# 9. MECHANICS' LIENS (§ 273\*)—ENFORCEMENT—INTERVENTION.

A mechanics' lien may be enforced by complaint in intervention in a suit by the contractor against the owner, provided it is filed within the prescribed six months.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 525-528; Dec. Dig. § 273.\*]



Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by C. T. Tubbs and others against Rosario Delillo and J. Kramer and others, interveners. From a judgment for plaintiff for less than the relief demanded, he appeals, and defendant prosecutes a cross-appeal. Modified and affirmed.

W. C. Cavitt, of San Francisco, for appellant. Chas. M. Bufford, of San Francisco, and Dave Cosgrove, of Fresno, for respondent.

**BURNETT, J.** There are two appeals in this case, which, by stipulation, have been submitted on the same record and they will receive consideration in one opinion.

There is a sharp controversy as to some of the facts, but the following are undisputed and are probably sufficient for a general understanding of the case: On the 14th day of March, 1908, C. H. Tubbs and Rosario Delillo entered into a contract in writing, whereby Tubbs agreed to furnish all the labor and material (including tools, implements and appliances) necessary for the construction on a lot of land owned by Delillo in a workmanlike manner of a three-story frame dwelling house and to complete the construction of the same on or before the 11th day of July following, and Delillo promised to pay therefor the sum of \$5,000 in seven installments as follows: (1) When the foundation was in, \$350; (2) when the frame was up and the roof on, \$1,000; (3) when the plumbing was roughed in, \$500; (4) when the brown coat of mortar was on, \$500; (5) when the white coat of mortar was on, \$1,000; (6) when the building was completed, \$450; (7) thirty-five days after completion, \$1,200. Under said contract each installment was payable on the contractor's written statement showing that the necessary amount of work had been done and materials furnished to entitle him thereto. It was also agreed that, if Delillo delayed the making of any payment for more than five days after the same became due, such delay, at the contractor's option, was to be deemed a prevention by the owner of the performance of the contract. It was further provided that should the owner, at any time during the progress of the work, request any alterations or deviations in, additions to, or omissions from the contract or plans or specifications the contractor should be at liberty to make them and the same should in no way affect or make void the contract; but the amount thereof should be added to or deducted from, the amount of the contract price by a fair and reasonable valuation, and any dispute "respecting the valuation of extra work, work done or work omitted" should be referred to, and decided by, arbitrators. The work was not completed by the contractor, and one of the main points of controversy is whether his relinquishment of

further operations on the building should be charged to his default or to that of the owner, and this question invites consideration at the outset. The court found: "That commencing on the 18th day of March, 1908, pursuant to said covenants, specifications, and unwritten understanding, plaintiff Tubbs did excavate defendant's said lot, and did furnish suitable labor and materials, and with them did proceed with the construction of said building upon said lot in a good and workmanlike manner, and, except as the same were altered, as hereinafter set forth, in all respects in accordance with said plans, drawings, and specifications, and on or before the 28th day of May, 1908, had put in the foundation of said building, erected the frame thereof, put on the roof, roughed in the plumbing, and placed the brown and white coats of mortar thereon, and on the 8th day of June, 1908, was still proceeding as aforesaid with said work; that on the 28th day of May, 1908, plaintiff Tubbs did personally deliver to defendant a notice in writing, subscribed by him, and in words and figures as follows: 'San Francisco, Cal., May 28, 1908. Mr. R. Delillo, San Francisco, Cal.—Dear Sir: I hereby notify you that the white coat of plaster is now on your building at South Park and that your payment of \$1,000 is now due. \* \* \*' That at all times after the 28th day of May, 1908, plaintiff Tubbs was demanding of defendant the payment of the 5th installment of the contract price of their said contract, but defendant wholly failed to pay any other or greater sum than the sum of \$138.85 hereinbefore set forth, and denied that he owed plaintiff Tubbs anything whatsoever on said contract, or for extras, or for deviations, or otherwise." It is not disputed that the owner refused to make any further payment to Tubbs, and it must be said that the record contains evidence to justify the refusal. In view of the decision of the lower court, however, we must, of course, look diligently to find support for the inferences favorable to the contractor's position.

[1] Following this course and without setting out the figures, we reach the conclusion that at least a considerable portion of the said fifth installment, in addition to the said \$138.85, was payable at the time the demand therefor was made. The owner's refusal to make any further payment, in the purview of the contract, placed him in default and entitled the contractor to recover the balance due for the work performed.

[2] It would make no difference that the contractor continued to work a few days longer than he was required as this would be rather a favor to the owner.

As to this vital feature of the case, the dispute arises principally from the consideration of the claim of the contractor that he had furnished extras and made changes for which he was entitled to additional compensation. Herein is involved the inquiry



whether he was authorized to do this extra work, and, if so, whether he actually performed it, and when he was to be paid and how much, if anything, was due therefor. As we have seen from the contract, the extra work was to be done on the request of the owner. It is found by the court that certain deviations from the plans and specifications and certain additional work were requested by the owner and the contractor followed the request. These are specified in the findings, and the various items are assailed by the owner as unsupported. We deem it unnecessary to set out the evidence seriatim as to these various changes, but it is sufficient to say that the record does contain a substantial showing that all were done and made by the contractor on the request of the owner.

[3] As to the compensation for these extras, the contract provided that a fair and reasonable valuation should be allowed, and the court determined that in the aggregate they were worth the sum of \$577.20. There is a slight variance between the evidence for the contractor and the finding as to some of the items of these extras, but the contractor, in his testimony, enumerated the various improvements, giving the value of each, which, according to his estimate, amounted to the sum of \$643. As is apparent, this is in excess of the total sum allowed by the court, and the said inaccuracy as to some of the items is entirely without prejudice. The contract did not provide when payment should be due for the extra work, but the contractor testified that: "I stated to Mr. Delillo that it was customary generally to pay for extras when they were completed and that all the extras would have to be paid for; that I had taken the job close and that I couldn't afford to give him any extras. He said all right, he understood that." Including, then, the value of the extras that were completed prior to said May 28th, there was ground, as already stated, for the demand by the contractor for an additional payment.

[4] As to the provision in the contract in reference to arbitration, it may be said that a written demand in proper form was made by the contractor upon the owner for such arbitration, and it was afterward repeated, but it was entirely ignored by the latter.

[5] Reaching the conclusion, therefore, that it is a fair inference from the record that the contractor was justified in withdrawing from further prosecution of the work, the inquiry arises: How much was he entitled to recover? The court found "that the value estimated by the standard of the contract price of plaintiff Tubbs' contract with defendant, of the work and materials bestowed by plaintiff Tubbs in constructing said building, before he ceased work as aforesaid, including the value of unused materials then on the ground, but exclusive of the value of deviations, alterations, and extras done and

furnished by plaintiff Tubbs as aforesaid, was the sum of \$4,125," that the reasonable value of removing certain old lumber from the premises by the contractor was the sum of \$10, and that the value of said extras was the sum of \$577.20. The contractor was charged with various payments made to him by the owner amounting to the sum of \$2,988.85, with the payment by the owner to materialmen in the sum of \$300 and to workmen of \$112.35. The balance of the account as stated is \$1,311, and the court found that the contractor was entitled to a personal judgment for this amount against the owner, subject, however, to a deduction therefrom of the whole amount of certain liens of other parties that were sustained by the judgment. It may be said that the integrity of this account finds support in the record. It is contended, however, by the contractor that the court should have allowed him compensation for the reasonable value of the work done by him, independent of the contract price. This would be, in accordance with one of the findings, the sum of \$4,950, but, as the court credited him with only \$4,125 for the work, it would follow that the judgment in favor of the contractor should be increased by \$825, and should be rendered for \$2,136, instead of \$1,311. This is in keeping with the rule laid down in *Adams v. Burbank*, 103 Cal. 646, 37 Pac. 640, and many other decisions of various jurisdictions. In the *Adams Case* a landlord entered into a valid contract for the construction of a building upon his land, and, after the partial completion thereof, ousted the contractor and appropriated to his own use the materials already put upon the ground by said contractor. The court held that the contractor was entitled to treat the contract as rescinded, and to recover the reasonable value of the work performed and materials furnished at the request of the owner, and that he was not bound by the contract price agreed upon for the work, and was not limited in his recovery to the payments due on the contract at the time he was prevented from completing it.

In *Porter v. Arrowhead Reservoir Co.*, 100 Cal. 500, 35 Pac. 146, a contract for the construction of a wagon road called for payment in monthly installments, and, upon the failure of the owner to pay an installment when due, the contractor stopped work and sued the owner on a quantum meruit for the value of the work, already done. It was held that, in order to recover, it was necessary for the plaintiff only to show a substantial failure on the part of the owner to comply with the agreement, and in the opinion various cases cited in support of the position, among them being *Schwartz v. Saunders*, 46 Ill. 18, in which the owner failed to pay the contractor, in the erection of a building, an installment of the contract price, the Supreme Court of that state saying: "That he had a right to abandon the

work under the circumstances seems a proposition so plain as to require no argument." And the court concludes that: "A failure to pay an installment of the contract price as provided in the contract is a substantial breach of the contract, and gives the contractor the right to consider the contract at an end, cease work, and recover the value of the work already performed." In *McConnell v. Corona City Water Co.*, 149 Cal. 60, 85 Pac. 929, 8 L. R. A. (N. S.) 1171, the contractor undertook to run and timber a tunnel and the owner agreed to furnish all the timber needed for the purpose, but, after a partial completion of the work, the owner failed to furnish lumber for the balance, and, in discussing the situation of a contractor under such circumstances, the Supreme Court said: "One who has been injured by a breach of contract has an election to pursue any of three remedies. He may treat the contract as rescinded and may recover upon a quantum meruit so far as he has performed; or he may keep the contract alive, for the benefit of both parties, being at all times ready and able to perform; or, third, he may treat the repudiation as putting an end to the contract for all purposes of performance and sue for the benefits he would have realized if he had not been prevented from performing."

[6] As to the other points made by the owner, so far as deemed worthy of consideration, we are in accord with the views expressed by counsel for the contractor in their brief, and we may as well adopt substantially their method and reasoning. Whether right or wrong, the order overruling the demurrer to the complaint for uncertainty in that it was not averred whether the contract sued upon was written or oral was entirely without prejudice for the reason that the contract was pleaded in the cross-complaint and was received in evidence without objection as the basis of the contractor's demand.

[7] There was no specific allegation by the contractor that the material furnished by him was actually used in the construction of the building or that said building had been completed, but this is immaterial in view of the fact that no lien was allowed *Tubbs*. His complaint is manifestly sufficient on a quantum meruit, and authorized a personal judgment in his favor for the reasonable value of his services.

[8] The point that *Tubbs* was a necessary party defendant to certain lien claimants' action consolidated with this cannot be considered, since it was not raised in the court below.

[9] There seems no good reason why a mechanic's lien may not be foreclosed through the agency of a complaint in intervention. In *Mars v. McKay*, 14 Cal. 127, it was held that: "A suit to enforce a particular lien under the mechanic's lien act is a proceeding to enforce all the liens against the

property. And an intervention in a suit already pending, if filed within the six months, is as much a compliance with the act as an original suit." It was said by the court that the "interveners having filed their intervention and become parties to the suit within the prescribed period of six months, and during the existence of their lien, the effect of their position is precisely the same as if they had commenced an original action." The foregoing quotation from the *Mars* Case suggests the answer to the owner's contention that the complaints in intervention relate to the date of the commencement of the original action and since the original action was begun before the interveners filed their notices the complaints in intervention are affected by this infirmity and must be held to have been prematurely filed. The logic of this contention would virtually preclude intervention at all in such suits. But, as stated in the *Mars* Case, the position of the interveners is the same as though they had brought a new action, and the situation must be viewed in the light of the facts existing at the time the complaint in intervention was filed.

As stated by the contractor, the cases cited by the owner in reference to this point relate to an entirely different situation involving an amended or supplemental complaint. It is undoubtedly true that, where a complaint is filed and an action begun before the cause of action attempted to be stated has accrued, the plaintiff in that action cannot cure the defect by filing an amended complaint. The status must be determined as of the date of the beginning of the action. If, however, an amended complaint sets up an entirely different cause of action, to that extent it would be analogous to a complaint in intervention. This is illustrated by the case of *Anderson v. Mayers*, 50 Cal. 525, wherein it is held that: "If a complaint on a judgment is amended so as to state a cause of action on a promissory note, the action on the note is not commenced until the amended complaint is filed, and the statute of limitations on this note commences running at the time last mentioned."

So in *Atkinson v. O. & S. Canal Co.*, 53 Cal. 102, it was held that, where the action was trespass and an amended complaint was filed for the purpose of including a parcel of land inadvertently omitted from the original complaint, the filing of the original complaint did not stop the statute of limitations from running against the trespass upon the omitted parcel. So likewise a complaint in intervention sets up a new cause of action, and admittedly also in favor of a third party, and the doctrine of relation does not apply. To determine, therefore, whether the action has been brought prematurely or whether the statute of limitations has run against it we must look to the date of the filing of the complaint in intervention and



not of the filing of the original complaint. As we view the whole case, therefore, the evidence supports the findings, and they, in turn, authorize the judgment with the additional award of \$825 to the contractor. According to the allegations of his complaint, he was entitled to the sum of \$1,888.95 only. As it was not amended in that respect, the relief accorded to him should not exceed that amount.

The judgment is modified, by increasing the amount of the personal judgment in favor of the contractor, Tubbs, to \$1,888.95, and, as thus modified, it is affirmed, respondent to recover costs in case No. 958, and each party to pay his own costs in case No. 954.

We concur: CHIPMAN, P. J.; HART, J.

(19 Cal. App. 634)

HAYES v. WESTERN FUEL CO. (Civ. 937.)  
(District Court of Appeal, Third District, California. Sept. 7, 1912.)

1. MASTER AND SERVANT (§ 120\*)—INJURY TO SERVANT—APPLIANCES—MASTER'S DUTY TO PROVIDE.

Plaintiff, a stevedore, while unloading a coal hatch, was injured by the overturning of a bucket and the emptying of the contents thereof back into the hold on plaintiff, due to the defective condition of the bucket, causing the latch to become loosened and the bucket to overturn in mid-air. *Held*, that plaintiff was injured by defendant's failure to furnish reasonably safe appliances and to exercise reasonable care to keep the appliances furnished in reasonably safe condition, which failure constituted actionable negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 211; Dec. Dig. § 120.\*]

2. MASTER AND SERVANT (§§ 288, 289\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—ASSUMED RISK.

Plaintiff, a stevedore engaged in shoveling coal into buckets in the hold of a vessel, was injured by one of such buckets overturning while being hoisted, and spilling the contents back into the hold on plaintiff. The bucket was defective, in that the rim was so broken that the latch that held it upright would not hold, and had previously been rejected by the foreman of a gang working in a different hold of the vessel, but had been pressed into service by the foreman of the gang with which plaintiff was employed. There was no evidence that plaintiff had any knowledge of the defect or of the danger incident thereto. *Held*, that plaintiff did not assume the risk, and was not himself negligent as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1090, 1092-1132; Dec. Dig. §§ 288, 289.\*]

3. MASTER AND SERVANT (§§ 208, 217\*)—INJURIES TO SERVANT—DEFECTIVE TOOLS AND APPLIANCES—PRESUMPTIONS.

A master being bound to furnish suitable tools and appliances, a servant is entitled to presume that that duty has been performed, and does not therefore assume the risk arising from the use of unfit and improper appliances, nor is he bound to make an examination or inquiry at his peril to ascertain the fitness of the tool or appliance provided for the work

intended, though, if he discovers the unfitness of a tool or appliance and appreciates the dangers incident to its use, and nevertheless continues without complaint in the prosecution of the work and injury results, he cannot recover.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 551, 574-600; Dec. Dig. §§ 208, 217.\*]

4. MASTER AND SERVANT (§ 103\*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES.

Where plaintiff, a stevedore, was injured by the overturning of a loaded coal bucket, due to a defect therein, as it was being hoisted from the hold of a vessel, and there was evidence that it was the custom of the foreman of each hatch to obtain a supply of buckets for the use of workmen, the court properly charged that the master was bound to furnish suitable appliances, and keep them in repair, and that such duty could not be delegated to another so as to exonerate the master from liability to an employé who was injured by an omission to perform such duty, or by its negligent performance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.\*]

5. MASTER AND SERVANT (§ 265\*)—INJURIES TO SERVANT—ASSUMED RISK.

Where, in an action for injuries to a stevedore by the overturning of a loaded coal bucket because of a defect therein, defendant claimed that plaintiff assumed the risk, the burden was on defendant, not only to show that plaintiff actually had or ought to have had knowledge of the defective condition of the bucket, but that he also comprehended and appreciated the dangers incident thereto, as provided by Civ. Code, § 1970.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

6. APPEAL AND ERROR (§ 1056\*)—EXCLUSION OF EVIDENCE—PREJUDICE.

Where, in an action for injuries to a stevedore by the overturning of a loaded coal bucket due to a defect therein, plaintiff did not count on the absence of a bolt as one of the defects in the bucket, the exclusion of a question asked of an alleged expert as to whether the absence of such bolt would produce such a looseness as would cause the bucket to dump was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.\*]

7. APPEAL AND ERROR (§ 1058\*)—RULINGS ON EVIDENCE—CURING ERROR.

Error, if any, in the sustaining of an objection to a question, was cured where the subject was fully covered by the witness in answer to other questions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4200-4204, 4206; Dec. Dig. § 1058.\*]

8. MASTER AND SERVANT (§ 295\*)—INJURIES TO SERVANT—DEFECTIVE MACHINERY—INSPECTION—INSTRUCTIONS.

Where a stevedore was injured by the overturning of a defective coal bucket as it was being hoisted, loaded, from the hold of a ship, an instruction that, while a servant assumes all ordinary risks of the business in which he is employed, he does not assume the risk of defective premises, machinery, or structures furnished by the master if the defect was either known to the master or could have been discovered by him by the exercise of reasonable inspection, was not objectionable as charging that defendant was liable in case the bucket was defective, and defendant knew, or could have known, of the defect by reasonable

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.



inspection, since the court was not dealing with the ordinary risks of the business, but with the extraordinary condition occasioned by the master's negligence in supplying a defective bucket.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168–1179; Dec. Dig. § 295.\*]

**9. MASTER AND SERVANT (§ 295\*)—INSTRUCTIONS—ASSUMPTION OF FACTS.**

Such instruction was also not objectionable as charging that plaintiff did not assume the ordinary risks of the business which were known to defendant or could have been known by him; the court having further charged that an employer was not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he was employed.

[Ed. Note.—For other cases, see Master & Servant, Cent. Dig. §§ 1168–1179; Dec. Dig. § 295.\*]

**10. MASTER AND SERVANT (§ 293\*)—INJURIES TO SERVANT—REQUEST TO CHARGE.**

In a suit for injuries to a stevedore by the overturning of a coal bucket as it was being hoisted, loaded, from the hold of a ship, due to a defect in the bucket, defendant requested an instruction that if the buckets furnished by defendant were of the kind ordinarily used for the purpose by employés in the same line of business in the community, and if defendant employed a blacksmith to keep the buckets in repair, or kept on hand a number of buckets in good repair, ready for use, any one of which could have been used by the employés at the time complained of, and it was the duty of the employés to select for use buckets in good repair, and discontinue the use of any bucket that became defective while in use, then defendant performed its whole duty toward plaintiff, and was not responsible, though the employés selected for use a defective bucket from those in good repair, or even though the employés continued to use the bucket after it became obviously defective. *Held*, that such instruction was properly refused as nullifying the defendant's duty to furnish suitable appliances in the first place, and as implying that he might relieve himself of that responsibility by delegating the task to an employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148–1156, 1158–1160; Dec. Dig. § 293.\*]

**11. TRIAL (§ 260\*)—REQUEST TO CHARGE—INSTRUCTIONS.**

A request to charge may be properly refused, where the subject has been fully covered by instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. § 260.\*]

**12. MASTER AND SERVANT (§ 297\*)—GENERAL VERDICT—ANSWER TO SPECIAL INTERROGATORIES.**

Where in an action for injuries to a stevedore by the overturning of a loaded coal bucket as it was being hoisted from the hold of a vessel, due to a defect in the bucket, a general verdict for plaintiff was sustained on the theory that defendant was negligent in leaving the defective bucket on the deck of the vessel whence it was taken by the foreman of plaintiff's gang and put to use in the hold, it was not material whether the jury's negative answer to a special interrogatory whether it was the duty of the stevedores employed by defendant to select buckets that they were to use in their work from a number of buckets in good repair kept on hand by defendant was sustained by the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1195–1198; Dec. Dig. § 297.\*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Eugene Hayes against the Western Fuel Company. Judgment for plaintiff, and defendant appeals. Affirmed.

C. H. Wilson, of San Francisco, for appellant. Eugene D. Sullivan and O. K. Cushing, both of San Francisco, for respondent.

**BURNETT, J.** Respondent was awarded by a jury a verdict for \$5,000 for personal injuries received while employed in filling buckets with coal in the hold of a vessel belonging to appellant. The circumstances of the accident, the extent of the damage, and the particular ground for charging responsibility to defendant are disclosed in the following allegations of the complaint: "That on said 26th day of March, 1907, while plaintiff was so employed by defendant, and while he was so engaged in the performance of the duty for which he was employed, to wit, filling said buckets with coal in the hold of said vessel, defendant was hoisting from the hold of said vessel one of said buckets filled with coal, and the same overturned above said hatchway and at a great height, to wit, 75 feet above and directly over the place in said hold where plaintiff was working, and the contents of said bucket, to wit, over 1,000 pounds of coal, fell upon and around said plaintiff, and broke and splintered the bones of one of plaintiff's legs so badly that part of said bones had to be removed, and broke two of plaintiff's ribs and otherwise greatly bruised and injured plaintiff and thereby caused him great pain and suffering. That said bucket which overturned and emptied its contents upon plaintiff as aforesaid was at the time and long prior thereto defective and broken; that the rim on the upper rear part of said bucket was cracked, thereby causing the latch which is fastened to the bail of said bucket at one end, and to the clutch on the rear of said bucket at the other, and which prevents said bucket from dumping before reaching the defendant's bunkers, to become loosened, and thereby causing said bucket to overturn in mid-air." It is also alleged that the defendant had knowledge of the defective condition of the bucket, but negligently continued to use it till plaintiff was injured. The answer expressly admitted the employment and the allegations concerning the nature of the work, the character of the accident, and the extent of the injury, but denied the other material averments of the complaint, and set up as an affirmative defense that the injury was caused by the fault and negligence of the plaintiff, and, furthermore, that said injury was chargeable to the risks of plaintiff's employment at the time of the accident, "which said risks had been and were duly assumed by the plaintiff."

[1] From the standpoint of respondent, the case involves primarily the application of the familiar legal doctrine, declared in the decisions over and over again, that it is the duty of the master to furnish reasonably safe appliances to the servant for the prosecution of his work and to exercise reasonable care in keeping said appliances in a safe condition for use, and, if an injury results to the servant from the failure of the master to perform this duty, the latter is liable for the consequences. Speaking generally, it may be said that in the record there is found ample support for this theory of respondent. From the direct and circumstantial evidence a rational inference may be drawn that the said coal bucket was defective as alleged in the complaint, that it was furnished to plaintiff in that condition by appellant, that the defect was of such character as to render it unsafe to use the bucket for the purpose intended; in other words, that it was not reasonably safe to operate it as plaintiff was required to do in the prosecution of his work, and that the accident with the consequent injury would not have occurred had it not been for said defect.

[2] But, of course, it does not necessarily follow that plaintiff was entitled to recover. However, in reference to the affirmative defenses of appellant, it is confidently believed that the jury was justified in holding that the accident was not due to any contributory negligence of plaintiff, and that, in a legal sense, there was no such assumption of risk by him as to relieve defendant from liability. These considerations will receive more specific attention as notice is given to the various contentions of appellant. Of these, in the foreground of the discussion and manifestly constituting a proposition of vital importance in the determination of the appeal, the assertion is made by counsel that the case comes within the rule "that, where a master provides and keeps proper tools or appliances for the use of his servants and delegates to them the duty of selecting such as they require, then the master is not responsible if the servant voluntarily uses a tool or appliance that has become obviously defective and unfit for use, and is injured by reason thereof." Concerning this statement of the rule and the propriety of invoking it in the case before us, several suggestions seems not inappropriate. In passing, it may be said that there is some inaccuracy in the language used. It rather implies that, if the master provides and keeps only proper tools or appliances for the use of the servant and the servant voluntarily selects therefrom one obviously unfit, the master is not liable. Where only proper tools are supplied, it is manifest that no room can be found for the unfit. But, interpreting the rule, as no doubt intended, to contemplate the case where a proper tool has become unfit from use and is then selected by the

servant, it is clear, upon principle and under the authorities, that the rule must be applied with great caution. Otherwise, we will find the problem embarrassed by the presence of two antagonistic and irreconcilable principles.

[3] Since the master is bound to furnish suitable tools and appliances, the servant may assume, of course, that the master will perform that legal and moral duty. It necessarily follows that the servant does not assume the risk that comes from the use of unfit and improper appliances. Nor is the servant required to distrust the fidelity of the master to this obligation, nor does the law demand of the servant that he make an examination or inquiry at his peril to ascertain the fitness of the tool or appliance for the work intended. This would be in contravention of the doctrine of the master's responsibility for the character of the tools. Of course, however, the law, as well as common sense and common justice, demands that the servant shall comport himself as upright and reasonable men ordinarily do, and if he discovers the unfitness of the appliance and appreciates the danger incident to its use, and, nevertheless, he continues without complaint in the prosecution of the work and injury results, the law, in consonance with the judgment of fair-minded men, exacts of him the penalty for his folly and attributes the consequences to his own negligence rather than to that of the master. Furthermore, there may be instances where the defect or unfitness of the appliance is so palpable and obtrusive and the danger incident to its use, under the circumstances disclosed, so palpable, that knowledge of these facts, even in the absence of direct evidence to that effect, must be imputed to the servant. No circumstance, however, should be permitted to obscure or derogate from the importance of the initial and primary obligation of the master to furnish suitable tools and appliances. It may be well to notice how the subject has been treated by some of the authorities.

In 1 Bailey's Personal Injuries, § 251, it is said: "It is well settled that it is the duty of the master to provide suitable and safe machinery and appliances for the use of his operatives, and it is also settled that the duty does not stop here, but that it is likewise his duty to keep such machinery in proper repair and in safe working order, and if these duties or any of them are negligently performed, and one of the servants thereby sustains an injury, the master is liable, even though he may have intrusted the performance of such duties to subordinates, by whatever name they may be called." In Shearman & Redfield on Negligence (5th Ed.) § 194, the authors, after stating the familiar personal duty of the master to furnish proper tools and implements, declare: "The master is not entitled to time to discover defects in things which are defective when



put in use. He should examine them before putting them in use. He cannot evade his responsibility in these respects by simply giving general orders that servants shall examine for themselves, before using the place, materials, etc., furnished by him." In section 194a it is said: "The master is also personally bound, from time to time, to inspect and examine all instrumentalities furnished by him, and to use ordinary care, diligence, and skill to keep them in good and safe condition." In *Daves v. S. P. Co.*, 98 Cal. 19, 32 Pac. 708, 35 Am. St. Rep. 133, it is said: "The duties which a railroad corporation owes to its servants and which it is required to perform are to furnish suitable machinery and appliances by which the service is to be performed and to keep them in repair and order. \* \* \* The performance of these duties cannot be shifted by it to a servant so as to avoid responsibility for injury caused to another servant by its omission. Nor is their negligent performance one of the ordinary risks of the service impliedly assumed by the employé by his contract of employment." The doctrine is more elaborately considered and presented in *Sanborn v. Madera Flume, etc., Co.*, 70 Cal. 261, 11 Pac. 710, and *Tedford v. Los Angeles Electric Co.*, 134 Cal. 76, 66 Pac. 76, 54 L. R. A. 85.

Respondent's classification of the cases upon the subject, while probably somewhat arbitrary, possesses merit, and it may be of assistance in the consideration of apparently conflicting decisions. It is thus claimed that "the cases where the servant is injured as a result of some defect in appliances furnished by the master fall into three general classes, as follows: (1) Where there are defects or breaks in appliances furnished by the master which should not be defective or broken. Such is the case here. (2) Where the injury results from some defect in the adjustment or preparation of the appliance, and where the adjustment or preparation is to be done by the servant, and is a part of the work that he is employed to do—obviously different from the case at bar. (3) Where the defect in the appliance is one necessarily attendant upon the use of the appliance and which is usually repaired by the workman himself and to repair which suitable materials are supplied, or where the appliance is of such a character that the use of it results in a gradual deterioration which ultimately renders it unsafe, as for example, the wearing of a rope, the loosening of a bolt or the dulling of an instrument—also clearly different from the case at bar." Under the first class are cited the following cases: *Jager v. California Bridge Co.*, 104 Cal. 542, 38 Pac. 413, where plaintiff was injured by the falling upon him of a cross-beam or headblock which became detached from its proper position at the top of a pile driver,

and wherein, in holding defendant responsible for the condition of the appliance, the court said: "It is not necessary to cite authorities to the point, for the rule is elementary that the same duty devolves upon the master in subsequently maintaining the appliance in a safe and suitable condition as rested upon him when it was originally furnished to his servant"; *Alexander v. Central L. & M. Co.*, 104 Cal. 532, 38 Pac. 410, wherein plaintiff was injured by falling from a platform and the same rule was declared as to defendant's duty to provide a suitable scaffold and platform and to use care afterward in its inspection and supervision for the purpose of discovering the defects that may subsequently appear; *Pacheco v. Judson Manufacturing Co.*, 113 Cal. 541, 45 Pac. 833, wherein the plaintiff was injured by the breaking of a pair of shears, part of which fell upon him, the court reversing a judgment of nonsuit upon the ground that "the evidence was such that the jury might have deduced as inferences therefrom that previously to the breaking which was the immediate occasion of injury to plaintiff the shears were cracked and weakened, that this condition was so far to be reasonably anticipated as to render prudent the adoption of measures for its discovery, and would have been detected by the application of reasonable and not impracticable tests, that such tests were not applied," and that, therefore, the defendant might legally have been held responsible for the accident; and *Higgins v. Williams*, 114 Cal. 176, 45 Pac. 1041, involving an injury to plaintiff by the falling upon him of an iron bucket which was being used to hoist earth from a trench in which he was working. It appeared that the bucket fell by reason of a pin coming out of a block that held the cable and the pin should have been kept in place by a key, but there was no key. The court said: "Wilson (the foreman) knew of this defect, or should have known of it, and his knowledge was the knowledge of defendants. In performing his duty he acted not as a fellow servant with plaintiff, but as representative or agent of defendants and for his negligence they are responsible."

In the second class are placed the following cases cited by appellant: *Burns v. Sennett*, 99 Cal. 363, 33 Pac. 916; *Kerrigan v. Market St. Ry.*, 138 Cal. 509, 71 Pac. 621; *Leishman v. Union Iron Works*, 148 Cal. 275, 83 Pac. 30, 3 L. R. A. (N. S.) 500, 113 Am. St. Rep. 243; *Manning v. Mining Co.*, 149 Cal. 35, 84 Pac. 657; *Kelley v. Norcross*, 121 Mass. 509; *Fraser v. Red River Lumber Co.*, 45 Minn. 237, 47 N. W. 785; *Treka v. Burlington, etc., Ry. Co.*, 100 Iowa, 209, 69 N. W. 422. The interesting and specific review of these cases by respondent might well be reproduced if time and space would permit.



The other cases cited by appellant are assigned by respondent to the third class, of which we mention only those from this state as follows: *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017; *Helling v. Schindler*, 145 Cal. 305, 78 Pac. 710; *Towne v. United, etc., Co.*, 146 Cal. 769, 81 Pac. 124, 70 L. R. A. 214, 2 Ann. Cas. 905. Of these, the *Towne* Case is particularly relied upon by appellant as decisive of the controversy here. This position, it is believed, cannot be maintained, on account of the vital difference between the facts of that case and this. Adopting substantially the language of respondent, we find the *Towne* Case to be as follows: A lineman, in the employ of the defendant, was injured by the falling of an electric light pole which the plaintiff and others were removing from the street. The men were furnished with pike poles, which were about 10 or 12 feet in length, about 2 inches in diameter, one end having an iron ferrule and an iron pike at the end, about 1½ inches in length, to be used in bracing the poles to be removed, and to keep them from falling while the man engaged in removing the wires was up the pole. Plaintiff was directed to climb and clear the wires from one of the poles, and another man was directed to brace the pole on its unprotected side with a pike pole. This man took from the pike poles, which were then and there on the ground within reach, a pole which had become dull and worn at the point, and forced the barbed portion thereof into the electric light pole, about eight feet from the ground, and rested the other end of the pike pole on the ground for the purpose of forming a brace. While plaintiff was at the top of the electric light pole it fell, and thereby plaintiff was injured. The pole fell because it was decayed at the ground, and because the pike pole, being dull, did not penetrate it a sufficient depth to hold but broke out or slipped, thus letting the pole fall to the ground. The judgment was reversed on the ground that it was the duty of the servant to know when the pike poles were dull and in need of sharpening, and to select one in good order, and not to use a dull one. That the *Towne* Case presents an exception to the general rule is pointed out by the Supreme Court in *Fogarty v. S. P. Co.*, 151 Cal. 794, 91 Pac. 652, wherein the court, through Mr. Justice Angellotti, says: "This rule (the rule in the *Towne* Case) is a qualification of the general rule relative to the duty of the employer to furnish an appliance that is reasonably safe, and to use reasonable care to keep the same in proper repair, and, as stated in *Helling v. Schindler*, 145 Cal. 303 [78 Pac. 710], it relates only to such slight defects attendant upon the operation of machinery as from their nature require remedying at the hands of the operators themselves and as a part of the proper op-

eration of the machine." Additional emphasis is given to the point, it may be said, by respondent's analysis of the cases cited as authority in the *Towne* decision.

But there are certain vital facts, deducible from the view that we must take of the evidence, some of which will be specified, that render it clear that the rule of the *Towne* Case has no application here. One decisive circumstance is that the bucket in its defective condition was furnished by appellant to plaintiff when he began his work. We have a right to infer that it was not selected by plaintiff; furthermore, that it was not his duty to select it, and that there was no change in its condition during his employment. The accident occurred the day he was employed and when he began his work, and the manner in which the defective tub was supplied is related by the witness Carlson as follows: "I was not foreman in the hatch where plaintiff was working, but I was foreman on the other hatch. When I found that tub was broken, I took it out of the hatch and landed it on the deck. That was the first day we started to work on that steamer. Hayes was hurt the next day. Before he was hurt, Ben Cline's gang came and took that tub from the deck where I had put it and went aft to their hatch. Ben Cline was foreman of the Hayes gang. I do not know what that gang did with the tub after I saw it run to their own hatch. Q. And it was while Cline had the gang of men unloading coal from the hatch next to yourself that he came and took that tub away, was it? A. Yes, sir." There is no evidence that Hayes was among the "gang" that took the tub. From circumstances, which we will not stop to detail, it is fairly inferable that he was not. But, at any rate, the tub was placed on the deck by the foreman of one hatch, who knew and apparently gave no warning of its defective condition, whence the bucket was taken, under the direction of the foreman of the hatch in which plaintiff was employed and there put to use without the latter's attention having been called to any defect or unfitness in said appliance.

[4] The jury were justified in concluding that it was the duty and the custom of the foreman of the hatch to obtain and supply the buckets for the use of the workmen, and they were correctly instructed that the obligation of the master to furnish suitable appliances and to keep them in repair and order "is a duty which cannot be delegated to another so as to exonerate the employer from liability to an employé who is injured by omission to perform the duty or by its negligent performance. In respect to such act or duty, the servant who undertakes or omits to perform it is the representative of the master. The act or omission is the act or omission of the master, irrespective of the grade of the servant whose negligence caused the injury, or of the fact whether it was or was not practicable for the master to act

himself." *Higgins v. Williams*, *supra*; *O'Connell v. United Railroad of San Francisco*, 124 Pac. 1022.

[5] Again, the burden was upon appellant to show that respondent actually had or ought to have had knowledge of the defective condition of said bucket. From the record we can say that neither inference is so imperative as to exclude any other rational conclusion. Indeed, there is no direct evidence upon the subject of plaintiff's actual knowledge, neither party having seen fit, apparently, to question him concerning it. One of the fellow workmen, so he testified, discovered the defect before the accident occurred, but there is no evidence that he directed to it in any manner the attention of respondent, nor can we say that the blemish was so obvious as to require plaintiff to be held to the responsibility of actual knowledge. On the contrary, incomplete as the record is in this respect, considering the fact that plaintiff was at work in the hold of the vessel and for only a few hours, with nothing apparently to excite his special attention to the bucket or to arouse his suspicions, the inference is quite fair and reasonable and not subject to legal stricture that he was without knowledge of said imperfection.

In brief, therefore, under the settled principles of appellate practice, the record presents us the case of a master furnishing his servant with a defective appliance, not only with the presumption of knowledge which the law imposes, but with actual knowledge of its unfitness, and giving no information of its condition to the servant who does not know and is not required to know that the appliance is otherwise than normal, and injury subsequently resulting from the use of said appliance. Hence the general rule contended for by respondent is rendered clearly applicable.

Besides, the law of the servant's responsibility in operation at the time of this accident was somewhat different from its condition when the *Towne Case* was decided. In 1907 section 1970 of the Civil Code was amended, in addition to other respects, by adding the provision that "knowledge by an employé injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employé fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and thereafter consented to use the same, or continued in the use of the same."

There is not only no evidence that plaintiff "fully understood, comprehended and appreciated" the dangers incident to the use of said defective bucket, but it is quite reasonable to hold that, if he knew of the defect,

he believed there was no additional danger incident thereto. Indeed, defendant denied under oath, not only that the bucket was broken or defective, but also that it ever turned by reason of any broken or defective condition, and an effort was made at the trial to show that the defect did not add to the peril of plaintiff's situation. Legally, respondent had as much right as appellant to be mistaken in that particular.

[6, 7] This effort to prove that the bucket could be safely operated has given rise to one point of controversy in reference to a ruling of the court. The witness Olinder, a blacksmith, who had been in the employ of defendant for several years and whose duty it was to repair the tubs and machinery generally, after stating that following the accident he discovered that a bolt was missing from the tub, was asked the question: "Will the absence of the bolt produce such a looseness that it would dump?" Assuming that the question involved a matter of expert testimony, it is entirely apparent, as pointed out by respondent, that the ruling sustaining an objection was not prejudicially erroneous for the reason that plaintiff in his complaint did not count upon any such defect, and for the reason that the ground was entirely covered by the witness in answer to other questions.

There are two assignments of error in relation to the instructions.

[8, 9] As we understand the law of negligence, one phase of it was correctly given by the court as follows: "While the servant assumes all the ordinary risks of the business in which he is employed, he does not by reason of his employment assume the risk of defective premises, machinery, or structures furnished by the master, if the defect was either known to the master, or could have been discovered by the master by a reasonably careful inspection." Appellant's objection to the instruction is stated in this language: "This instruction tells the jury that the defendant is liable in this case if they find that its tub was defective, and that it knew of or could have discovered the defect by a reasonably careful inspection, and that the plaintiff did not assume the ordinary risks of the business which were known to the defendant or could have been discovered by him." In this appellant is clearly in error. The court was not dealing with the ordinary risks of the business, but with the extraordinary condition occasioned by the act of the master in supplying defective appliances. Since it is the duty of the master to furnish safe appliances, he must be primarily and legally accountable for the consequences of his failure to observe his duty in that respect. The other contingency suggested by appellant was covered by the court in additional instructions, one of which contained this statement: "An employer is not bound to indemnify his em-

ployé for losses suffered by the employé in consequence of the ordinary risks of the business in which he is employed."

[10] Appellant complains of the action of the court in refusing to give the following instruction: "If you find from the evidence that the tubs furnished for the use of the defendant's employés were of the kind ordinarily used for the purpose by employers in the same line of business in the community, and if you find that the defendant at the time complained of employed a blacksmith to keep the tubs in repair, and if you further find that defendant kept on hand a number of tubs in good repair, ready for use, any one of which could have been had and used by the employés at the time complained of and if you further find that it was the duty of defendant's employés to select for use tubs in good repair and discontinue the use of any tub that became defective while in use, then I charge you that the defendant performed its whole duty toward the plaintiff, and is not responsible in this case even though you find that the employés selected for use a defective tub from among those in good repair kept on hand by defendant, or even though you find that the employés continued to use a tub after it became obviously defective. In such case, your verdict must be for the defendant." There are several objections to the instruction, as suggested by respondent. Probably the vital one is that it ignores and virtually nullifies the importance of the duty of the master in the first place to furnish suitable appliances. It also implies that he may relieve himself of this responsibility by delegating the task to an employé, although another employé in a different line of work may be injured in consequence of the act of the one who represents the principal in the selection of the appliance. There is a formal objection also that it lacks simplicity and was likely to be misunderstood by the jury.

[11] Again, it is apparent that the particular phase of the law of negligence intended to be reached by said instruction was fully covered by other instructions which were certainly exceedingly favorable to appellant. Indeed, the charge of the court, taken in its entirety, seems to have left nothing lacking for the faithful guidance of the jury.

[12] We are convinced that there is support in the evidence for the negative answer of the jury to the question: "Do you find from the evidence that it was the duty of the stevedores employed by the defendant to select a tub or tubs that they were to use in their work from a number of tubs in good repair kept on hand by the defendant?" But, even if not supported, the circumstance would not require a reversal of the case, since the general verdict could be sustained upon the theory of defendant's negligence in leaving the defective bucket upon the deck

of the vessel whence it was taken and put into use in the hold.

It would be pleasing to follow more closely and completely the interesting argument of counsel, but the length of this opinion already invites apology.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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tract. The Secretary of State has certified to the county clerk of Los Angeles county that he is the Republican nominee for member of the assembly from said district. It is alleged that he is ineligible for that office by reason of nonresidence. The county clerk has been requested to strike his name from the official ballot as such candidate, and has refused. We are asked to issue a writ of mandate compelling the clerk to comply with that demand. The Constitution of the state (article 4, § 7) reads as follows: "Each house shall choose its officers, and judge of the qualifications, elections, and returns of its members." By that article the assembly is made the exclusive judge of the qualifications of its members. The law providing for an official ballot cannot be held to have changed the intent of the people in adopting that constitutional provision that the assembly should be the sole and exclusive judge of the eligibility of those whose election is properly certified. For this court to undertake to try the question of eligibility and to deprive the candidate of any chance to be elected would simply be to usurp the jurisdiction of the assembly.

The petition is denied.

164 Cal. 1

In re COLTON'S ESTATE. (S. F. 6,020.)  
(Supreme Court of California. Sept. 27, 1912.  
Rehearing Denied Oct. 26, 1912.)

1. EXECUTORS AND ADMINISTRATORS (§ 314\*)  
— PARTIAL DISTRIBUTION — INDIVISIBLE  
CHOSE IN ACTION.

Under Code Civ. Proc. § 1661, providing that if at hearing it appears that the estate is but little indebted, and that the share of the party applying for partial distribution can be allowed to him without loss to the creditors, the court must grant his application, it is improper to grant an application for a division of an indivisible chose in action, which is already in litigation, suit having been brought by the administrator; the very existence of the chose as assets resting on a contingency.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1274-1297; Dec. Dig. § 314.\*]

2. EXECUTORS AND ADMINISTRATORS (§ 314\*)  
— PARTIAL DISTRIBUTION — PERSONS ENTITLED TO APPEAL.

Where the distributees of an estate which consisted entirely of an indivisible chose in action, which was in litigation, entered into an agreement fixing the share of each and postponing the time of division, a distributee who was a party to such contract has such an interest as to be entitled to appeal from an order directing a premature partial distribution obtained by another distributee.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1274-1297; Dec. Dig. § 314.\*]

3. EXECUTORS AND ADMINISTRATORS (§ 314\*)  
— PARTIAL DISTRIBUTION — PERSONS ENTITLED TO ALLEGE ERROR.

Under Code Civ. Proc. §§ 938, 963, 1660, respectively providing that any party aggrieved may appeal, that an appeal may be taken from an order directing the distribution or partition of an estate, and that the executor or

164 Cal. 56

ALLEN v. LELANDE, County Clerk, et al.  
(L. A. 3,342.)

(Supreme Court of California. Oct. 18, 1912.)  
STATES (§ 30\*) — LEGISLATURE — QUALIFICATION OF MEMBERS.

Const. art. 4, § 7, providing that each house of the Legislature shall choose its officers, and judge of the qualifications, election, and return of its members, makes the assembly the exclusive judge of the qualification of its members, so that the courts will not determine whether one nominated for the assembly is ineligible by reason of nonresidence.

[Ed. Note.—For other cases, see States, Cent. Dig. § 39; Dec. Dig. § 30.\*]

In Bank. Application for writ of mandate by J. Scott Allen against H. J. Lelande, county clerk of Los Angeles, and another. Petition denied.

Milton K. Young, of Los Angeles (Theodore Bell, of San Francisco, of counsel), for petitioner. John D. Fredericks, Dist. Att., of Los Angeles, for respondents.

PER CURIAM. J. Henry Baetz has been nominated as a Republican candidate for the assembly in the Sixty-Fifth Assembly dis-

administrator or any person interested in an estate may resist an application for distribution, executors of an estate which consists only of an indivisible chose in action which is already in litigation may appeal from an order decreeing a partial distribution; such order being embarrassing to the due administration of the estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1274-1297; Dec. Dig. § 314.\*]

**Department 2.** Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

In the matter of the estate of Ellen M. Colton, deceased. From an order granting Helene M. B. Sacher's application for partial distribution, Caroline Colton Dahlgren and others appeal. Reversed.

J. F. Riley and Charles W. Slack, both of San Francisco, for appellants. Edward C. Harrison and Maurice E. Harrison, both of San Francisco, for respondent.

**HENSHAW, J.** This is an appeal from a decree of partial distribution given under the following circumstances: Contest having arisen over the will of Ellen M. Colton, deceased, all of the parties in interest compounded their differences and entered into a written agreement which provided for the distribution of the estate "after paying the debts, if any, of the decedent, and the necessary costs of administration." Application for partial distribution was made upon behalf of Helene M. B. Sacher, to whom, under the agreement, was to be distributed one-fourth of the estate. At the time of her petition for partial distribution and the time of the hearing thereof, the necessary costs of administration of the estate had not been paid, and the greater part of the estate consisted of a claim against the California Safe Deposit & Trust Company appraised at \$300,000, for the enforcement of which the executors had brought suit, which suit was and still is pending and undetermined. The application was for the distribution to Helene M. B. Sacher of one-fourth of the claim against the California Safe Deposit & Trust Company. The court decreed distribution as prayed for, and from its decree the executors and Caroline Colton Dahlgren, to whom, under the agreement, was to be distributed one-half of the estate, appealed.

Upon the appeal two propositions are advanced: The first that the decree is in violation of the written agreement of the parties, who by their agreement covenanted that such distribution should not be made until the necessary costs of administration had been paid, and that these costs, in fact, had not been paid; second, that, in view of the condition of the assets of the estate, it was error for the court to decree partial distribution. Upon both of these propositions appellants' position is well taken. Respondent

relies upon the provisions of section 1661 of the Code of Civil Procedure, and construes those provisions as a mandate upon the court to order distribution when the conditions contemplated by the section are found to exist. Generally speaking, this is true, but it is quite within the powers of the parties (and here the parties were all the parties in interest), or for a single party to estop himself by contract or conduct from insisting upon the enforcement of this rule. *Estate of Glenn*, 153 Cal. 77, 94 Pac. 230. The written contract of these parties into which they advisedly entered was that distribution should be postponed until the necessary costs of administration had been paid. No attack is made upon this agreement; it is not sought to be avoided upon any legal or equitable grounds, and it stands, therefore, as a binding covenant upon all the parties to it. We need not be at pains to consider the advantages to be derived by one or another of the parties by the enforcement of the agreement, whether either or any will sustain any financial detriment or advantage by its enforcement or nonenforcement. Suffice it that the contract is one within the power of the parties to make, one by the parties advisedly made, and it is binding upon the court in probate unless adequate cause be shown for setting aside its provisions. No such cause is shown. We have said that it is unnecessary to consider the advantages or disadvantages which might result to one or another of the parties to this agreement should the court see fit to enforce, or, as here, to disregard, its terms. The contract was based upon a sufficient consideration, the mutual surrender of asserted legal rights, and, this being the case, any party to it is entitled to insist upon the fulfillment of its terms, regardless of any question of financial gain or loss. Indeed, the real consideration may not be financial at all. Solely by way of illustration it may be said that a father or mother might enter into such a contract to delay distribution to the end of postponing the time when a wayward son might take his legacy in the belief that, if the son took the property immediately, he would squander it, and, if possession was delayed, a reformation might have intervened. This, as we say, is only to illustrate the innumerable reasons which might prompt the execution of such a contract as this, aside from reasons purely of financial gain, but, whatever the reasons may have been, we repeat, no cause having been shown why the contract should not be observed, the parties to it were entitled to insist upon its terms.

[1] As little doubt may be entertained upon the second proposition. What the court has done without adequate or any cause therefor shown (excepting, perhaps, the belief entertained by the court that it was acting under compulsion of section 1661, Code

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Civ. Proc.) is to distribute an indivisible chose in action, a chose in action actually in litigation, a claim in suit which could not from its very nature be divided without great embarrassment to the executors in the due conduct of that litigation. Indeed, it may be said, not, of course, as a proposition of law, but as a statement of fact for the guidance of courts in probate, that, generally speaking, claims in litigation should not be distributed unless with the full assent of all the parties interested and under circumstances where it is apparent to the court that no embarrassment will result to the administrators, or to the administration, in the orderly effort to reduce such a claim to judgment and possession. In *re Kittson*, 45 Minn. 197, 48 N. W. 419; *Murff v. Frazier*, 41 Miss. 408. By this court it has been said that, when an estate is in the condition here shown, it is not ready for distribution; our language being: "If the assets are merely claimed to exist, and the right to them is involved in litigation, either by an action brought by the executor or administrator to recover them for the estate, or by an action against the executor or administrator to recover them from the estate, then the estate is not ready for distribution." The very existence of the property as assets is uncertain and contingent upon the determination of the suits. *Estate of Ricaud*, 57 Cal. 421. Such was the precise situation here presented, and the distribution was made under the opposition of other parties in interest and the opposition of the executors.

[2, 3] The right of Caroline Colton Dahlgren, as a party aggrieved, to appeal is beyond question. She not only possessed rights under the contract which were injuriously affected by the decree, but she possessed an interest in the estate which, for the reasons indicated, were liable to suffer detriment because of the decree. The test laid down in *Adams v. Woods*, 8 Cal. 306, "Would the party have had the thing if the erroneous judgment had not been given? If the answer be 'yea,' then the person is the party aggrieved," however satisfactory to the case then under consideration, by no means affords a complete definition of the phrase "party aggrieved," nor has it ever in this state been held to afford such a complete definition. Under our decisions, any person having an interest recognized by law in the subject-matter of the judgment, which interest is injuriously affected by the judgment, is a party aggrieved and entitled to be heard upon appeal. As to the appeal of the executors, there can be no doubt of their right to appeal from any order which is embarrassing to the due administration of the estate. Code Civ. Proc. §§ 938, 963, 1660; *Estate of Kelley*, 63 Cal. 106; *Estate of Ryer*, 110 Cal. 556, 42 Pac. 1082; *Estate of Heydenfeldt*, 117 Cal. 551, 49 Pac. 713. That a de-

creed made under these circumstances is so embarrassing has already been declared.

The decree appealed from is therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

#### On Petition for Rehearing.

PER CURIAM. In this case the discussion in the opinion in Department 2 relating to the first proposition advanced by the appellant, namely, that the decree is in violation of the written agreement of the parties, is withdrawn. The court is satisfied with the discussion and decision upon the second proposition, and that the case was properly reversed upon the grounds therein stated.

Petition for rehearing is denied.

164 Cal. 85

#### In re WOMERSLEY'S ESTATE. (L. A. 3,090.)

(Supreme Court of California. Oct. 19, 1912.)

#### 1. WILLS (§ 487\*)—CONSTRUCTION.

Civ. Code, § 1340, provides that when, in applying a will, it is found that there is any imperfect description, or that no person exactly answers the description, mistakes and omissions may be corrected if the error appears from the context of the will or from extrinsic evidence, but evidence of testator's declarations as to his intention cannot be received, and section 1318 provides that, in case of uncertainty arising upon the face of the will as to the application of its provisions, testator's intent is to be ascertained from the language, in view of the circumstances under which it was made, exclusive of his oral declarations. A will executed by W. provided: "I give and bequeath to my wife, E. W., all the real estate I die possessed of, wherever located, for her sole and separate use during the period of her natural life, and direct that at her death the said real property be equally divided among the heirs of the W. family, share and share alike, my said wife, E. W., to have all the income from said property during her life." Testator was an Englishman, and with his brothers and sisters inherited from his father; the brothers and sisters being his sole heirs at law if he died intestate. *Held*, that the use of the words "heirs of the W. family" did not involve a latent ambiguity to be resolved under section 1340, but should be construed in view of the circumstances under which the will was made, excluding testator's oral declarations.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1023, 1026-1032; Dec. Dig. § 487.\*]

#### 2. WILLS (§ 506\*)—CONSTRUCTION—"HEIRS."

The clause requiring equal division of the remainder among "the heirs of the W. family" meant that the remainder was to be given to those of testator's family who would be his heirs if he died intestate, such use of the word "heir" being a common and colloquial use, so that the widow of testator's brother cannot claim as a remainderman (citing 4 Words and Phrases Judicially Defined, 3252).

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1090-1099; Dec. Dig. § 506.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7677, 7678.]



In Bank. Appeal from Superior Court, Orange County; Z. B. West, Judge.

In the matter of the estate of James N. Womersley. From a decree decreeing distribution of the estate as prayed for in the executor's petition, an appeal was taken. Affirmed.

Williams & Rutan, of Santa Ana, for appellant. E. E. Keech, of Santa Ana, for respondent. Wm. M. Brown, of Orange, for executors and other heirs.

HENSHAW, J. By his last will James N. Womersley, deceased, devised his real property as follows: "Secondly, I give and bequeath to my wife Emily A. Womersley, all the real estate I die possessed of, wherever located, for her sole and separate use during the period of her natural life, and direct that at her death the said real property be equally divided among the heirs of the Womersley family, share and share alike, my said wife, Emily A. Womersley, to have all the income from said property during her life." The executor of this will filed his final account and a petition for the distribution of the estate showing the ownership by the estate of the real property devised, and showing, further, that the heirs at law of the deceased were Emily A. Womersley, his widow, John Womersley and William Womersley, brothers, and Sussana Ray, Maud Catherine Savory, and Minna Clarke, sisters. The petition sought a decree distributing a life estate in the realty to the widow with a remainder over to the brothers and sisters. Florence Aimee Blake was the widow of Harry E. Womersley, a brother of James N. Womersley. Her husband died some years before the death of James, testator. She filed objections to the distribution prayed for, and sought to share equally with the brothers and sisters under the construction which she gave to the second clause of the will above quoted. A demurrer to the objections and petition of Florence Aimee Blake was interposed by Emily A. Womersley, the widow. The demurrer was sustained and the court decreed distribution as prayed for in the executor's petition. The whole controversy revolves about the true construction of the second paragraph, and the question is whom did the testator mean by "the heirs of the Womersley family."

[1] There is here no latent ambiguity to be resolved under section 1340 of the Civil Code. The phrase used by the testator undoubtedly requires construction, but, if that phrase contain any uncertainty, it is one which arises upon the face of the will, and is to be construed by taking in view the circumstances under which the will was made, excluding the testator's oral declarations. Civ. Code, 1318. Those circumstances disclose that deceased was an Englishman, that he with his brothers and sisters

inherited from his father, that the brothers and sisters were those above named, and in the event of his intestacy were (with his widow) his sole heirs at law. There seems to be no difficulty in arriving at the intent of the testator from the words expressed in the will.

[2] Plainly the words mean that the remainder was left to those of his, the Womersley, family, who would be his heirs in the event that he died intestate. This use of the word "heirs" is not strained, but is a common colloquial use recognized both by lexicographers and lawwriters. Standard Dict. "heirs"; 4 Words and Phrases, 3252; 1 Underhill, Wills, p. 498; 14 Cyc. 28. Appellant, Florence Aimee Blake, did not belong to the class thus designated. She would not have been an heir of James N. Womersley had he died intestate.

The contention advanced upon the appeal of the widow that the uncertainty in the second clause of the will is such and so great as to avoid it is, for the reasons already given, untenable.

The decree appealed from is therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.

164 Cal. 88

GORDON et al. v. COVINA IRR. CO.  
(L. A. 2,776.)

(Supreme Court of California. Oct. 25, 1912.)

1. WATERS AND WATER COURSES (§ 252\*)—RIGHT TO WATER.

Where an irrigation ditch was constructed by defendant company under a contract requiring it only to transport for so-called old users water delivered by them from their appropriation to defendant's ditch, not to exceed, however, a certain amount, plaintiffs' right to receive water from such ditch for the irrigation of certain parcels of land subject to irrigation therefrom was not affected by a so-called compromise agreement subsequently entered into, to which plaintiffs were not parties and which was not signed by all the irrigators in the original district.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 252.\*]

2. WATERS AND WATER COURSES (§ 252\*)—IRRIGATION COMPANY — OBLIGATION TO FURNISH WATER.

Where an irrigation company, in order to consolidate an existing ditch, agreed to transport for so-called old users through defendant's ditch at a prescribed charge, the amount of water furnished to defendant's ditch by such old users not to exceed a specified quantity, and to divide its own waters among its stockholders pro rata according to their stockholdings, and to sell any surplus, defendant was under no obligation to carry or deliver to any of the old users any water except that received for them, nor to furnish to such users any part of its own water acquired for its stockholders and for sale.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 252.\*]

3. WATERS AND WATER COURSES (§ 156\*)—  
EASEMENT IN GROSS — APPURTENANCES  
RUNNING WITH LAND.

Defendant irrigation company, to obtain a right of way for its ditch over land belonging to B., accepted a deed providing that B. should have the right to purchase and use the water in the ditch on the same terms and conditions as the stockholders of defendant corporation. Defendant's by-laws provided for distribution of the water to stockholders in proportion to their stock, either for use or sale by them, and that any surplus remaining and not needed for stockholders' use might be sold for the benefit of the company. B. conveyed the land which subsequently passed by mesne conveyances to plaintiff, but for nearly 20 years no one had claimed the right to water under B.'s deed, it being furnished during two seasons to one claiming under his stockholding. *Held*, that the provision in the deed was an easement in gross for the personal benefit of B. only, and did not pass with the land on his conveyance thereof to plaintiff.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 158, 174-183; Dec. Dig. § 156.\*]

In Bank. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by J. T. Gordon and another against the Covina Irrigating Company. Judgment for plaintiffs for less than the relief demanded, and they appeal. Affirmed.

Ward Chapman, of Los Angeles, for appellants. Anderson & Anderson, of Los Angeles, for respondent.

ANGELLOTTI, J. We have in this case appeals by the plaintiffs (husband and wife) from the judgments and orders denying a new trial in two separate actions brought to have it determined that the plaintiffs are entitled to be furnished by defendant with water for irrigating purposes upon certain lands. In one action Emma T. Gordon sought such a determination as to a tract of land described as the north 20½ acres of the west 24½ acres of the S. W. ¼ of section 25, township 1 N., range 10 W., S. B. M., which we shall hereinafter designate as parcel "A." In the other action J. T. Gordon sought such a determination as to a 10-acre tract, being lot 2, section 27, of the same township and range, hereinafter designated parcel "B," an adjoining 8-acre tract in section 23 of the same township and range, hereinafter designated parcel "C," and a 42½-acre tract, originally the property of one J. G. Bower, hereinafter designated parcel "D." In Mrs. Gordon's action the trial court concluded that she was entitled to water from defendant for only 9.23 acres of parcel "A," and as this right had never been denied by defendant, and was expressly conceded by the answer, gave judgment that plaintiff take nothing by her action without prejudice to her right to begin an action against certain other persons (termed "old users") and this defendant jointly to assert any right she may claim to water for a greater acreage. In the other action the

court concluded: As to parcel "B," that Gordon had acquired by prescription the right to water for the southerly three acres only at the rate of one inch for eight acres measured under four-inch pressure; as to parcel "C," that Gordon was entitled to receive water at the same rate for 1.6 acres only; as to parcel "D," that he was not entitled to receive any water. As to parcels "A," "B," and "C" the alleged rights of plaintiffs are based on certain contracts.

The defendant, Covina Irrigating Company, was originally named the Azusa Water Development & Irrigation Company; its name having been changed to the Covina Irrigating Company since the execution of the various contracts hereinafter referred to. It was organized in the early 80's, and is a private mutual water company, its water, under its articles and by-laws, being distributed pro rata among its stockholders; only such surplus as is not needed for its stockholders being for sale for the benefit of the company. Prior to its organization, the ordinary flow of the San Gabriel river had been diverted during the irrigating season on both the east and west sides for irrigation purposes. On the east side, some of the water was taken out by an old ditch, known as the "public water ditch," and used by a large number of irrigators who were known in subsequent transactions as "old users." None of the land described in the complaints was susceptible of irrigation from this old ditch but a small portion of parcel "C"; the evidence being such as to support a conclusion that 1.6 acres had been irrigated by means of a lateral ditch connecting therewith. In 1882 J. T. Gordon and many others, being desirous of obtaining water for irrigating purposes from such river, began the construction of a ditch that would run from the river through their lands. Before the completion of this new ditch, the defendant began the construction of a cement ditch to carry water that it was developing by means of a tunnel in the San Gabriel canyon. The Gordons, and probably all who were interested in the new ditch then in process of construction, executed deeds to defendant of a right of way over their lands for such cement ditch, the same to conform as near as possible to the line of the new ditch then being constructed; the grantors being given the right to use such ditch in common with the defendant for conveying such water as they themselves owned or subsequently acquired, whether from the old public ditch or elsewhere. The cement ditch was completed by defendant in 1885 or early in 1886. About 14 or 15 acres of parcel "A," 4 or 5 acres of parcel "B," and about 3.5 acres of parcel "C" lie below this cement ditch. Water was at once turned into the ditch, but the evidence is such as to support a conclusion that at no time prior to 1890 was more than 9 acres of parcel "A" irri-



gated, or more than the southerly 3 acres of parcel "B," or more than 1.6 acres of parcel "C." In June, 1888, a contract was entered into between defendant and some 70 or 80 persons, including the plaintiffs, who had been using water from said river by means of said ditch on certain lands. This agreement recited that the right of each of these persons to a pro rata share of the water flowing in the Azusa water ditch (except  $\frac{7}{24}$ ) for irrigation and domestic use on their lands (which were described and included all of parcels "A," "B," and "C") had been recognized by the water commissioners. The agreement then acknowledged the right of each of these individuals to take from the San Gabriel river "the quantity of water heretofore used by them for irrigation and domestic use in and upon the hereinbefore described lands; the quantity of water so claimed as aforesaid being the quantity distributed to each by the aforesaid water commissioners from the said public ditch for use upon the premises aforesaid." It recited that defendant was willing to allow such persons to run said water through its cement ditch to said lands, and to acknowledge that the quantity agreed to be delivered by it to them "belongs in the whole to" them, as appurtenant to said lands. Defendant agreed to receive at the mouth of its water ditch in San Gabriel canyon all the water belonging to them, and permit the same to flow through its ditches to its laterals nearest said lands; said persons to there receive it with sufficient pipes or ditches. Said individuals, or old users, as they are generally styled, agreed to deliver at the mouth of said ditch their pro rata share of said waters. Defendant agreed that, if such water was so delivered, it would carry and deliver it "in quantities of one miner's inch to each and every eight acres of land," and when there is any water so received, flowing into or through said ditch, would give such old users the preference of use in the proportions hereinbefore stated, "provided always, however, that, should the amount of water belonging" to such old users, received at the mouth of the ditch, be less than the pro rata share belonging to them which formerly flowed through the Azusa public ditch, then the defendant agreed to deliver such lesser quantity as shall bear the same relation to one to eight acres as the water received bears to the pro rata share heretofore distributed to said users from the public ditch. It was stated that the pro rata share claimed by each party was " $\frac{1}{124}$  part of all the waters theretofore flowing in the Azusa public water ditch, less  $\frac{7}{24}$  of the whole." Defendant agreed "to receive the aforesaid water and to deliver at all times so long as it continues to receive such water, as herein agreed, one miner's inch to each eight acres of land described herein." The agreement fixed the price to be paid by the users for such service. By a supplemental agreement

between the same parties, dated February 13, 1889, it was stipulated that the company would carry out its agreement even if it should develop that one or more of such persons should own and be able to deliver less than  $\frac{1}{125}$  of all the Azusa ditch water, less  $\frac{7}{24}$ , but that no one shall be entitled to more than one inch of water for each eight acres for which he has turned over to defendant the old user right for water, and that "no water shall be required of" defendant, "nor shall any of said parties have any right under this agreement in excess of the amount of water furnished by such old user to the company."

What was called the "compromise agreement," purporting to be an agreement of all parties claiming the waters of the San Gabriel canyon, bearing date January 26, 1889, was introduced in evidence. This agreement was not recorded until November 2, 1889. The agreement provided for the division of all the waters of such canyon. The parties were as follows: The Azusa Water Company was the party of the first part. The defendant, under its old name, was the party of the second part. The Duarte, etc., Company and the Beardslee, etc., Company (west side companies) were the parties of the third part. The Azusa Land & Water Company, the Azusa Agricultural Water Company, and Kate S. Vosburg and Louise S. Macneil were the parties of the fourth part. Individuals signing the agreement, "and known as old users," were the parties of the fifth part. It was agreed that so long as there may be an amount of water equal to the flow of 1,700 inches miners' measurement under four-inch pressure, or any lesser amount, at the point of division between the parties of the third part and the other parties,  $\frac{72}{720}$  should be taken by defendant,  $\frac{216}{720}$  by the parties of the third part,  $\frac{126}{720}$  by the parties of the fourth part, and  $\frac{306}{720}$  was to be "divided into as many parts as there were acres in the tract hereafter agreed to be known as 'the Azusa Water District,' and taken by parties of the fifth part, and by the parties of the first and second parts, pro rata in proportion to acreage represented therein by said first, second, and fifth parties." It was stipulated that the first and second parties shall "represent all the acreage and take the water of all lands of the so-called old users who have turned over to such corporation the management and control of the water to which they are entitled." The first, second, and fifth parties agreed on the boundaries of the acreage constituting the tract to be known as the Azusa Water District, the same being set forth. Provision was made for the division among the parties of all water in excess of 1,700 inches. Provision was made as to the place whence the various parties might take their water, and also for the payment by the several parties of their proportion of the expenses. A committee of nine was pro-



vided for, one of whom was to be selected by defendant, and two by the fifth parties, to represent all the parties and to have full charge from the source of supply to the point of division with the third parties (the west side users). Neither of the plaintiffs joined in the execution of this agreement or was by name designated as a party thereto. Only 9.23 acres of parcel "A" (the Mrs. Gordon tract) were included within the boundaries of the district described therein, while some 14 acres thereof lay below the cement ditch and could be naturally irrigated therefrom. No part of either parcel "B" or parcel "C" was included in such boundaries. About 4 or 5 acres of parcel "B," and about  $3\frac{1}{2}$  acres of parcel "C" lay below such ditch and could be irrigated therefrom.

Mr. Gordon made known to defendant his objection to having his lands excluded from the compromise agreement, and a proposed contract was prepared by Mr. Wicks, a large stockholder of defendant, between the Gordons and the parties of the first, second, and fifth parts (the last being the old users) in the compromise agreement, reciting that the Gordons are "old users \* \* \* through the old main ditch," and are entitled to share in the compromise, and stipulating that all of parcels "B" and "C," and an additional six acres more or less in parcel "A," "which can be irrigated from the cement ditch," is entitled to a water right equal to any similar area in said Azusa Water District, and that the Gordons shall be supplied with water from the cement ditch "out of the  $\frac{306}{720}$  of the first 1,700 inches, and out of the  $\frac{226}{720}$  of the water above 1,700 inches." This agreement was executed by the defendant, by the Azusa Irrigating Company, and by only 9 of the some 75 old users who had joined in the execution of the compromise agreement. This contract was delivered by defendant to Mr. Gordon, but there was testimony sufficient to support the conclusion that Mr. Wicks informed the board of directors of defendant, in the presence of Mr. Gordon, "that, in order to make the contract effective, all the irrigators in the old district would have to sign it to make it binding on the company."

Ever since the execution of the compromise agreement, the committee of nine provided for therein has had entire charge of the distribution and delivery of water to the various companies, and the trial court found that "the only water permitted by said committee of nine to flow to the defendant for use by old users under contract with the defendant \* \* \* has been water appurtenant to lands and for use upon lands within the boundaries of said Azusa Water District," except that water for 1.6 acres of parcel "C" was permitted to so flow and has been received by defendant. Ever since 1890 from  $14\frac{1}{2}$  to 15 acres of parcel "A" (the Emma J. Gordon tract) has been under cul-

tivation, and water was delivered to it without objection, on the basis of one-eighth of an inch to the acre, on the theory that it was entitled to a 15-acre user water right under the compromise agreement from 1890 until the year 1902, when it was cut down to a  $\frac{923}{100}$  acre right. Such water the court finds was received by Mrs. Gordon, "not from the stock water of the defendant, but from the old user water which was carried by the defendant, and to which the old users under contract with the defendant, and owning land within the boundaries of the Azusa water district, were entitled." As to parcel "C" (the 8-acre tract), no use of water was required or shown subsequent to the compromise agreement until "some time in 1901 or 1902," when water was delivered for one season to a tenant. There was a conflict of evidence on the proposition whether this was stock or old-user water, and the court found that it was "stock water to which the plaintiff was entitled by virtue of stock of defendant company," but that plaintiff at that time demanded old-user water therefor. A subsequent demand for old-user water for another season was never complied with. In 1906 Gordon set out this tract in orange trees. His demands for old-user water for this tract have never been complied with. As to parcel "B" (the 10-acre tract), the evidence was such as to support a conclusion that no water was ever received by Gordon for more than 3 acres. His demands for a larger portion of "old-user" water, repeatedly made since May 12, 1902, have always been denied. These actions were commenced May 10, 1905. In addition to other findings, the court found in response to allegations to that effect made by the answers, first, that the other parties to the contract of June, 1888, and the contract supplemental thereto, were necessary parties to a determination of the questions involved relating to parcel "A," but not as to parcels "B" and "C," and, second, that the causes of action set forth in the complaints are barred by the provisions of sections 318, 337, and 343 of the Code of Civil Procedure.

[1] It is clear that whatever rights plaintiffs acquired under the contract of June, 1888, and the supplemental contract of February 13, 1889, to receive water for irrigation on parcels "A," "B," and "C," as against defendant, cannot be held to be affected by the so-called compromise agreement dated January 26, 1889. They were not parties to that agreement, and, of course, if they had been given rights by the prior agreements, those rights could not be affected by an agreement to which they were not parties. Nor can they be held to have acquired any additional right by virtue of such compromise agreement (except as to the 9.23 acres of parcel "A" included in the water district described therein), or the attempted agreement of February 23, 1889, purporting

to give them rights under the compromise agreement. As to the compromise agreement, the provision relied on by appellants to the effect that the defendant shall represent all the acreage and take the water of all lands of the so-called old users who have turned over to such corporation the management and control of the water to which they are entitled clearly had reference only to the acreage included in the water district specifically described in such agreement, and the old users on such acreage. The attempted agreement of February 23, 1889, on its face contemplated an execution by all the old users who had signed the compromise agreement. Its provisions were of such a nature that it could not be effectual as against any of such old users who did not join in its execution. By its express provisions, the additional water to be given to Mrs. Gordon, and all of the water to be given to Mr. Gordon, was to be taken from the portion allotted by the compromise agreement to the acreage embraced in the water district described therein. So much of their land "as can be irrigated from the cement ditch" was to be added to and made a part of such water district, and thus made entitled to receive water belonging under the compromise agreement solely to the acreage described therein. As we have seen, the evidence was sufficient to support the conclusion that Mr. Gordon was informed that, to make the attempted contract effective against defendant, all the irrigators in the old district would have to sign it. But, independent of this the attempted contract was such on its face as to show the necessity for this.

[2] The material question, then, is as to the rights of the plaintiffs against defendant under the contract of June, 1888, and the supplemental contract of February 13, 1889. We are of the opinion that it must be held, as was practically held by the lower court, that the defendant simply undertook to take such water as might be delivered to it by the so-called old users, and carry it for them through its ditch to their lands, at a prescribed charge; the amount to be furnished any old user, however, not to exceed more than one inch of water for each eight acres of land, or such lesser quantity as shall bear the same relation to one to eight acres as the water received bears to the pro rata share theretofore distributed to said users from the public ditch. Practically, the defendant made itself a carrier of their water for the old users, and its liability in that connection to any such user was dependent on receiving water to be carried from or for him. Whatever uncertainty may exist in the provisions of the contract of June, 1888, on this point is removed by the clear and explicit provision in the supplemental contract that none of said parties "shall \* \* \* have any right under this agreement in excess of the amount of water fur-

nished by such old user to the company." By the agreement, the old users expressly undertook "to deliver" to defendant, at the mouth of the ditch, their pro rata share of the water, and defendant agreed that, "if the aforesaid water is delivered to them as aforesaid, \* \* \* they will carry and deliver" it, etc. There was no obligation on the part of defendant to carry or deliver to any of the old users any water except that received for them, and certainly no obligation on its part to furnish to either of plaintiffs any of its own water acquired for its stockholders and for sale if there was a surplus over the amount required for the stockholders.

There can be no doubt as to the purpose of the compromise agreement so far as the intent to exclude plaintiffs from any participation in the waters of the San Gabriel canyon, except as to the 9.23 acres of Mrs. Gordon included in the water district described therein, is concerned. This agreement purported to cover *all* the waters of such canyon, and to provide for their division in a specified way, to the exclusion of plaintiffs, except as to said 9.23 acres of Mrs. Gordon. The old users joining in the execution thereof formally declared that the only acreage entitled to any old users' water was that described therein. Plaintiffs had full notice of this claim and of the subsequent acts of the parties under it.

The agents of the parties provided for in such agreement, the committee of nine, at all times thereafter had actual possession of all the waters of the canyon for the purposes of distribution and delivery, and there was enough in the evidence to support the conclusion of the trial court that the only water permitted by said committee to flow to defendant for use by old users, except water for 1.6 acres of parcel "C," has been water for acreage included within the limits of the water district described in such agreement. Whatever may have been the right of the Gordons as against those appropriating to their own use waters in fact belonging to them (the Gordons), if they so did, it would seem to necessarily follow that the Gordons did not deliver to defendant, either personally or by agents, old-user water to be carried to their premises (except as to the 9.23 acres of parcel "A" and the 1.6 acres of parcel "C"), and that, in the absence of such delivery, there is no liability on the part of defendant to deliver to them any of such old-user water. As we have seen, the only obligation of defendant under the contracts with plaintiffs was in respect to such old-user water, and there was no obligation on its part to furnish any of its own water to them. As to the excess over 9.23 acres of Mrs. Gordon's land furnished with water from 1890 to 1902, between five and six acres, such water being furnished from the old-user water and as water to which



she was thought to be entitled under the compromise agreement, it may be that Mrs. Gordon acquired the right to have such supply continued, but we think it very clear that the other old users were necessary parties to the determination of that question, and that the defense of nonjoinder of necessary parties in that regard was properly sustained by the lower court. As already noted, the judgment expressly provided that it was without prejudice to the right of Mrs. Gordon to prosecute another action against the old users referred to in the answer and against the defendant as the distributor of their waters, and to assert and enforce such rights as she may have. In view of what we have said, it is apparent that the complaint of appellants in regard to the conclusions of the trial court as to parcels "B" and "C," owned by Mr. Gordon, cannot be held well founded.

[3] As to parcel "D," originally the Bower tract, an altogether different question is presented. The sole claim of Mr. Gordon as to this land is based on the provisions of a deed dated September 10, 1883, executed by James G. Bower, the then owner of such tract, to defendant. By this instrument, Bower, for an expressed consideration of \$10, remised, released, and quitclaimed to defendant a right of way over the land of Bower in the N.  $\frac{1}{2}$  of the N.  $\frac{1}{2}$  of section 26, Township 1 N., Range 10 W., S. B. M. (which included this land), and on a line sufficiently described, for a water ditch of sufficient capacity to convey 5,000 inches of water, the same to be so constructed as not to obstruct any roads of Bower, defendant to construct and maintain crossings over said ditch where necessary for Bower's use, and "said first party (Bower) to have the right to purchase and use the water of said ditch upon the same terms and conditions as the stockholders of said corporation." Defendant's ditch has been constructed along the line designated in the deed. Bower conveyed this tract of land to one J. S. Slauson, Slauson to Henry Martz on April 29, 1887, Martz to one George W. McKennon on January 9, 1900, and McKennon to plaintiff, John T. Gordon, on January 9, 1902. All of the deeds were in the form of grant, bargain, and sale deeds, and conveyed the land "together with the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining," but contain no special reference to any right to water from defendant. The trial court found upon sufficient evidence that no water was ever furnished for irrigation of said land, except that for two seasons (1890 and 1891) water was delivered to a tenant in possession of said premises, but that the same was delivered to such tenant under and by virtue of stock of defendant company held by the tenant or his lessor, and was not delivered as water to which said land was en-

titled under the terms of said contract or any contract. It further found that neither the deed executed by Bower to the predecessor in interest of plaintiff, nor any of the mesne conveyances, contained any assignment or grant by Bower of any right held or claimed by Bower to take or use water from said ditch. It also found that only about five acres of said land are below the cement ditch or can be irrigated therefrom. It also found that plaintiff's claim as to this land was barred by the provisions of sections 318, 337, and 343 of the Code of Civil Procedure.

The question in this connection is as to the meaning and effect of the provision that Bower is to "have the right to purchase and use the water of said ditch upon the same terms and conditions as the stockholders of said corporation." The claim of Mr. Gordon is that this created a right appurtenant to the land of Bower over which the ditch was constructed, entitling the owner thereof to purchase and use thereon the waters of this ditch to the extent of the requirements of such land, upon the same terms and conditions as the stockholders of defendant. Defendant, on the other hand, claims that the right created was one personal to Bower, an easement in gross, and that such right did not pass by simple transfer of the land. So far as the record shows, as claimed by defendant, the water of defendant "is not made appurtenant to any land, but is distributed to the shareholders in proportion to their stock, and \* \* \* can be used and \* \* \* is used by stockholders upon any land that they may choose, either their own, or upon sale by them to other landowners." Section 2 of article 9 of its by-laws is as follows: "All water developed or acquired by this company shall be divided pro rata in proportion to the amount of stock they severally hold amongst the stockholders, provided that, if there be a surplus not needed for the stockholders' use, it may be sold for the benefit of the company."

In the light of the facts as to the rights of stockholders of defendant corporation in regard to the water of the company, it is apparent that the provision relied on is very uncertain and indefinite in its terms. The intent to limit the effect of the provision to any particular land is by no means clear. The land in fact owned by Bower in the 160 acres constituting the N.  $\frac{1}{2}$  of the N.  $\frac{1}{2}$  of section 26, township 1 N., range 10 W., S. B. M., is not described in the deed, and the "right to purchase and use the water of said ditch" is not, in terms, limited to the land owned by him or to any other particular land. The only prescribed limitation on the right is expressed in the words "upon the same terms and conditions as the stockholders of said corporation." The right is given simply to the "said first party" (James G. Bower). According to the evidence, the right



of a stockholder to use water is not appurtenant to any land, but he may change his place of use as he sees fit. According to findings sufficiently supported by the evidence, there has been no practical construction by any of the parties in favor of the theory that it was intended to make this right appurtenant to the land. In fact, under such findings, the only practical construction shown was opposed to such theory. For nearly 20 years no one apparently claimed the right to water under this contract, and, in the two seasons in which water was furnished for use on this land, it was demanded and received upon stock of the company. In view of all the circumstances, we are of the opinion that the trial court was warranted in concluding, despite the presumption that an easement is to be deemed appurtenant to some other estate whenever it can fairly be construed as such, rather than one in gross, that the right created was one personal to Bower, and not an appurtenance to any particular land. If this be true, it admittedly follows that there has been no assignment of the right, and that Mr. Gordon acquired no interest therein by reason of the conveyance of the land to him in the year 1902, which was the year when the dispute commenced between plaintiff and defendant as to water rights. We appreciate the force of the argument of learned counsel for Mr. Gordon to the effect that treating the provision as one personal to Bower, and placing him in the exact position of a stockholder of defendant, by reason of the fact that he did not own any stock there would be no way of determining the proportion of water which he was entitled to purchase. But, assuming that no measure of his right in this regard can be found in the deed, we do not think that such fact alone would compel the construction sought by plaintiffs to be given to this provision. It may be that the provision, construed as it was by the lower court, would be void for uncertainty, and still remain that no other construction might fairly be given to it. But it is suggested by counsel for defendant that, construing the provision as one personal to Bower, it might reasonably be held that there was a limitation on the amount of water he might purchase, and that he could take only such amount as would suffice to irrigate such of his land as lay below the ditch, with the right to make such use of the same as he saw fit. However, it is not necessary to determine as to this.

The judgments and orders appealed from are affirmed.

We concur: SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

SHAW, J., did not participate herein.

19 Cal. App. 670

CHASE v. HOLMES et al. (Civ. 1,138.)

(District Court of Appeal, Second District, California. Sept. 16, 1912.)

1. APPEAL AND ERROR (§ 430\*)—APPEAL FROM JUDGMENT—TIME.

An appeal from a judgment cannot be maintained where the notice of the appeal was not served until more than six months elapsed after the entry of judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2173, 2174; Dec. Dig. § 430.\*]

2. PRINCIPAL AND AGENT (§ 33\*)—REVOCA-TION OF AGENCY.

Where plaintiff intrusted a note to a collection agency for collection on percentage, and defendant was unable to collect the note and had incurred no expense, defendant's agency was not coupled with an interest, and was revocable on notice as prescribed by Civ. Code, § 2356, and plaintiff, having revoked the same, was entitled to possession of the note.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 54; Dec. Dig. § 33.\*]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Replevin by John B. Chase against W. H. Holmes and others, doing business under the firm name and style of W. H. Holmes & Co. Judgment for plaintiff, and defendants appeal. Affirmed.

Charles W. Hatton, of Los Angeles, for appellants. Ray L. Chesebro, of Los Angeles, for appellee.

ALLEN, P. J. The action was one in claim and delivery. The facts as found by the court are these: Plaintiff, the payee of a promissory note for \$2,000, intrusted same with defendants, a collection agency, with authority to collect, upon an agreement to pay 15 per cent. on all moneys collected thereon. The note was assigned to defendants for collection and a suit instituted, pending which a settlement was effected through which the payor paid in money to plaintiff \$547.50, transferred 10 shares of corporate stock, and executed a new note to the original payee for \$600. Plaintiff paid to defendants the sum of \$81 as commission on such collection, and transferred the certificate of stock for 10 shares under an agreement that 15 per cent. thereof, or 1½ shares, should be transferred to defendants, and the remaining 8½ shares to plaintiff. The court finds that this payment and transfer were in full settlement of all accounts due defendants for effecting such settlement; that on the date of such settlement plaintiff delivered said \$600 note to defendants upon the further agreement that they should retain 15 per cent. of any sum collected thereon. Defendants were unable to collect said note, or any part thereof, and, shortly after its maturity, plaintiff demanded possession thereof, which was refused; hence this action.

[1] The notice of appeal was from the judg-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ment and an order denying a new trial. More than six months having elapsed after entry of the judgment, the appeal therefrom cannot be considered.

The only matter requiring attention relates to the action of the court in denying a new trial. The specifications of error are as to the insufficiency of the evidence to support the finding with reference to the original agreement through which 15 per cent. of the moneys received should constitute defendants' compensation, and that the sum of \$81 and the transfer of 1½ shares of stock were received by the defendants in full satisfaction of their commission. We find evidence in the record sustaining the findings of the trial court; in fact, defendants' evidence goes far in that direction, were that of the plaintiff to be disregarded. The note in controversy was delivered to defendants and a receipt given therefor which states that the same was received for collection.

[2] Defendants incurred no expense other than that defrayed by plaintiff, and, under the agreement evidenced by this receipt, had no interest or claim other than the right to retain a per cent. upon moneys collected. Defendants collected nothing and were not agents with power coupled with interest, and the agency existing was one revocable under section 2356, Civil Code. Plaintiff having revoked this agency, he was entitled to possession of the note.

We see no error in the record warranting a reversal of the order denying a new trial, and the same is affirmed.

We concur: JAMES, J.; SHAW, J.

(19 Cal. App. 672)

PEOPLE v. KLEMPKE. (Cr. 252.)

(District Court of Appeal, Second District, California. Sept. 17, 1912.)

#### 1. CRIMINAL LAW (§ 449\*)—OPINION EVIDENCE—DISCRETION OF COURT.

It is for the trial court in the exercise of a sound discretion to determine the qualification of a witness to give an opinion as to another's inability to speak or understand a given language.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1034-1058; Dec. Dig. § 449.\*]

#### 2. WITNESSES (§ 331½\*)—IMPEACHMENT.

Evidence as to the number of times a peace officer testifying had theretofore been called upon to testify in criminal cases was not admissible to affect such witness' credibility.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 331½.\*]

#### 3. CRIMINAL LAW (§ 379\*)—CHARACTER EVIDENCE.

A question as to a witness' knowledge of accused's honesty and integrity, asked in a burglary prosecution, was properly excluded, being too general, and not purporting to show accused's reputation in his community.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 843, 844; Dec. Dig. § 379.\*]

#### 4. CRIMINAL LAW (§ 568\*)—EVIDENCE—MOTIVE.

Where accused's commission of the offense charged was clearly established by positive evidence, evidence of motive became immaterial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1271; Dec. Dig. § 568.\*]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Teofil Klempeke was convicted of second-degree burglary, and appeals from a judgment and order denying a motion for a new trial. Affirmed.

P. C. Kibbe, of San Luis Obispo, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., of Los Angeles, for the People.

ALLEN, P. J. Appellant was convicted of burglary in the second degree. From the judgment pronounced he appeals.

There can be no serious question as to the sufficiency of the evidence to sustain the verdict. Positive testimony appears in the record to the effect that defendant was seen emerging from a car used as a habitation by certain employes of a railroad company; that entrance thereto had been effected through force; that defendant, after leaving said car, had in his possession property belonging to the men living therein. His arrest immediately followed, while he still retained possession of the property.

Appellant seeks a reversal of the judgment on account of certain rulings of the trial court which he claims were erroneous and prejudicial. The defendant was shown to be a native of Russia and to have been in this country only 18 months. Evidence was admitted tending to show that defendant, through the use of the English language, made certain incriminatory statements with reference to the property in his possession shortly after his arrest. A witness, shown to have had but a limited acquaintance and means of observation with reference thereto, was asked if defendant could speak the English language; counsel announcing that by such evidence he expected to prove that defendant could not speak the English language. An objection was interposed to this question, which was sustained by the court, and this ruling is claimed to have been erroneous. It is certain that the witness could not of his own knowledge state as a matter of fact that defendant could not speak or understand a given language. His answer could only be in the nature of an opinion.

[1] It may be that one, after an extended acquaintance, with opportunities for observation and proper tests, would be a competent witness to give an opinion as to the inability of another to speak or understand a given language, but it is for the trial court in the exercise of a sound discretion to determine the qualification of such witness so to be heard. In the case under consideration the



court determined that such witness was not so qualified, and we cannot say that any abuse of this discretionary power is made to appear.

[2] The court upon another occasion sustained an objection to a question asked of a witness as to the number of times as a peace officer he had been called upon to testify in criminal cases. This evidence could have no effect other than that of affecting the credibility of the witness, and we are unable to see how the testimony of a peace officer could be affected by proof of the fact that he had in other cases been called upon to testify as a witness.

[3] We see no error in the action of the court sustaining an objection to a question propounded to a witness as to his knowledge of defendant's honesty and integrity. The question was too general, and did not purport to show his reputation in the community in which he lived. *People v. Murphy*, 146 Cal. 506, 80 Pac. 709. Numerous exceptions and specifications of error relate to the exclusion of evidence going to show want of motive.

[4] The commission of a crime by defendant was clearly established by positive evidence, and the motive therefore became unimportant. *People v. Besold*, 154 Cal. 369, 97 Pac. 871. Numerous exceptions are specified as to the action of the trial court in the matter of instructions to the jury. An examination of the record discloses no prejudicial error in relation thereto. Certain of these instructions refused, which were specific in their character, were covered by the general instructions, while a portion thereof purported to instruct as to matters not in evidence. The court in our opinion fairly and fully instructed the jury as to the law of the case presented by the evidence. We see no prejudicial error based upon the statements or acts of the district attorney, nor of the trial court. Nothing therein in our opinion was of such character as to warrant a reversal on account thereof. The record discloses a verdict, and judgment proper under the evidence, and no miscarriage of justice can be said to have resulted.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

19 Cal. App. 667

HECKER v. BAKER. (Civ. 1,154.)

(District Court of Appeal, Second District, California. Sept. 16, 1912.)

1. APPEAL AND ERROR (§ 549\*)—TRANSCRIPT—CONSIDERATION—OBJECTIONS—BILL OF EXCEPTIONS.

Objection to the consideration of the record on appeal on the ground that notice of the entry of judgment was not given within the time prescribed cannot be reviewed where it is not presented by bill of exceptions; it being presumed in support of the record that

the question of fact was determined adversely to respondent by the trial judge.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2441-2451; Dec. Dig. § 549.\*]

2. WORK AND LABOR (§ 4\*)—SERVICES—IMPLIED CONTRACT TO PAY.

Where it appeared that plaintiff's services sued for were rendered without any intent to charge compensation therefor, and the facts and surrounding circumstances indicated that they were to be gratuitous, plaintiff cannot recover the reasonable value thereof.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 3-7; Dec. Dig. § 4.\*]

Appeal from Superior Court, Los Angeles County; N. D. Arnot, Judge.

Action by F. H. Hecker against R. M. Baker. Judgment for defendant, and plaintiff appeals. Affirmed.

Charles M. Ackerman, of Los Angeles, for appellant. Lucius M. Fall, of Los Angeles, for respondent.

ALLEN, P. J. The action was one to recover for certain services rendered by plaintiff to defendant. Defendant by his answer denies the performance of the services, their value, or that any services were performed at defendant's request or for his benefit. Findings and judgment went for defendant, and plaintiff appeals under the alternative method.

[1] Objection is made by respondent to a consideration of the transcript because the notice required by section 953a, Code of Civil Procedure, was not given in time. Whether or not the notice of entry of the judgment was in fact given was a question of fact for determination by the judge to whom the transcript was presented for certification. It is true that the record discloses that the transcript was signed by a judge other than the trial judge, but a stipulation appears in the record to the effect that the transcript should be signed by the presiding judge, and it is so signed. Being signed in the manner agreed upon, and no objection being made at the time to the delay in the notice of the entry of judgment, it must be presumed, in support of the record, that the question of fact was determined adversely to respondent, and that the presiding judge properly authenticated the transcript as he was authorized to do by the stipulation. It was the duty of respondent, if he desired to object to the authentication of the transcript and have reviewed the action of the court below in relation to the certification, to have presented the matter to this court upon a bill of exceptions, under which only can questions of fact be reviewed. It is not within our province to consider affidavits attached to the record and not embodied in a bill of exceptions.

[2] Considering the appeal, then, upon its merits, we find evidence in the transcript tending to show that defendant, the owner

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



of certain premises, proposed to plaintiff to engage with him in business as occupants of such premises, defendant to fit up the premises in a proper manner, and when ready for business defendant to be allowed a rent for the room and fixtures. The stock was to be bought on joint account, and the profits, after payment of expenses, to be divided. This plaintiff agreed to, on the condition, however, that he was to be permitted to purchase all furniture and fittings, for the reason that he could buy cheaper than another by reason of already being in the business. The parties had various consultations over the purchases during the progress of fitting up the room, a part of which furniture consisted of an expensive soda fountain purchased by plaintiff and paid for by defendant. After the room was fitted for business, plaintiff declined to enter into the joint possession of the premises upon the plea that it would interfere with an established business then being conducted by him. He, however, when defendant remonstrated with him upon his failure to carry out his original plan, suggested that he would gladly show defendant, or those in his employ, how to conduct the business, and would give him the directions as to the preparation of certain articles designed for sale in the business. Plaintiff did give some instructions in the preparation of certain articles for the market and made occasional visits to the place, but it is obvious, if the trial court accepted as true the statements of defendant and his witnesses, that such services were rendered without any intent on plaintiff's part to charge a compensation therefor; in fact, there is to be found in the record declarations of plaintiff to that effect. The circumstances surrounding the parties when the various services were rendered, together with the evidence in the record in connection with their performance, we think, clearly justifies the court in finding the same to have been gratuitous upon the part of plaintiff, and that the settlement had between the parties was intended to be and was a full and final adjustment of all differences between them.

We see no error in the record, and the judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

19 Cal. App. 695

MILLS v. JACKSON et al. (Civ. 983.)

(District Court of Appeal, Third District, California. Sept. 17, 1912. Rehearing Denied by Supreme Court Nov. 16, 1912.)

# 1. REPLEVIN (§ 68\*)—AMENDMENT TO COMPLAINT.

The allowance of an amendment to the complaint in replevin excluding some of personality claimed in the original complaint was within the court's discretion.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 251-256; Dec. Dig. § 68.\*]

# 2. PLEADING (§ 236\*)—AMENDMENTS—CONFORMITY TO PROOF.

In replevin to recover personality claimed to have been purchased in connection with real estate sold to plaintiff by defendants, husband and wife, there was evidence that the wife was not the actual vendor, but represented to plaintiff that she had no interest in the property but that it belonged solely to her husband, and after the evidence was in, but before submission, the court permitted an amendment to the complaint setting up an estoppel as against her to deny her husband's ownership of the personality by reason of her representations to plaintiff that he owned it. *Held*, that there was no abuse of discretion in permitting the amendment to make the complaint conform to the proof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.\*]

# 3. ESTOPPEL (§ 83\*)—EQUITABLE ESTOPPEL—MISREPRESENTATIONS.

In replevin to recover personality claimed to have been purchased from defendant under representations by his wife, also a defendant, that he owned the property, it appeared that during the negotiations the wife deliberately led him to believe that her husband owned the personality and frequently told him that she did not own any of it, and that plaintiff believed such statements and acted upon them, and upon such belief purchased the property. Code Civ. Proc. § 1962, subd. 3, provides that whenever one has, by his own declaration or act, intentionally and deliberately led another to believe a particular thing to be true and to act upon such belief, he cannot, in litigation arising therefrom, be permitted to falsify it. *Held*, that the wife was estopped from denying that her husband owned the personality purchased by plaintiff.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 218, 227-229; Dec. Dig. § 83.\*]

# 4. EVIDENCE (§ 460\*)—PAROL EVIDENCE—EXPLAINING CONTRACT—SALE.

A memorandum of the sale of personality which merely recited that it included "all personal property on said ranches, live stock, hay, grain, and farm and dairy implements, furniture, etc., except 14 head horses, two dozen chickens, and piano and parlor table and hall piece, one saddle and bridle," was incomplete so that parol evidence was admissible to identify the property described as sold with that described in the complaint; such evidence not varying the memorandum.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2115-2128; Dec. Dig. § 460.\*]

# 5. APPEAL AND ERROR (§ 994\*)—FINDINGS—CONCLUSIVENESS.

Any inconsistencies in the evidence of a given witness is a matter solely for the consideration of the jury and trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901-3906; Dec. Dig. § 994.\*]

# 6. REPLEVIN (§ 93\*)—VERDICT—CONFORMITY TO PLEADINGS.

Where the answer in replevin did not ask for the return of property included in the original, but omitted from the amended complaint, there was no issue as to such property, so that the verdict need not find for defendants for its return.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 360-368, 371-375; Dec. Dig. § 93.\*]

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by Robert M. Mills against Thomas J. Jackson and another. From a judgment

for plaintiff and an order denying motion for a new trial, defendants appeal. Affirmed.

Rehearing denied by Supreme Court; Beatty, C. J., dissenting.

Jas. F. Farragher, of Yreka, for appellants. J. M. O'Neill and L. E. Coburn, both of Yreka, for respondent.

**BURNETT, J.** The action was in replevin. It grew out of the purchase by plaintiff of certain real and personal property for the sum of \$35,000. At the time of the agreement for the sale a memorandum was drawn up by Mr. Mills and signed by Mr. Jackson, as follows: "March 8th, 1911, received of Robt. M. Mills \$500, being part of the purchase price, for the ranch, known as the Arbaugh Ranch and the Arenburgh Ranch and also the ranch known as the French Ranch in McCloud or Squaw Valley ranch, containing in all 965 acres with all appurtenances, also all personal property on said ranches, live stock, hay and grain, farm and dairy implements, furniture, etc. Except 14 head horses, 2 doz. chickens, and piano and parlor table and hall piece, one saddle and bridle. Consideration for the three above named ranches thirty-five thousand dollars to be cash payment." The balance of the consideration was afterwards paid by plaintiff, but a dispute arose as to the articles of personal property covered by the agreement, and hence this suit. Before trial plaintiff was permitted to amend his complaint by excluding some of the personal property claimed therein, and, after the evidence was in, but before submission of the case, another amendment was allowed setting up an equitable estoppel against defendant Emma H. Jackson. The jury trying the case found the following verdict: "We, the jury impaneled to try the case wherein Robert M. Mills is plaintiff and Thomas J. Jackson and Emma H. Jackson are defendants, do find for the plaintiff and fix the value of the property mentioned in the complaint at the sum of \$833."

We deem unnecessary elaborate treatment of the points made by appellant, as the principles involved are elementary and familiar. Neither do we feel called upon to set out the evidence, as it is known to the parties and can be of no particular importance to any one else.

[1] That it was within the discretion of the court to permit the plaintiff to file the said amendments to his complaint we entertain no doubt. The purpose was to promote the determination of the cause upon its merits with as little expense and trouble as possible, and the proceeding was clearly within the letter and the spirit of our reformed procedure. No reason is apparent why a party who brings an action and subsequently discovers that he is entitled to only a portion of that for which he sues should not be permitted, by amendment to his complaint, to invoke the judgment of the court or jury

upon the real issue between the parties. It seems difficult to understand why he should be compelled to try the title to something to which he has found out before trial that he had no title and when he has concluded not to assert title to it. Of course, if defendants had been taken by surprise or put to additional expense, no doubt the court, upon a proper showing, might and would have imposed terms upon plaintiff, but no such case is presented.

[2] It is equally clear that, upon principle and authority, the court was justified in allowing an amendment to conform to the proof. The complaint was framed upon the theory that the property was sold to plaintiff by the defendants. There was evidence at the trial that defendant Emma H. Jackson was not an actual vendor but that she represented to the purchaser that she had no interest in the property, but that it belonged solely to her husband, defendant Thomas J. Jackson. It was to meet this theory that the amendment was allowed. The equitable estoppel thereby pleaded was undoubtedly germane to the issue of ownership, which was before the jury for determination. Upon this branch of the case it is deemed sufficient to cite the following authorities: Sections 469 and 470, Code of Civil Procedure; *Hedstrom v. Union Trust Co.*, 7 Cal. App. 278, 94 Pac. 386; *Jackson v. Jackson*, 94 Cal. 462, 29 Pac. 957; *Firebaugh v. Burbank*, 121 Cal. 193, 53 Pac. 560.

[3] Appellants' claim that the equitable estoppel was not sufficiently pleaded is unwarranted. Plaintiff, following substantially the language of subdivision 3 of section 1962, Code of Civil Procedure, averred: "That at the time of making such purchase by the plaintiff as aforesaid and prior thereto, during the negotiations that led up to said purchase, she deliberately led the plaintiff to believe that the said Thomas Jackson was the owner of said personal property. That she frequently told this plaintiff during such negotiations, and at the time that said purchase was completed, that she did not own any of said property, but that the said defendant Thomas J. Jackson did own the same and the whole thereof, and that the plaintiff did believe said statements of said defendant and did act upon them and upon such belief, and, acting upon such belief and statements, he did purchase such property as aforesaid." We find thus presented clearly all the elements of equitable estoppel, or an instance of what the Code classifies as conclusive presumptions. Section 1962, Code Civ. Proc. It appears that by her acts and declarations she deliberately and intentionally led plaintiff to believe that her husband was the owner of said property and to act upon said belief in its purchase. It would follow that she is estopped from denying said ownership.

[4] The court did not err in allowing parol evidence of the negotiations between the



parties. The effect of this was not to vary the terms of any written contract. It is apparent that the written memorandum received in evidence is quite incomplete as to the personal property. There was no attempt therein to enumerate or specify the articles definitely, and hence parol evidence was proper and necessary for their identification—in other words, for the purpose of showing that the personal property described in the complaint was identical with that intended to be and actually sold. *Habenicht v. Lassak*, 77 Cal. 139, 19 Pac. 260. Since Emma H. Jackson also participated in these negotiations, the evidence was admissible against her, since it is admitted that she did not sign said written instrument. This would be so, upon either theory, that she was a part owner, or that by her acts and declarations she was estopped from denying the ownership of her husband. Since a part of the purchase money was paid at the time of the sale and afterwards the balance, she is in no position to urge, in opposition to this view, the statute of frauds as prescribed in section 1624 of the Civil Code.

The original complaint, as we have seen, alleged that plaintiff purchased the property "from the defendants." The complaint was in this form when a motion for nonsuit was made by appellant Emma H. Jackson. While the more plausible view of the case is that presented in the complaint as finally amended, there is found in the record substantial support for the action of the court in denying said motion. So it may be said as to the verdict of the jury and the final judgment that they are legally justified.

[5] Appellants criticize with considerable asperity the testimony of plaintiff, and it must be admitted that the transcript discloses some apparent inconsistencies and contradictions therein, but this was a matter solely for the consideration of the jury and trial court. After a reading of all the testimony, it is sufficient for us to say that it affords legal support for the finding against appellants. The evidence as to the value of the personal property is indeed meagre, but this feature of the case is unimportant in view of the fact that plaintiff, at the time of the trial, had the property in his possession; the evidence showing that he had taken it by auxiliary process as provided in section 509 et seq., of the Code of Civil Procedure. There is some general criticism of the action of the court in the matter of instructions. We think, however, that the law was fully and fairly disclosed therein, and we can see no ground for appellants' complaint.

[6] It is claimed that the jury should have found in favor of appellants for the return of the property included in the original but omitted from the amended complaint. No such verdict, however, was demanded in the amended answer, and therefore no issue was presented as to these articles. The

reason why no such demand was made is probably because said property had been returned by plaintiff. It is stated by respondent in his brief, and not denied by appellants, that said property had been restored to defendants before the trial of the action. This being true, and the plaintiff having abandoned all claim to them, they were, of course, eliminated from further consideration. The situation in *Howell v. Foster*, 65 Cal. 169, 3 Pac. 647, was quite different, as is apparent from a reading of that case. No other point is deemed of sufficient importance to merit specific attention.

We find no prejudicial error in the record, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

BEATTY, C. J., dissents.

19 Cal. App. 688

### PEOPLE v. BLAIR. (Cr. 184.)

(District Court of Appeal, Third District, California. Sept. 17, 1912. Rehearing Denied by Supreme Court Nov. 15, 1912.)

#### 1. EMBEZZLEMENT (§ 11\*)—ELEMENTS—DEMAND FOR RETURN OF PROPERTY.

To constitute the crime of embezzlement, a demand for the return of the embezzled property is not necessary where the fraudulent appropriation is established by other sufficient proof.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 9, 10; Dec. Dig. § 11.\*]

#### 2. EMBEZZLEMENT (§ 39\*)—ADMISSIBILITY OF EVIDENCE.

On a trial for embezzlement, the admission of evidence as to the disposition of the property made by accused after his arrest, not for the purpose of showing embezzlement subsequent to his arrest, but as relating back and showing his intention, if he did embezzle it before, was proper.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. § 62; Dec. Dig. § 39.\*]

#### 3. EMBEZZLEMENT (§ 44\*)—WEIGHT AND SUFFICIENCY OF EVIDENCE.

Evidence on a trial for embezzlement held sufficient to support a conviction although no demand had been made that the property be returned by accused or applied by him to the purpose for which it was delivered to him.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 67-70; Dec. Dig. § 44.\*]

#### 4. CRIMINAL LAW (§ 1172\*)—APPEAL—HARMLESS ERROR—ERROR FAVORABLE TO APPELLANT.

On a trial for embezzlement, the court charged that one who acts as the agent of another and in such capacity is intrusted with and receives into his care any money for the use of another person, and fraudulently appropriates it to his own use or to any use or purpose not in due and lawful execution of his trust, was guilty of embezzlement, and that, if the jury found that accused did unlawfully, fraudulently, and feloniously convert, embezzle, and appropriate the money mentioned in the information to his own use and contrary to his trust as agent, he should be found guilty. A requested instruction which was erroneous as requiring a demand for the return of the property or its application to the purpose for which it was delivered to accused was given by the



court so modified as to charge that it was the duty of accused to apply the property to such purpose within a reasonable time, that the jury were the judges under the circumstances of what was a reasonable time, and that if no demand for its return was made, and if an unreasonable time had not elapsed, the jury should acquit. *Held* that, if this instruction was erroneous as weakening the force of the correct instruction given and as making accused's guilt or innocence depend upon performance of his duty within a reasonable time, such error was favorable to accused, and hence not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154–3163, 3169; Dec. Dig. § 1172.\*]

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

William T. Blair was convicted of embezzlement, and he appeals. Affirmed.

Leslie E. Johnston, of Napa City, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, of Sacramento, for the People.

CHIPMAN, P. J. Defendant was tried and convicted on an information charging him with the crime of embezzlement, committed at the county of Napa about June 19, 1911. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

It is contended: First, that the evidence fails to show that defendant was guilty of embezzlement; and, second, that the court erred in refusing to give the only instruction requested by defendant and in giving it as modified by the court.

1. Upon the first point defendant contends that the complaining witness, Mrs. Booker, "intrusted the sum of \$3,500 to defendant with which to buy a farm or ranch. No time was specified within which the purchase was to be made; no place was specified as to where the ranch or farm was to be purchased. The amount defendant was to pay for the ranch was not mentioned, and no demand was ever made upon defendant that he return the money or carry out the trust." The evidence was that no demand had been made upon defendant for a return of the money; that defendant received the money about June 19, 1911, deposited it in a bank in Napa, and about that date drew it out and departed from Napa with it, and was not afterwards seen by Mrs. Booker until after his arrest in January, 1912. It does not appear that Mrs. Booker had any opportunity to make a demand upon defendant otherwise than by letter, and, as he told her in a letter written by him July 20, 1911, from some place in Arkansas, that he was about "to start to Sacramento" and that he wanted her "to leave off writing until" she heard from him, there was no opportunity after that date even by letter.

[1] But upon this point we think defendant is in error in his contention that a demand was necessary in order to make the

conversion of the money embezzlement. The law is very well stated in the case of *People v. Hatch*, 125 Pac. 907, wherein the opinion refers to at least two of the cases relied upon by defendant. We quote: "It is claimed that no demand was shown to have been made upon defendant for the money involved with which it was his duty to comply. In the first place, the guilt or innocence of defendant does not necessarily depend upon the question whether or not any demand has been made upon him for the money involved. The real question is, Does the evidence show a fraudulent appropriation by defendant of the money involved? Neither *People v. Page*, 116 Cal. 387, 48 Pac. 326, nor *People v. Royce*, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524, lays down the rule that a demand is necessary as a matter of law to constitute an embezzlement. In each of these cases the court discussed the evidence and held that it was insufficient to support a verdict of guilty, and in so doing adverted to the fact that no demand had been made, and in each case also adverted to the fact that it had not been shown that the defendant had in fact or at all appropriated the money involved to his own use, or that he did not have it on hand at all times to meet any demand if one had been made. 'No doubt embezzlement may be established under certain circumstances without proof of a demand, as where other evidence clearly shows an appropriation by an employé of his employer's funds, with intent to do so fraudulently and feloniously.' *People v. Royce*, supra. In some cases, in the absence of other sufficient proof, a demand may be necessary to fix the fact of the fraudulent appropriation; but the real test always is, Does the whole evidence establish the crime charged—that is, a fraudulent appropriation as charged in the indictment? *People v. Ward*, 134 Cal. 301 [66 Pac. 372]." It thus appears that it is only in the absence of other sufficient proof that a demand may be necessary to fix the fact of the fraudulent appropriation; the true test being: "Does the whole evidence establish the crime charged?"

The complaining witness, Mrs. Booker, is a widow of 75 years, and in the month of March or April, 1911, resided at St. Helena. She hired defendant to work for her at that time, and later, while in her service, she intrusted \$3,500 to defendant for the purpose of purchasing a farm, mentioning Kansas, Arkansas, Missouri, and Colorado as the states in which he was to make the purchase. The evidence would justify the inference that Mrs. Booker's understanding was that defendant would purchase a ranch for her and for her support while she lived and to go to defendant at her death. Defendant journeyed through these states and wrote Mrs. Booker four letters which were introduced in evidence. One of them was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes

dated Cord, Arkansas, June 28th, in which he speaks of liking Colorado better than Arkansas. The next letter was dated at the same place, July 8, 1911, acknowledging the receipt of a letter from Mrs. Booker, and informs her that he may come to Napa. The third letter was dated "Cabool, July 20," and informs Mrs. Booker that he will start for Sacramento soon and tells her to "leave off writing" to him until she hears from him. The last letter is dated Holden, Missouri, August 5th in which defendant wrote: "Mrs. Booker—Dear Ma: I will be in Sacramento, Cal., soon. Then I will write and tell you what to do. I want to see you enjoy life. I will locate in Ogden, Utah, on Salt Lake as that is the best climate I have been in since I left you. Now cheer up and don't think the time long for I have had a hard time. Good bye. As ever, Your Will." We next hear of defendant under arrest in January, 1912, at Camas, a small town near Vancouver, state of Washington, and of his extradition for the offense here charged. Of his movements after August, 1911, nothing appears except as shown by his own statements to the arresting officers and the officers sent from this state. To one of these he stated that he came to Napa and tried to find Mrs. Booker, and from there he went to St. Helena. No account of his subsequent whereabouts or what he was doing appears. He did not find Mrs. Booker and she did not know of his return, and whether he made any effort to find her is not shown. Defendant introduced no evidence. To the officer who brought him back from Vancouver he stated: That when arrested he had \$2,050, in a belt around his body, of the money intrusted to him by Mrs. Booker; that he went to a bank with the sheriff who arrested him and deposited the money; that he "put one over on Cressep, the sheriff of Clark county, in reference to the possession of the money," which he further explained was done by giving a lawyer at Vancouver checks for all of this money. Concerning the intrusting of the money to him by Mrs. Booker, he said: "She called him in the house and gave him \$50, two \$20 bills and a \$10 bill, then subsequently she gave him \$3,500 and he was to buy a ranch some place in the east, he was to buy a ranch, and they were going to be married when he got the ranch. When he said that I said, 'What did you do with the rest of the money? You only had \$2,000, that was \$1,500 shy?' Well, he said if he could get to talk with Mrs. Booker 15 minutes he could settle the matter all right. He said he had property that he bought for \$1,000 some place, when he could see Mrs. Booker he could explain it. That was in substance the conversation we had with reference to the money."

[2] Objection was made to testimony relating to what defendant did with the money after his arrest. The court correctly, we

think, admitted the evidence, not to show embezzlement of the money subsequent to his arrest, but as "relating back and showing his intention if he did embezzle it before."

[3] We think there was sufficient evidence to justify the jury in concluding that the crime of embezzlement was committed by defendant. If he returned to Napa at all, of which we know only from what he said to the extradition officer, it is inconsistent with any theory of innocence that he should make no effort to find his benefactress while at her place of residence or to communicate with her in any way, but, on the contrary, should betake himself to another state where she would be the least likely to know anything about him. He severed all connection with her in August, 1911, and wrote her to cease writing to him, and falsely led her to expect he would meet her in Sacramento in a short time. The case exhibits a wanton violation of the trust reposed in him by this old woman, whose examination as a witness shows her to have been a person easily victimized through her own credulity.

[4] 2. The defendant requested the following instruction which was given, with modifications indicated in italics: "I instruct you, gentlemen of the jury, that if you shall find from the evidence that on or about the 19th day of June, 1911, the complaining witness, Mrs. Caroline Booker, instructed (intrusted?) the defendant William T. Blair with the sum of \$3,500, lawful money of the United States of America, upon the express trust or agreement that said Blair was to use said moneys for the purpose, and none other, of purchasing a farm or ranch for said Mrs. Booker, but that no time was fixed as to when said purchase was to be made or place designated where said ranch or farm was to be purchased, *it was incumbent upon defendant to perform said contract within a reasonable time after receiving said money, and you are the judges under all of the circumstances shown in this case what would have been a reasonable time within which to purchase such farm.* And if you shall further find that neither Mrs. Booker, or any one in her behalf, ever demanded of defendant before the date of his arrest that he return said sum of money to her or that he forthwith purchase said ranch or farm, *and that an unreasonable time had not elapsed after defendant received the money up to the time of his arrest,* then I instruct you that the failure of defendant to purchase such ranch or farm, if you shall find from the evidence that defendant did fail to make such purchase, or his failure to repay or return to Mrs. Booker said money prior to the date of his arrest, is not sufficient to charge him with embezzlement, and your verdict must be not guilty." As requested, the instruction assumed that, if the money was intrusted to defendant to purchase a farm, and neither the time nor



the place was fixed for the purchase, there could be no embezzlement unless before his arrest there had been a demand made upon him for the return of the money or the purchase of the farm. This assumption ignores the doctrine clearly laid down in the Hatch Case, *supra*, that, "The real test always is, Does the whole evidence establish the crime charged—that is, a fraudulent appropriation as charged in the indictment?" The court would have been justified in refusing the instruction.

The court correctly instructed the jury as follows: "I instruct you that one who acts as the agent of another, and in such capacity is intrusted with and received into his care any money for the use of another person and fraudulently appropriates the same to his own use or to any use or purpose not in the due and lawful execution of his trust, is guilty of embezzlement; and in this case, if you find from the evidence to a moral certainty and beyond a reasonable doubt that the defendant did unlawfully, fraudulently, and feloniously convert, embezzle, and appropriate the money mentioned in the information, or any part thereof, to his own use and contrary to his trust as such agent, then your verdict must be guilty." If the modified instruction had any effect, its tendency was to weaken the force of the correct instruction given by the court and to defendant's advantage. Defendant's criticism is that the instruction made the guilt or innocence of defendant to turn upon the question whether he had performed his trust within a time found by the jury to have been "reasonable" or "unreasonable," and that the question of time was a false quantity. Conceding this, still it gave defendant an added chance for escape of which he cannot complain. However, after a consideration of the entire record, including the evidence, we cannot say that the error which crept into the instruction complained of, if it be error, has resulted in a miscarriage of justice. Am. to the Constitution, § 4½, art. 6.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

19 Cal. App. 675

PEOPLE v. PRESTON. (Cr. 182.)

(District Court of Appeal, Third District, California. Sept. 17, 1912. Rehearing Denied by Supreme Court Nov. 15, 1912.)

1. CRIMINAL LAW (§ 742\*)—TRIAL—QUESTIONS FOR JURY.

On a trial for statutory rape, where the prosecutrix gave as an excuse for not replying to questions that she was ashamed to tell and asked several times how she should express it, it was a question for the jury whether her apparent unwillingness to testify was due to her immature age and innate modesty, or to the fact that the testimony called for was false.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1098, 1138, 1719-1721; Dec. Dig. § 742.\*]

2. RAPE (§ 57\*)—TRIAL—QUESTIONS FOR JURY.

On a trial for statutory rape, testimony of the prosecutrix, although given reluctantly and nowhere in direct terms charging accused with having sexual relations with her, held to present a question for the jury whether she meant to, and in fact did, testify that he had such sexual relations with her.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 87; Dec. Dig. § 57.\*]

3. RAPE (§ 52\*)—EVIDENCE—WEIGHT AND SUFFICIENCY.

On a trial for statutory rape, the act of sexual intercourse may be proved by circumstantial as well as by direct evidence.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-74, 76; Dec. Dig. § 52.\*]

4. RAPE (§ 52\*)—EVIDENCE—WEIGHT AND SUFFICIENCY.

On a trial for statutory rape, evidence held sufficient to support a conviction.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-74, 76; Dec. Dig. § 52.\*]

5. CRIMINAL LAW (§ 472\*)—EVIDENCE—ADMISSIBILITY.

On the trial of a married man 45 years old for statutory rape on a young girl, where she had testified that an unsigned note addressed to her and asking her to meet the writer in secret was handed her by accused, although such note was then admissible in evidence to show the relations between the parties, it was proper for the state to show by expert evidence that accused was the author of the note.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1059; Dec. Dig. § 472.\*]

6. RAPE (§ 62\*)—APPEAL—HARMLESS ERROR.

Where the evidence on a trial for statutory rape was sufficient to support a conviction, accused was not prejudiced by the failure of the state to have an examination of the vagina of prosecutrix made by a physician for the purpose of ascertaining whether she had had criminal intercourse with any one, especially where he made no motion for such an examination.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 103, 104; Dec. Dig. § 62.\*]

7. RAPE (§ 43\*)—EVIDENCE—PHYSICAL EXAMINATION.

A court has inherent power on motion of a person accused of statutory rape to order an examination by a physician of the vagina of the prosecutrix for the purpose of ascertaining whether she has had criminal intercourse with any one.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 62, 65; Dec. Dig. § 43.\*]

8. CRIMINAL LAW (§ 742\*)—TRIAL—QUESTIONS FOR JURY.

On a trial for statutory rape, where the testimony of the prosecutrix was not inherently improbable, it was a question for the jury whether contradictions and inconsistencies therein impeached her statement as to the act of intercourse, and an appellate court could not substitute its judgment for that of the jury and trial court on this question.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1098, 1138, 1719-1721; Dec. Dig. § 742.\*]

9. RAPE (§ 54\*)—EVIDENCE—CORROBORATION—NECESSITY.

There is no rule requiring the prosecutrix in a prosecution for rape to be corroborated.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 83, 84; Dec. Dig. § 54.\*]



10. WITNESSES (§ 352\*)—EVIDENCE—CHARACTER OF FEMALE.

On a trial for statutory rape, evidence that the prosecutrix during her whole life had been subjected to bad or immoral influences and surroundings, offered as tending to show that her reluctance to testify was not due to modesty, delicacy, or shame regarding the sexual relation, but to the fact that she had been coached to tell a fabricated story, was properly excluded.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1152; Dec. Dig. § 352.\*]

11. CRIMINAL LAW (§ 720\*)—ARGUMENT—REFERENCE TO MANNER OF TESTIFYING.

The manner in which a witness testifies is generally a matter for argument addressed to those who must decide the facts.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1670, 1671; Dec. Dig. § 720.\*]

Appeal from Superior Court, Siskiyou County; Jas. F. Lodge, Judge.

Wallace A. Preston was convicted of statutory rape, and he appeals. Affirmed.

Mark L. Burns, of Dorris, and Taylor & Tebbe, of Yreka, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, of Sacramento, for the People.

HART, J. The defendant prosecutes this appeal from the judgment of conviction rendered against him and from the order denying him a new trial on an information charging him with the crime of statutory rape. The crime is alleged to have been perpetrated in the county of Siskiyou, in the month of November, 1910.

The principal point urged by the defendant is that the evidence is insufficient to support the verdict. There is, however, another point, which was particularly pressed at the oral argument and which involves an attack on the rulings of the court disallowing certain testimony proposed by the defendant. The child, Mabel McNames, upon whom the crime of which the defendant was convicted is alleged to have been committed, is the daughter of a Mrs. Stephenson by William McNames, her former husband, and was, when the alleged acts of criminal intimacy between her and the defendant took place, but a little over 12 years of age. The defendant was of about the age of 45 years at the times that his illicit relations with Mabel are claimed to have been maintained, and was a married man, having a wife and a young daughter. He was the owner of some land situated in the "Sleepy Creek" section of Siskiyou county, and not far distant from the place of one Cal. McNames, at whose home the Stephensons resided. It appears that the defendant, during the haying season of the year 1910, went to the McNames ranch for the purpose of assisting the Stephensons in harvesting and gathering their hay, with the understanding that, in consideration of and return for the services thus given, Stephenson would later assist him (Preston) in

constructing a levee on or near the latter's ranch. It was only a short time after the defendant commenced working for Stephenson when, according to the story told by Mabel, he began paying inordinate attention to the child, and finally succeeded in securing sexual relations with her.

Preston, it appears, while engaged in working for the Stephensons, occupied a sleeping room in their house. The girl slept in the kitchen. During that time, so Mabel testified, he visited her room every night after the rest of the family had gone to sleep, and would get into her bed. After he ceased working for the Stephensons, he would often go to their house late at night, remove his shoes, and, leaving them outside the door, go to the room of the child and get in her bed, it appearing that the outside doors to the house were always left unlocked. On one occasion, she said, she went with him in a buggy to his house, situated a short distance from where her family resided, and there (his own family then being in Dorris) he had illicit connection with her. The fact that she went to his house on the occasion referred to was corroborated by the child's mother. Mabel declared that the defendant had had such relations with her as much as 19 different times, and perhaps more than that number of times.

Now, the only testimony in the record tending to establish the guilt of the accused, aside from a couple of circumstances, one of which, if coming about under ordinary conditions, might well be viewed as possessing no special significance of an evil nature, and to which we shall later refer, was that given by the prosecutrix herself. The theory of the defense at the trial, and which was presented in the oral argument to this court with much force and unfeigned earnestness, was that the story of the prosecutrix was purely a fabrication, and that it was inspired and concocted by the mother of the child from motives of blackmail. The defense introduced some testimony tending to sustain that theory, and upon such testimony, together with the fact that numerous inconsistent statements by the prosecutrix concerning the alleged commission of the crime were disclosed on her cross-examination, it is vigorously insisted that this court is justified in finding that the charge was not satisfactorily proved or not sufficiently shown to measure up to the required proof in criminal cases.

The entire record of the testimony taken at the trial has been certified to this court under the new method of bringing up records in criminal cases, and it comprehends six volumes, of the requisite form and size, of typewritten matter. This testimony we have carefully examined and scrutinized, and, while greatly impressed at the time with the oral argument of counsel for the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

defendant, and although keenly mindful of the proposition, to which counsel addressed himself with singular force, that a story such as was told by the prosecutrix in this case is one that is ordinarily too readily accepted as verity by the general public, and that the members of a jury in such a case are consequently likely to be influenced more or less by the general feeling with which the atmosphere of the community seems thus to be impregnated as to the story, and will therefore require a less degree of proof to satisfy their minds as to the truth of the story than the law prescribes, yet, after reviewing the testimony in the manner suggested, we find ourselves in a position in which we feel unable to declare that the verdict was not justified. At the same time, it must be admitted that the criticisms of the testimony of the prosecutrix are not altogether without merit.

[1] She was a reluctant witness. It was with great difficulty that she was induced to return any sort of answers to questions propounded to her by the district attorney. But, eventually, after several hours were consumed, by persistent and, indeed, rather importunate questioning by the district attorney, the court, and even one of the attorneys for the accused, in securing a statement from her of what, if anything, the defendant did to her, she replied that he did "nasty things" to her, and finally that "he put his thing into mine," and these constituted the only answers involving accusations against the defendant she made to questions in their form not directly leading or suggestive. These answers, and the reluctance with which she returned them, constitute in part the basis of the claim and the argument by the defense that her story was fabricated and that it was put into her mouth, not by any improper conduct of the defendant toward her, but by her mother with and from whom, without cause, it originated and emanated. But the child repeatedly gave as an excuse for not replying to the questions by the district attorney that she was ashamed to tell what had occurred, and several times asked how or in what form she should express it, and it was, of course, a matter for the jury to determine whether her apparent unwillingness to testify was due to the fact, if it was a fact, that the testimony thus called for was false, or to the fact of her immature age and innate modesty. The latter inference was certainly as reasonable from the manner in which she acted on the stand as any that could be deduced therefrom, and we might even say that it was the most reasonable that could thus be drawn, for the natural repugnance in a female child of her age to acknowledging, before and in the presence of a number of grown persons, criminal intimacy with a man much her senior in years is a matter of common notoriety.

[2] The further contention is advanced, however, that nowhere did the prosecutrix in direct terms testify that the defendant had sexual relations with her; that the words, "he put his thing into mine," do not necessarily mean that she intended to say that the accused inserted his private parts into her private parts, and therefore it is argued they afford no more ground for the inference that he had sexual intercourse with her than as a basis for the inference that he put something of his into another part of her body—as, for instance, into her hand. But the record shows that, after she had answered as above indicated the questions put to her, the district attorney, referring to a particular occasion on which she had testified that the accused had done "the same thing to her," asked her, "Is that the last time he had sexual intercourse with you?" to which she replied affirmatively. She had previously declared that she knew the signification of the words "sexual intercourse" as well as of the words "organ" and "private parts." No attempt was made on cross-examination to show that she did not know the true import of the words "sexual intercourse," and it must be assumed that, when she declared that she did, she knew precisely the true significance of her answer to that effect. If, therefore, there be any force in the argument that the words, "he put his thing into mine," do not necessarily mean that the prosecutrix thus intended to express the fact that the accused had sexual relations with her, her answer to the question to the prosecuting attorney whether a certain occasion was the last time the defendant had "sexual intercourse" with her was a sufficient explanation of what she meant by the use of the words, "he put his thing into mine." The jury were, in other words, justified, from her whole testimony, in inferring that she meant to testify and did in fact testify that the defendant had had sexual relations with her. Moreover, the prosecutrix further testified that, on one occasion upon which he acted "nasty" with her, certain of her clothes became stained with blood as the result of his conduct, and that she destroyed the clothes by burning them so that her mother would not detect the blood stains. This was an important circumstance which the jury were authorized to consider, and very likely did consider, in determining whether she meant to testify, when describing the defendant's act with her, viz., that "he put his thing into mine," that he had committed the act of fornication upon her.

[3] Obviously the act of sexual intercourse may be proved by circumstantial as well as by direct evidence.

But it is claimed that, assuming that her description of the defendant's conduct toward her was sufficient to indicate that he had been illicitly intimate with the girl, still her



testimony stands in the record uncorroborated, and it is insisted that, considering the character of her story, the conviction should not be sustained on her uncorroborated testimony. This contention is not strictly correct, as an examination of the circumstances to which reference is above made will, we think, reveal.

[4] It was shown that the defendant, after the date when, according to the girl's testimony, he began having relations with her, purchased at Yreka and delivered to her a dress, a waist, a belt, and a pair of corsets. The girl testified that the defendant stated to her that he intended securing a divorce from his wife and then marrying the prosecutrix; that he said to her one day that he intended to buy her a dress and other articles of wearing apparel, and admonished her to tell her mother, on receiving them, that they came as a present from her own father, William McNames. The prosecutrix further testified that, the defendant having suggested that he would procure for her a ready-made dress, she measured herself by means of strings, and gave the strings, indicating the length, etc., of the dress, to the defendant prior to his departure for Yreka. On his return, she further testified, the defendant delivered to her a package containing the articles mentioned, and remarked to the child, in the presence of her mother, that he had received the package from the post office and conjectured that it was a present from her father. The prosecutrix confirmed this by declaring to her mother that her father had sent her the articles. The mother corroborated the girl's testimony on these matters. The defendant's explanation of this circumstance was that the girl's mother had requested him to purchase the articles, and that the measurements of the child, by means of strings, for the purpose of obtaining a ready-made dress, were made by the mother and the strings by her delivered to him. Mrs. Stephenson contradicted the defendant's statement in that respect. He, however, further testified, in this connection, that he first went home on returning from Yreka, and that he showed the package to his wife, and at the same time explained to her how and for whom he came to purchase the articles. But it is a fact of no little importance and significance in this connection that, although the defendant's wife was a witness in his behalf, she was asked no question and gave no testimony concerning the claim by the defendant that he called her attention to the articles or package and explained to her for whom he had purchased them. The jury had the right, of course, to believe the prosecutrix and her mother with respect to the circumstances under which the articles were purchased and delivered to the former by the defendant. And, if the jury believed that they told the truth relative to that transac-

tion, then they were at liberty to consider it, in connection with the other testimony in the case, as a circumstance disclosing the defendant's attitude toward the prosecutrix and, perhaps, his motive in presenting her with articles which he said had cost him the sum of \$10.

[5] Another circumstance of considerable significance is to be found in the note which the prosecutrix testified that the defendant secretly handed to her on a certain evening in November, 1911, in which he requested her to meet him secretly the following evening. It appears that on that occasion the defendant, one Gibson, and one Shirley paid a visit to the Stephensons. All the parties present, including Stephenson and his wife and Mabel, were sitting in the front room. Gibson was engaged in playing a violin, and the others were listening to the music and talking. The defendant and Mabel were sitting close to each other near a table standing in the center of the room. While the music and the conversations were in progress, the defendant passed the note to Mabel in such manner as not to attract the attention of other members of the company. After the visitors, including Preston, departed, Mabel went to her room and there immediately proceeded to read the note, when Cal. McNames stepped into the room, and, observing her perusing the writing, declared to her that she had received the note from Preston. This she at first strongly denied, but a few moments later admitted to McNames that Preston had placed the note in her hands that evening. It appears that McNames, from certain actions he had previously observed on the part of Preston toward the girl, had become suspicious that the pair were sustaining improper relations with each other, and the receipt of the note by the girl from Preston confirmed his suspicions. He thereupon concluded to reveal his suspicions to the mother of the girl, and a short time thereafter told the mother of his suspicions and of the receipt of the note by her daughter. Mrs. Stephenson called the daughter to her presence and accused the latter of receiving a note from Preston. The child at first strenuously denied receiving such a note, but finally admitted that, on the occasion above referred to, Preston did clandestinely hand her the note. The mother compelled the prosecutrix to produce the writing, and it was offered and received in evidence. It reads as follows: "May Dear: I wanted to get to see you. I have got something I must tell you. Can you come out beyond the water closet to-morrow night at 10 o'clock. You know how to leave the door so you can get out still. I will have the buggy down the fence. Don't fail if you can come let me know. Destroy this quick." The note was written in pencil and bore no signature, but the district attorney introduced some testimony, in the nature of expert proof, tending



to show that the writing contained in the note was in the hand of the defendant. This testimony was given by two certain bankers of Siskiyou county, one of whom, upon comparing the writing in the note with a letter written by him and also with the admitted signature of the defendant subscribed to other written instruments, declared it to be his opinion that the writing in the note was that of the defendant. This testimony was offered for the purpose, of course, of supporting the statement of the prosecutrix that the defendant surreptitiously delivered the writing to her on the occasion of his visit at the home of her parents with Shirley and Gibson. Her testimony alone would have been sufficient to justify the admission of the note in evidence, she having testified that it was given to her by Preston under the circumstances indicated, but the district attorney very properly sought to prove, not only that the defendant handed the note to the girl under the circumstances as shown, but that he was the author of the writing contained in the note. This circumstance, as stated, was important because of its tendency to disclose that a secret liaison between the defendant and the girl had been maintained, and thus, in view of the great disparity between the ages of the two and the fact that the defendant was a married man, furnish the basis for a strong inference in support of the verity of the girl's story.

We have now reviewed the principal testimony presented by the people in support of the charge, and we think that it must be clearly manifest therefrom that the verdict is thus placed beyond the power of a court of review to disturb. It is true, as stated, that the brother and the great-uncle of the prosecutrix gave what appears to be very damaging testimony against the theory and claims of the prosecution. They gave testimony which, if believed, or if believable, when considering their manner of giving it, would tend very strongly to show that the charge was trumped up against the accused for purposes of blackmail. The one testified that the mother, when she first heard of the defendant's alleged treatment of her child, threatened to make him pay her a certain sum of money, and the other declared that the mother threatened the child to do her great physical violence if she failed to stick to her story of the defendant's criminal intimacy with her. It was also made to appear that the mother said that she would sit in the courtroom during the progress of the trial, and that she would, by a nod of her head, indicate to the child how she should answer questions put to her by the attorneys. All this testimony we say appears to support the theory that blackmail was at the bottom of the prosecution, or that the charge was the result of a fabrication, yet it could all be true, and the accusation that the defendant

had been illicitly intimate with the girl still be well founded. In any event, however, the jury and the trial court heard all the testimony, and it must be presumed that they weighed it by means of the tests by which the weight of evidence and the credibility of witnesses may, with approximate accuracy, be determined, and it must be assumed that they, for sufficient legal reasons, after considering the testimony of those witnesses, regarded it as possessing no persuasive evidentiary force.

[6, 7] There is no force here in the argument based upon the suggestion that, if the prosecutrix had in reality subjected herself to sexual relations with the defendant, strong corroborative proof thereof could have been developed by an examination of the vagina of the girl by a physician, who could thus have determined and said whether she had ever had criminal intercourse with a male. From this proposition it is argued that, the people having failed to present to the jury the highest and most reliable proof available to them of one of the essential elements of the crime charged, it was not only the duty of the jury, but it is that of this court, to view the accusations of the girl with such a degree of suspicion and doubt as would and will result in entirely overthrowing her testimony. It would have been well, in the interest of justice, for the people to have furnished the proof referred to and thus have established to the complete satisfaction of all whether the child had been criminally known by some one, but, since the jury were satisfied by the character of the proof presented in support of the charge, we are unable to perceive where the failure of the people to offer better or more convincing proof upon any of the elements of the offense can now be of any avail to the defendant. Besides, if the defendant had genuine anxiety to bring the result of an examination of the girl by a physician to the attention of the jury, we can perceive no just reason why the court, in the exercise of its inherent power, could not, upon the motion of the accused, have ordered an examination (the party to be examined not being the defendant), and we doubt not that, upon application by the defendant, the court, in the interest of justice, and under the circumstances, would have promptly ordered an examination before or even at the time of the trial. *Johnston v. S. P. Co.*, 150 Cal. 536, 89 Pac. 348, and cases therein cited; *Clark v. Tulare Dredging Co.*, 14 Cal. App. 414, 438, 112 Pac. 564; *Wanek v. City of Winona*, 78 Minn. 98, 80 N. W. 851, 46 L. R. A. 448, 79 Am. St. Rep. 354.

[8] There is nothing inherently improbable in the testimony of the prosecutrix. It is true that she contradicted herself upon numerous matters, which may, however, when compared to the vital parts of her testimony, well be regarded as of minor

importance. But, whatever the nature or character of the contradictions or inconsistencies she might have been guilty of in detailing her story, it was, after all, for the jury to decide whether such contradictions or such inconsistencies were of such significance as to have the effect of impeaching her statement as to the fact of the asserted sexual intercourse. In such a case as this, the appellate courts are not authorized to substitute their judgment for that of the jury and the trial court as to the weight and effect of the evidence. In the case of the *People v. Moore*, 155 Cal. 237, 100 Pac. 688, the defendant having been convicted of an assault to commit rape alleged to have taken place on the sidewalk of a public street, upon which, and near the scene of the alleged assault, a number of people were standing and to which reflected the electric lights from the hotel in front of which the assault occurred, it was vigorously contended that the detailed circumstances under which the assault was alleged to have been committed were too incredible to support the theory that the purpose of the assault was to commit rape upon the person of the female. The Supreme Court, however, while in effect conceding the circumstances to be seemingly incredible, was not sufficiently impressed with that contention to reverse the cause for that reason. The court said: "A court of review, having jurisdiction of questions of law alone, cannot disregard findings of fact supported by direct evidence strongly corroborated by disinterested and unimpeached witnesses; and neither can it be said, as a legal conclusion, that the facts so found are insufficient to warrant the inference as to the felonious intent."

[9] There is no rule requiring the prosecutrix in a prosecution for rape to be corroborated, but, as we have shown, the prosecutrix in the case at bar was to some extent corroborated by unimpeached circumstances of more or less potency in probative force, and, as in the *Moore Case*, neither can it be said here, as a matter of law, that, from the entire testimony, the jury were not justified in finding that the crime as charged in the information, was satisfactorily proved.

[10] The defendant complains that the court committed prejudicial error by refusing to allow testimony bearing upon the character and the moral environment of the prosecutrix during her whole life. The testimony directed to the proof of these facts was not, as obviously it could not be in the case of statutory rape, offered as a defense to the crime charged against the defendant, but upon the theory that, if it could have been shown that the prosecutrix was

reared under bad or immoral influences and surroundings, such testimony would have tended to disclose that the reluctance with which she gave her testimony was not occasioned by modesty or delicacy or shame regarding the sexual relation, but by the fact that she had been coached by some one to tell a fabricated story. We think that the court's rulings upon the proffered evidence were correct. No issue of the sort to which the rejected testimony was proposed to be addressed arose in the case, so far as the evidence was concerned, except the manner itself in which the prosecutrix conducted herself as a witness. And it seems to us that, had the proof been allowed, it would not have had any stronger tendency than did the girl's manner of testifying to a discovery of the specific motive or reason actuating her to hesitate in describing the revolting details of the alleged conduct of the defendant with her, for it would still remain a question, and one which the jury would be required to decide, whether the cause of the witness' manner of testifying arose out of shame or modesty, or from the falsity of her story, or from a desire to shield the defendant as far as she could under the circumstances, or from any other reason or motive. Nor do we think that it can be justly laid down as an abstract truth that, because a female may have a bad character, she is necessarily to be expected to act or speak immodestly on all occasions. Indeed, it is not uncommon to find females notoriously devoid of strictness in matters of morality, who are on most occasions quite circumspect in expressing themselves and who would, equally with persons of the most exemplary moral conceptions and character, with reluctance narrate in a public courtroom the details of immoral relations they may have sustained with the opposite sex.

[11] But, without speculating further as to the effect of such testimony, it may be observed that the manner in which a witness testifies is generally a matter for argument to be addressed to those who must decide the facts. Each side is at liberty to present to the court and jury its own interpretation of the way in which the witness has told his story, and at last it is for the jury to draw their own conclusions as to the significance, in the one direction or the other, of the witness' manner or the influence it should be allowed to exercise in confirming the truth or falsity of his testimony.

We have discovered no just legal reason for remanding the cause and the judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.



(20 Cal. App. 205)

**PEOPLE v. BRECKER. (Cr. 192.)**

(District Court of Appeal, Third District, California. Sept. 17, 1912. On Rehearing, Oct. 23, 1912. Rehearing Denied by Supreme Court, Dec. 23, 1912.)

**1. CRIMINAL LAW (§ 1086\*)—APPEAL—RECORD.**

One of the first duties of an appellate court is to ascertain whether there is a record before it which may be legally reviewed; and, if not, it must affirm or dismiss the appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2769, 2772, 2794; Dec. Dig. § 1086.\*]

**2. CRIMINAL LAW (§ 1105\*) — APPEAL — RECORD—AUTHENTICATION—AFFIDAVIT OF REPORTER.**

Pen. Code, § 1247, provides that the original and each copy of the transcript of the stenographer's notes shall be duly certified by the reporter under oath, and section 1247a requires the judge, in absence of objection to the transcript, to certify thereon that no objection has been made and to deliver the transcript to the clerk; or, if objection be made, to determine such objection, and, if sustained, correct the transcript, certify that it has been corrected, and redeliver it to the clerk. *Held*, that the judge's certificate is a mere nullity as an authentication of the record, unless the stenographer certified the transcript under oath as required.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2887-2889; Dec. Dig. § 1105.\*]

**3. CRIMINAL LAW (§ 1105\*)—APPEAL—RECORD—AUTHENTICATION.**

The proceedings at trial cannot be reviewed, unless they are authenticated in the manner pointed out by statute or the court rules.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2887-2889; Dec. Dig. § 1105.\*]

**4. CRIMINAL LAW (§ 1105\*)—APPEAL—RECORD—AUTHENTICATION—STATUTORY REGULATIONS.**

The Legislature has power to provide a reasonable method of authenticating the record of a trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2887-2889; Dec. Dig. § 1105.\*]

**On Rehearing.****5. CRIMINAL LAW (§ 935\*)—NEW TRIAL—INSUFFICIENT EVIDENCE—DOUBTS OF TRIAL JUDGE.**

The mere fact that the trial judge has "some doubt" as to whether the verdict should have been rendered does not necessarily require him to set it aside, and that he stated upon denying a new trial that "I have my doubts upon the sufficiency of the evidence that the verdict should stand, but I will let the higher court pass upon the question," did not require the judgment to be set aside; it being presumed that the court's doubt was not sufficiently strong as to justify it in setting aside the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2297, 2298; Dec. Dig. § 935.\*]

**6. CRIMINAL LAW (§ 1159\*) — APPEAL — REVIEW.**

The rule that the appellate court cannot review questions of fact is not changed because the trial court expressed a doubt as to the sufficiency of the evidence to support the conviction upon overruling a motion for new trial,

if the evidence was still sufficient to sustain the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

**7. FALSE PRETENSES (§ 49\*)—SUFFICIENCY OF EVIDENCE.**

Evidence in a prosecution for obtaining money by false pretenses made in selling corporate stock *held* to sustain a conviction.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 62; Dec. Dig. § 49.\*]

**8. FALSE PRETENSES (§ 49\*)—SUFFICIENCY OF EVIDENCE.**

In a prosecution for obtaining money for mining stock by false pretenses in representing that accused was the agent of the mining company in selling it, evidence *held* to sustain a finding that accused had no authority to sell the stock at the time he sold it.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 62; Dec. Dig. § 49.\*]

**9. CRIMINAL LAW (§ 1159\*)—APPEAL—CONCLUSIVENESS OF VERDICT.**

An appellate court may only determine whether the evidence is sufficient as a matter of law to support a verdict of conviction, not being concerned with whether in point of fact it was sufficient to justify the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

**10. CRIMINAL LAW (§ 1169\*) — APPEAL — HARMLESS ERROR—ADMISSION OF EVIDENCE.**

In a prosecution for obtaining money for mining stock by false pretenses in representing that accused was the agent of the mining company in selling the stock, a witness testified that accused, when trying to sell the stock, said that he owned a large quantity of land in Mexico and paid taxes of \$5,000 a year, and had to raise the money to pay the taxes by selling the stock, but the statement as to the ownership of land and payment of taxes was not shown to be false. *Held*, that admission of the evidence as to such statement was not harmful to accused, especially where the court instructed that the only representation claimed to be false was that accused was the corporation's agent in selling the stock.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3137-3143; Dec. Dig. § 1169.\*]

**11. CRIMINAL LAW (§ 1169\*) — APPEAL — HARMLESS ERROR—ADMISSION OF EVIDENCE.**

In a prosecution for obtaining money for mining stock by false pretenses in representing that accused was the agent of the mining corporation for selling the stock, the admission of evidence that accused, about two weeks after the transaction, said that he had secured an option on 5,000 shares of the stock, and offered witness 200 shares for \$100, was not harmful to accused, even though the evidence were irrelevant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3137-3143; Dec. Dig. § 1169.\*]

**12. WITNESSES (§ 396\*)—CROSS-EXAMINATION—EXPLAINING EVIDENCE.**

In a prosecution for obtaining money by false representations, the witness who swore to the complaint testified on cross-examination that the money paid for the stock purchased by him and another from accused was not witness' money, whereupon accused put in evidence the complaint in the justice's court, which alleged that the money was the personal property of such witness and the other. *Held* that, to explain his evidence, such witness could testify that, although the other purchaser paid accused



the money for the stock by his personal check, both he and witness, by previous agreement, paid an equal amount for the stock, and were in fact its joint owners.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1261-1264; Dec. Dig. § 396.\*]

**13. CRIMINAL LAW (§ 1169\*) — APPEAL — HARMLESS ERROR—ADMISSION OF EVIDENCE.**

A letter was admitted in evidence as tending to show flight by accused, which was written by him and addressed to the manager of a hotel at which he had stopped, in which he stated that he was sick and requested the manager to pack up his stuff as he did not like to pay \$2 a day for a room. *Held* that, since the letter rather tended to show that accused did not attempt to flee, any error in admitting it for the purpose stated was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3137-3143; Dec. Dig. § 1169.\*]

**14. CRIMINAL LAW (§ 351\*) — EVIDENCE — FLIGHT.**

Evidence of flight by one who has committed a crime is admissible upon the theory that it shows a consciousness of guilt, but to make the evidence admissible it should clearly appear that accused left the scene of the act from a realization of having committed a crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 776, 778-785; Dec. Dig. § 351.\*]

**15. WITNESSES (§ 37\*) — KNOWLEDGE OF FACTS.**

In a prosecution for obtaining money for mining stock by false representations that accused was the agent of the corporation for selling the stock, a qualified witness could testify that accused was not at the time of the sale authorized by the corporation to sell stock.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 80-87; Dec. Dig. § 37.\*]

**16. CRIMINAL LAW (§ 1036\*)—APPEAL—PRESENTATION BELOW.**

An objection not made to the admission of evidence at trial cannot be first raised on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2639-2641; Dec. Dig. § 1036.\*]

**17. CRIMINAL LAW (§ 371\*) — EVIDENCE — PRIOR OFFENSES.**

In a prosecution for obtaining money for mining stock by false representations that accused was the corporation's agent for selling the stock, witnesses to whom accused had previously sold similar stock without delivering certificates, upon representations that he was the agent of the company, could testify to such transactions as bearing on the question of intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.\*]

**18. CRIMINAL LAW (§ 656\*)—TRIAL—INSTRUCTIONS—MISLEADING INSTRUCTIONS.**

In a prosecution for obtaining money for mining stock by false representations that accused was the corporation's agent for selling the stock, the court remarked that the only issue was whether accused was such agent at the time of the sale, but afterward instructed that, to establish guilt, the state must prove that accused stated that he was the mining company's authorized agent, that the statement was false and that he knew it was false at the time, and that the purchaser believed it to be true and was induced thereby to buy the stock, and the court allowed full inquiry as to all elements of the offense. *Held*, that the court's remark as to the question of authority, being the only is-

sue, could not have misled or confused the jury as to the issues in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1524-1533; Dec. Dig. § 656.\*]

**19. CRIMINAL LAW (§ 673\*) — APPEAL — HARMLESS ERROR—FAILURE TO INSTRUCT.**

In a prosecution for obtaining money for mining stock by false representations that accused was authorized to sell it, in which evidence was admitted as to other sales by accused without authority upon similar representations, the court's failure to instruct that the evidence as to such other transactions could only be considered on the question of intent in committing the act charged was not prejudicial to accused, in view of the fact that the rulings upon the admission of the evidence stated that it was limited to such purpose, and must be so considered by the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1597, 1872-1876; Dec. Dig. § 673.\*]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

E. C. Brecker was convicted of obtaining money by false pretenses, and he appeals from the judgment, and from an order denying a motion for a new trial. *Affirmed*.

Max Grimm, of Stockton, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, of Sacramento, for the People.

**HART, J.** The defendant was convicted of the crime of obtaining from one Bert Romeroni and one James Vernon, on or about the 2d day of January, 1911, the sum of \$150 by false and fraudulent pretenses. He appeals both from the judgment and the order denying a new trial.

The attack upon the judgment and the order is based upon the asserted insufficiency of the evidence to justify the verdict of conviction, and certain rulings of the court admitting and rejecting certain evidence. The Attorney General has submitted a motion to dismiss the appeal upon the ground that the appellant failed to file, within five days after taking the appeal from the judgment and the order, with the clerk of the court in which the action was tried and present to said court, "an application stating in general terms the grounds of the appeal, and the points upon which the appellant relies, and designate what portion of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon." Section 1247, Pen. Code.

The resistance to the foregoing motion is based upon an affidavit of the trial judge, filed in this court, setting forth that all the requisites of section 1247 in the respect referred to by the motion were duly complied with. But it will not be necessary to consider the motion, or, in this opinion, the questions arising therefrom, viz., whether the law requires the record on appeal to show that the provisions of section 1247 of the Penal Code in the particulars to which

the motion relates have been complied with, and, if so, whether, in the absence of such a showing, the affidavit of the trial judge affirming a compliance therewith constitutes competent authentication of the fact; for there is before us no properly authenticated transcription of the record in this cause, and therefore nothing that we are authorized to review advantageously to the appellant.

[1] This point is not included among the grounds upon which the motion to dismiss the appeal is based, but the Attorney General has called our attention to it in his brief, and, even if he had failed to do so, about the first duty of a court of appeal in any case is to ascertain whether a record which may be legally reviewed is before it, and, if it finds that there is not, there is no other alternative left to it but to dismiss the appeal, or affirm the judgment.

[2] Section 1247 of the Penal Code, among other things, provides that the original and each copy of the transcription of the stenographic reporter's notes ordered by the court to be made shall by the reporter be duly certified under oath to be correct. Section 1247a of said Code provides, *inter alia*, that the judge shall, unless objection is made to the transcript by either the defendant or the district attorney, within 10 days after receipt thereof by him, certify on the transcript that no objection has been made thereto within the time allowed by law, and after so certifying shall immediately redeliver the same to the clerk; or, if objection to the transcript be made, the judge must immediately hear and determine the objection, and, if the objection is found to be good, must correct the same, whereupon he must certify that all objections to the transcript have been heard and determined, and the same corrected in accordance with such determination, and thereupon immediately redeliver the same to the clerk. The reporter has not in this case certified under oath to the correctness of the transcription of the portion of his notes which the court ordered written up, but has merely annexed to the transcript a naked statement, in the form of a certificate, that said transcript is correct. Nor is the form of the judge's certificate strictly in harmony with the requirements of section 1247a, it containing no statement either that no objections were made to the transcript, or, if any were made, the same were heard and determined and the transcript accordingly corrected. But, waiving any question as to the sufficiency of the judge's certificate, it is obvious that the reporter's certificate is altogether insufficient, and does not involve that authentication of the transcript of the proceedings which the statute imperatively requires. Under the present method of taking appeals in criminal cases, the judge's certificate, even if such an one as the judge's certificate here may be said to be in substantial compliance with the statute, must

be held to be a mere nullity, so far as any effect it may have as an authentication of the record on appeal, where, as is true here, the phonographic reporter's certificate is wanting in one of the most vital of the requisites of a proper or legal authentication.

[3] The Supreme Court of this state has uniformly held that the proceedings in a trial court cannot be reviewed on appeal unless such proceedings have been authenticated in the mode pointed out by law or the rules of the courts of appeal. *People v. Martin*, 32 Cal. 91; *People v. Ferguson*, 34 Cal. 309; *People v. Armstrong*, 44 Cal. 326; *People v. Long*, 121 Cal. 495, 53 Pac. 1097; *People v. Terrill*, 131 Cal. 112, 63 Pac. 141; *People v. Schultz*, 14 Cal. App. 106, 109, 111 Pac. 271.

In the *Schultz* Case, although the question did not directly arise, the Court of Appeal of the First District, referring to the failure of the stenographer to certify under oath to the correctness of his transcript, says: "Even if appellant was entitled to adopt the method prescribed by sections 1247 and 1247a, Penal Code, for bringing to this court the evidence in the case, which we do not believe, he has not complied with the provisions of said sections." The intimation from the foregoing is that, in order to render the record made up according to the method prescribed by sections 1247 and 1247a of the Penal Code reviewable on appeal, there must be among other requisites, a certificate under oath by the phonographic reporter that the transcription of the portion of his notes ordered transcribed by the court is correct.

But there can be no doubt that the provision of section 1247 relating to the manner in which the reporter shall authenticate the transcription of his notes is mandatory and that anything short of the authentication so prescribed amounts to a failure to comply with an imperative demand of the statute. If the authentication may be held sufficient without the oath of the reporter, then with equal reason may it be held that the mere subscription of the reporter's name to the transcript without a certificate of any kind would be sufficient to satisfy the statute.

[4] The authentication of the record on appeal of the proceedings of the trial court constitutes the evidence from which the reviewing court may determine whether the proceedings were had in the court below, and the Legislature may contrive and provide any reasonable method of furnishing such evidence; and, when once the Legislature prescribes a method for proving that the proceedings which are taken to a court of appeal for review have been had in the trial court, then any substantial departure from that method will render the appeal abortive.

However much it may always be desirable to dispose of cases brought to the appellate courts upon their merits, we are not at liberty to ignore or disregard the plain mandates



of the statute as to the method of proving to such courts that the record on appeal contains a correct reproduction of the proceedings which it is desired shall be reviewed.

The judgment and order must be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

#### On Rehearing.

HART, J. The judgment and the order from which these appeals were taken in this cause were affirmed in an opinion filed in this court on September 17, 1912. The ground upon which the affirmance was based was that there was not a legally authenticated record of the evidence brought up to this court. Section 1247, Pen. Code.

The defendant in due time petitioned for a rehearing, and, with the petition, submitted an amended certificate by the stenographic reporter who took the phonographic report of the testimony and other proceedings of the trial, and asked that the case be reopened, and that such amended certificate be substituted for the defective one attached to the transcript of the testimony. Said certificate, as so amended, being legally sufficient in all respects and the Attorney General being of the opinion that there is no legal objection to the allowance of the same, whereby the stenographic transcription will stand as having been properly authenticated, and as a review of an appeal upon the merits is always to be preferred, the rehearing asked for was in due time granted and the motion for the substitution of the amended certificate by the stenographer allowed. Therefore, without expressing any opinion as to the legal propriety in a court of appeal to allow a defective and insufficient authentication of a record on appeal to be corrected, we shall treat the record here as having been authenticated in conformity with the requirements of law and review the case upon the merits.

We are not to be understood, however, as receding from the position maintained in the former opinion filed herein as to the requisites of a proper authentication of the testimony received and other proceedings had at the trial of a criminal case or as to the defectiveness or insufficiency of the authentication of this record as it was originally brought to this court.

The information in this case charges the defendant with the crime of obtaining on or about the 2d day of January, 1911, by false and fraudulent pretenses the sum of \$150, from the prosecuting witnesses, Bert Romeroni and James Vernon. He was convicted by the jury, hence these appeals.

The general objections urged against the correctness of the judgment and the order are insufficiency of the evidence to justify the verdict, alleged errors in the rulings of

the court upon the evidence, and alleged misdirection of the jury by the court in its charge upon the law of the case.

1. As to the point that the verdict was not justified by the evidence, counsel for the defendant emphasizes in his brief the fact that the judge presiding at the trial, according to counsel, remarked, upon denying the defendant's motion for a new trial: "I have my doubts upon the sufficiency of the evidence, that the verdict should stand, but I will let the higher court pass upon the question"—and insists that the observation thus made by the court was equivalent to the expression of an opinion that the evidence was insufficient to justify the verdict and that in such case it was the court's duty to order a new trial (People v. Flood, 102 Cal. 330, 36 Pac. 663; People v. Knutte, 111 Cal. 453, 44 Pac. 166), and, that the court below having failed to do so after expressing such doubt, it is the duty of this court under such circumstances to reverse the order.

[5] It is true that, where a trial court is of the opinion that a party prosecuted for a crime has been convicted upon insufficient evidence, it is its duty to set the verdict aside by granting a new trial. As has often been said in the cases, the determination of the facts is a matter which is exclusively the attribute of the jury and the latter's functions should not be invaded or interfered with by the court; but in all trials at nisi prius the court, in the last analysis, exercises (and very properly so) a supervisory control over the action of the jury, and, where it is clear that the jury had failed to intelligently and justly perform the duty cast upon them by the law, it is, of course, the duty of the court, in the exercise of such supervisory power, to vacate or set aside the verdict. But this does not mean that in every case of doubt entertained by the court of the justness of a verdict of guilty the result of the jury's deliberations should be vitiated by the action of the court in the exercise of its power to grant new trials. The exercise of that power should always be within the bounds of sound judgment and discretion, and not arbitrary. A jury may have some doubt upon the question of the guilt of an accused person; still even they would have no right to acquit, unless such doubt was a reasonable one. And a judge may, and in many cases doubtless does, have some doubt as to whether a verdict of guilty should have been returned, and yet such doubt might not be sufficient to generate an unequivocal opinion that the verdict was not justified, and, when the court is not of an opinion of that character as to a verdict of guilty, it has no right to grant a new trial or to permit a doubt not sufficient to create such an opinion to override the functions which are, under our law, peculiarly those of the jury.



In the present case we have a right to presume, from the fact that the motion for a new trial was denied, that the doubt of the court as to the justification of the verdict did not reach the dignity of such an opinion of the jury's conclusion as to warrant it in setting aside the verdict. We must assume, in other words, that, had it entertained such opinion, it would have promptly done its duty by granting a new trial.

[6] Now, then, if the trial court, in whose presence the witnesses testified, could not say upon a review of the evidence that the verdict was not justified, much less is this court in a position to do so, and therefore, in the determination of the question whether the evidence supports the verdict, this court is no less to be governed by the rule that questions of fact cannot be reviewed by an appellate court unless they present questions of law than it would be had the court below expressed no doubt upon the sufficiency of the evidence to warrant and support the verdict. And, thus viewing the evidence, we are not prepared to say that it does not sustain the findings of the jury.

2. It appears from the evidence that the defendant was connected in some way with a mining corporation, named and known as Dredger Mining Company, which had been organized for the purpose of mining, by the dredging process, the American river bottom, near Folsom, in Sacramento county. It further appears that the defendant was introduced to Vernon by Romeroni at the Occidental Hotel, in the city of Stockton, somewhere in the neighborhood of the 15th day of December, 1910. Representing that he was the agent of the company mentioned, authorized as such to sell stock in the concern, Brecker, at that time and place, undertook to sell stock in said company to Vernon. After considerable talk, mostly by Brecker, who gave an elaborate description of the plans, properties, and prospects of the corporation, saying that the latter needed money with which to prosecute its business, hence the necessity for the sale of stock, and telling Vernon that, after purchasing the stock, he could visit and inspect the properties of the company, and that, if then he became dissatisfied with his bargain, he (Brecker) would return him (Vernon) the money paid for the stock, Vernon refused to invest in the concern, and at that time did not do so. Either on the 1st or 2d of January, 1911, however, Brecker, accompanied by Romeroni, went to Holt's station, in San Joaquin county, where Vernon was employed. Brecker renewed negotiations with Vernon for the sale to the latter of some stock in said corporation. Vernon testified that, after the defendant had gone "over about the same conversation we had in the hotel office" (referring to the first conversation spoken of), he (Vernon) bought 100 shares of stock at \$1.50 per share, and gave his personal check to

Brecker for the sum of \$150. Brecker thereupon assured Vernon that he would either deliver to him his certificate of shares when he (Vernon) went to Sacramento on his way to visit the mine, or, in case that he did not go to Sacramento, would mail the certificate to his (Vernon's) address in Stockton or at Holt's station. Vernon told Brecker that he could not go to the mine, and he did not go there. On the 15th day of January, 1911, Vernon again met Brecker, and the latter then said that he had secured an option on 5,000 shares of stock in the same corporation, and tried to induce Vernon to purchase some of said stock, but the latter refused to make any further investment therein. Vernon never met Brecker after the 15th day of January, 1911, and never received the certificate for the shares of stock for which he paid \$150. Vernon declared that he believed the statement of the defendant that he was the agent of and as such authorized to sell stock in and for the Dredger Mining Company, and that, upon that representation and the belief that the investment would result profitably to him, he purchased the stock.

The witness Romeroni corroborated Vernon in some particulars as to the first conversation which occurred between the latter and the defendant at the Occidental Hotel. Among other things, he said he heard Brecker say to Vernon that he (Brecker) was the "authorized agent" of the Dredger Mining Company. This witness also corroborated Vernon as to the conversation and transaction in which the latter purchased the stock on the first or second of January, 1911. He further testified that at about that same time in January the defendant in his presence sought to sell stock to other persons in San Joaquin county, and that in each of those instances he announced that he was the "authorized agent" of the corporation.

C. M. Beckwith, who was at the time of the trial, in the latter part of April, 1912, and had been for about two years prior thereto, secretary of the corporation, testified that the defendant was neither an agent of nor authorized to sell the stock of the corporation during the month of January, 1911. In other words, he said that the accused was, in no capacity, connected with the corporation at that time.

The deputy sheriff who arrested the defendant upon the charge alleged in the information testified that the defendant admitted to him that he was not an agent of the company at the time of the transaction involved here.

The defendant's story was, in substance, that he was authorized to sell stock for the corporation, and that at the same time he had individual stock belonging to certain stockholders for sale. He was not, however, very clear as to whether the stock he claimed to have sold to Vernon and Romeroni was

the company's stock or the individual stock referred to.

[7] We think, as before declared, that the record discloses a sufficient case against the accused to foreclose just interference with the verdict by this court. It may be conceded that the evidence as to the precise statements or representations made by Brecker at the time that he succeeded in consummating the alleged sale of stock to Vernon is not as satisfactory as it is evident that it could have been made. Neither Vernon nor Romeroni directly testified as to the exact representations that the defendant made on that occasion. Romeroni did say, however, that at about that time he heard the defendant declare to others to whom he undertook to sell stock in the corporation that he was its "authorized agent," and Vernon testified that the defendant repeated "about the same conversation" that occurred between them at the Occidental Hotel in the middle of December, 1910. In that conversation, it will be recalled, Brecker, according to both Vernon and Romeroni, represented that he was the agent of the corporation, with authority to sell its stock. It would, of course, have been the proper course to have required the witnesses to repeat exactly or as accurately as they could the statements made by the defendant when he made the purported sale to Vernon and Romeroni (and, it may be suggested, the duty to do so rested as much upon the attorney for the defendant as upon the district attorney); still the jury were authorized to infer from Vernon's testimony that the defendant on the occasion on which he sold the stock to Vernon and Romeroni repeated the representations as to his authority to sell stock for the corporation that he had made to Vernon in the preceding month of December.

Counsel contends, however, that the testimony conclusively shows that the defendant was a promoter of the corporation from the time of its organization and as such authorized to sell its stock, and that there is no evidence showing that he had ever been dismissed from that relation with the concern, or that he had ever ceased representing it in that capacity. Upon this contention counsel undertakes to establish the continuation and existence of the authority in the defendant to sell the company stock at the time of the Vernon transaction by invoking the application of the presumption that "a thing once proved to exist continues as long as is usual in things of that nature." Section 1963, subd. 33, Code Civ. Proc. But, conceding it to be true that the defendant was, in point of fact, authorized to sell stock for the corporation up to January, 1911, the testimony of the secretary of the corporation that he was in no way connected with the concern in the month of January, 1911, when he had the transaction involved here with Vernon and Romeroni, precludes any ground for the operation of the presumption referred

to, for the presumption thus sought to be invoked is merely a disputable one which must give way to the force of any credible testimony introduced to overcome it.

[8] And from that testimony of the secretary the jury were perfectly justified in inferring that if, at some previous time the defendant was authorized to sell stock for the company, his authority in that regard had been revoked, and did not exist when he obtained \$150 from Vernon and Romeroni in consideration of stock in the corporation.

As to the defendant's story, it is to be remarked that it is not difficult to understand how the jury could have justly disbelieved it in view of the fact that the district attorney showed that, at the preliminary examination of the charge set forth in the information, the accused, testifying for himself, declared that he was not, nor did he pretend to be, the agent of the corporation when he had the transaction with Vernon.

[9] But there is no need of further examination of the testimony in this opinion. It is enough to finally say, as we have in effect before declared, that we are satisfied that no doubt can reasonably arise from the record as it is presented here that the evidence, whether, in point of fact, it was or was not of sufficient probative force to justify the jury in returning a verdict of guilty, nevertheless, as a matter of law, supports it, and this conclusion is as far as an appellate court is required to go in passing upon the question whether it is or is not authorized to set aside a verdict upon the evidence.

[10] 3. The objection to the ruling allowing the witness Vernon to state all that was said by Brecker in their conversations about the stock and the purchase thereof is not substantial. The particular criticism of said ruling is based upon the statement by the witness that the defendant, when trying to sell the stock to Vernon, said that he owned a large quantity of land in Mexico, that his taxes amounted to \$5,000 a year, and that he had to raise money to pay the same; that he expected within 30 days to get money from his land, and then he hoped to buy up all the stock in the corporation which he had sold or might sell around Stockton. This statement was very likely made by the defendant to Vernon to inspire in the latter confidence, not only in the investment, but in the integrity and good faith of the defendant himself, and, if that was the defendant's purpose in making it, and it had been shown to be false, it would have been proper, not as proof of the alleged false representation upon which the defendant induced Vernon and Romeroni to buy the stock, but as constituting a part of the scheme by which the defendant sought to imbue the prosecuting witnesses with the belief that his representations were true. In this view, it would have been considered as part of the transaction. But the statement was not shown to have been false and the



effect of allowing it to go before the jury as verity, so far as a direct contradiction of it was concerned, could certainly have done the defendant no damage. Moreover, the court pointedly instructed the jury that the only representation alleged in the information to be false and to the consideration of which, in deciding the question of the guilt or innocence of the accused, they were to confine their deliberations, was that he was the agent of the corporation and as such authorized to sell its stock.

[11] 4. Vernon was permitted, over the objection of the defendant, to relate a conversation which occurred between him and the defendant on the 15th day of January, or about two weeks after the happening of the transaction upon which this charge is founded. It is claimed that the court prejudiced the rights of the defendant by that ruling. The witness testified that the defendant, at the time mentioned, said to him that he had secured an option on 5,000 shares of the company's stock and that he offered him (witness) 200 shares thereof for \$100. Brecker's statement that he had so secured that number of shares in the stock of the corporation was not shown to be untrue, and, conceding that the testimony relative thereto was not relevant, which we do not decide, we fail to see wherein it could have resulted in possible harm to the defendant.

[12] 5. The witness, Romeroni, who swore to the complaint filed in the justice's court against the defendant, charging him with the crime stated in the information, testified, on cross-examination, that the money—\$150—paid for the stock purchased by him and Vernon was not his (the witness') money. Counsel for the defendant thereupon offered and the court received in evidence the complaint filed in the justice's court, which, among other things, alleged that said money was the personal property "of the said Bert Romeroni and the said James Vernon." Thereafter the court allowed the witness to explain that, although Vernon paid Brecker the \$150 through his personal check, Romeroni and Vernon, by previous agreement, each paid an equal amount for and thus became joint owners of the stock so purchased. This testimony is complained of here as irrelevant and prejudicial. The ruling was eminently proper. A witness will always be permitted to explain his testimony, where it is necessary to do so, for the purpose of relieving it, if thus it can be done, of any apparent inconsistency by which it may be characterized.

[13] 6. A letter, written at Sacramento by the defendant, dated January 20, 1912, and addressed to the manager of the hotel at which the former stopped while in the city of Stockton, and in which the defendant stated that he was sick and requested the manager to "pack my stuff until I come down, as I do not like to pay \$2.00 a day for a room," etc., was received in evidence upon

the theory that it tended to confirm the hypothesis of flight upon the part of the accused, it having been further shown by the assistant manager of said hotel that the defendant never called for his baggage. The defendant's home was in Sacramento, and we can perceive little if any force in the letter as proof of flight.

[14] Flight by one who has committed an act which to all appearances is felonious may be shown upon the theory that it is evidence of a consciousness or a sort of admission by conduct of guilt, and it implies that the party is thus trying to escape detection or apprehension or both. The mere going away from the scene of a crime is not always flight in the sense that evidence is thus furnished of a consciousness on the part of the party that he has committed a public wrong. That element in the proof of guilt should, therefore, never be gone into unless the testimony available for that purpose is clear and convincing that the accused party left the scene of the act which is charged against him as a crime because he realized that he had committed a crime, lest by such insinuation, based upon circumstances not worthy of consideration, irreparable harm to the right of the accused to a fair trial may be committed. But the letter objected to here would seem rather to show that the defendant made no attempt to flee than that it was his purpose in leaving Stockton to get away from probable arrest and prosecution, otherwise he would not have boldly made his whereabouts known to be at a place only a short distance from the scene of the transaction which has brought about his conviction of a felony. And it is this view of the contents of the letter—a view which the jury probably took of it—that rendered its admission in evidence in no degree subversive of the defendant's just rights. Neither is there any merit in the contention that the letter was prejudicial in that it might have been construed by the jury as containing an insinuation that the defendant left without paying for his room. The letter itself merely stated in effect that the defendant desired to give up the room because, by reason of illness, he could not go to Stockton and occupy it, and that he did not wish to be under the expense of maintaining the room when he could not utilize it.

[15] 7. It was not error to allow the witness, Beckwith, to say that the defendant was not in the month of January, 1911, authorized to sell stock for the company. The criticism directed against the legal propriety of this testimony is more in the form of an argument than an objection, for it goes to its weight rather than to its competency, the ground of criticism being that, because Beckwith had previously declared that he could not answer a similar question and made certain statements indicating that he could not know whether the defendant was authorized during the month mentioned to



sell stock for the corporation, the testimony was objectionable and should not have been allowed.

8. The deputy sheriff, who arrested the defendant, testifying for the people, said that, after he had taken the accused into custody, the latter stated to him that he (defendant) was not an agent of the company, but merely had an option on stock. This testimony is now denounced as improper because, purporting to disclose a confession of the defendant, it was not admissible until there was first some proof tending to establish the corpus delicti. Conceding that the statement of the defendant as shown by the testimony of the deputy sheriff constituted a confession, the objection here urged against it is not good, for it was not given in evidence until after the representations upon which the defendant disposed of the stock to Vernon were shown and the testimony of Beckwith that the defendant had no connection with the company and was not authorized to sell its stock when said sale was made was given.

[16] Besides, the defendant did not make the objection at the trial that he now makes to the officer's testimony—indeed, he in reality made no objection to it at all, his only objections having been addressed to the forms of the preliminary questions which were designed to lay the foundation for the testimony of the extrajudicial statement of the defendant.

[17] 9. A number of witness to whom the defendant had previously sold stock in the same corporation upon the representation that he was the agent of and authorized to sell stock for said company and to whom he failed to deliver certificates therefor, although they paid for the stock, were allowed to testify to those transactions against the defendant's objections that such testimony was of other offenses than the one charged. We think the testimony was clearly proper under the doctrine laid down in many of our cases, of which the case of the *People v. Whalen*, 154 Cal. 472, 98 Pac. 194, is now the leading one, and which clearly explains the circumstances under which testimony of other crimes than the one charged may be received upon the question of the intent with which the act involved in the crime set forth in the information under inquiry was committed.

[18] 10. The objection that the court in its rulings limited the scope of the investigation to the question whether the defendant was or was not the agent of the corporation when he sold the stock to Vernon is untenable. The court in ruling on one question did remark that the only issue in the case was whether the defendant was such agent at the time referred to, but, notwithstanding that remark, the court nevertheless allowed full inquiry into all the elements con-

stituting the offense. The jury could not, therefore, have been misled or confused by the remark of the court, as counsel contends, and this proposition must become the more manifest when it is considered that the court in very clear language instructed the jury that these facts must be proved in order to establish the guilt of the accused: (1) That the defendant made the statement alleged to have been false, to wit, that he was the duly authorized agent of the Dredger Mining Company; (2) that such statement was false; (3) that defendant knew or believed such statement was false when he made it; (4) that the complaining witnesses believed such statement to be true, were deceived by it, and that such statement was the principal cause which induced them to part with their money.

11. And this leads us to observe that the criticism of the instructions given by the court upon the foregoing propositions involving the elements of which the crime charged is constituted is altogether unfounded.

The charge of the court upon all the features of the case as presented by the information and the evidence was exhaustive, expressed in perspicuous language, and fair. It is not necessary to examine said instructions in detail in this opinion. It is deemed enough to say that no one can read them without concluding that they clearly and accurately state the law applicable to the crime as charged.

[19] But it is urged that the court in the matter of its charge was guilty of an omission which seriously militated against the rights of the accused by failing to instruct the jury that the testimony received of other similar transactions to the one involved here could be considered by them only for the purpose of gathering light upon the intent with which the act charged was committed. While it is true that the court did not instruct upon the proposition referred to, it did in ruling upon the admissibility of such testimony frequently declare that it was limited to that purpose and that it must be so regarded and considered by the jury. While it would have been better for the court to have thus specially instructed the jury, it cannot be held that failure to do so under the circumstances resulted in injury to the defendant.

We have now specially considered the more important points urged for a reversal, and, as must be apparent, have been able to discover no sound legal reason for disturbing the result.

The judgment and order are, therefore, affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

19 Cal. App. 748

**PEOPLE v. STOCK. (Cr. 253.)**

(District Court of Appeal, Second District,  
California. Sept. 20, 1912.)

**CRIMINAL LAW (§ 981\*)—JUDGMENT AND SENTENCE—INSANITY—STATUTES.**

Pen. Code, § 1368, provides that, if a doubt arises as to accused's sanity, the court must submit that question to a jury. After conviction and denial of a new trial, defendant presented affidavits, and requested that the question of his sanity be inquired into, and the trial judge, though stating that he had no doubt as to defendant's sanity, allowed an examination by a commission of physicians, who reported defendant sane. *Held* that, as the trial court entertained no doubt at any time as to defendant's sanity, there was no occasion for an inquiry on that question, so that objections to the report of proceedings had would be wholly disregarded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2497, 2498; Dec. Dig. § 981.\*]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

P. R. Stock was convicted of the statutory felony of having uttered and passed a certain check drawn upon a bank without having a credit or deposit at such bank. From the conviction and from denial of his motions for new trial and in arrest of judgment, he appeals. *Affirmed*.

Dick Foye Harding and J. Howard Bell, both of Santa Ana, and W. E. Ferguson, of Exeter, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

**JAMES, J.** Defendant was convicted of having uttered and passed in the county of Orange a certain check drawn upon a bank of Los Angeles without having a credit or deposit at such banking institution, which act is made a felony by the provisions of section 476a, Penal Code. The charge contained in the information was fully supported by the uncontradicted testimony of witnesses introduced by the prosecution; the defendant offering no evidence on his own behalf. The judgment directed that he be imprisoned in the state prison for a period of 10 years. A

motion for a new trial was presented and denied, as was also a motion in arrest of judgment. After all of these proceedings were had, defendant's counsel announced in open court that he took exception to the judgment, and then said: "The defendant will give notice of appeal." This statement of counsel was made immediately after the court had pronounced judgment, and seems to have been intended as a notice of appeal from that judgment; no reference being made to the motion for a new trial which had been previously denied. However, without approving the practice in that regard, we will assume, as no question is urged as to its sufficiency, that the notice should be treated as one which would save to the defendant the right to have the ruling on motion for new trial reviewed, as well as the judgment. The defendant filed no brief in support of his appeal, and his counsel at the time set for oral argument was content to submit the case with a few remarks only which referred altogether to the question of the sanity of the defendant. After the motions for new trial and in arrest of judgment had been denied, counsel for defendant presented certain affidavits and requested that the sanity of the defendant be inquired into, and that time for pronouncing judgment be continued in order that this might be done. The trial judge announced that in his opinion there was no doubt as to the sanity of the defendant, but that he would accede to the request of counsel for defendant and allow an examination to be made by a commission of physicians, which examination was immediately thereafter had. The physicians called to make this inquiry reported that they found the defendant to be sane, and the court thereupon proceeded to pronounce sentence. As we have indicated, this examination was made at the request and with the full approval of defendant.

It was not an examination had in accordance with the provisions of section 1363 of the Penal Code, which section provides that if, during the pendency of an action, up to and including the time when the defendant is brought up for judgment, a doubt arises as to his sanity, "the court must order the question as to his sanity to be submitted to a jury." After the examination was had and the commission made its report as to the sanity of defendant, defendant's counsel took exception to the report on the ground that the proceeding taken did not conform to the requirement of section 1368, and objected to the report upon that ground.

In our view of the matter, taking into consideration the announcement made by the court, both before and after the appointment of the commission which examined into the question of defendant's sanity, that he, the trial judge, had no doubt at all as to the sanity of the defendant, the proceedings had upon the inquiry made before the physicians

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



may be disregarded wholly. In the mind of the court no doubt was entertained at any time throughout the trial or thereafter as to defendant's sanity, and therefore there was no occasion for the ordering of a jury to pass upon that question. See *People v. Pico*, 62 Cal. 50. This decision is closely in point, because the proceedings had in that case were similar to those taken here and the ruling of the Supreme Court fully sustains the view we have taken of the matter. A careful examination of the entire record discloses to our minds no error prejudicial to any of the rights of the defendant.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(19 Cal. App. 784)

YOUMANS v. H. S. CLARKE CO.  
(Civ. 1,148.)

(District Court of Appeal, Second District, California. Sept. 23, 1912.)

**APPEAL AND ERROR (§ 524\*)—QUESTIONS FOR REVIEW—RECORD—DOCUMENTARY EVIDENCE.**

In an action on an account stated, plaintiff relied upon a document, signed by defendant, and claimed to be an account stated, but such document was not incorporated in the record nor shown to be authenticated in any way, and was referred to only by the statement of a witness that defendant had signed the paper shown him. It was printed in the transcript after the clerk's certificate as an exhibit, but there was nothing to identify it as the one introduced at the trial, or to show that it was used on the motion for a new trial. *Held*, that it constituted no part of the record proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2371, 2375; Dec. Dig. § 524.\*]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by Edward T. Youmans against H. S. Clarke Company. From a judgment for defendant and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

I. Henry Harris, of Los Angeles (Charles A. Bank, of Los Angeles, of counsel), for appellant. C. L. Shinn, of Sacramento, and E. L. Kenney, of Los Angeles, for respondent.

SHAW, J. The complaint alleges that defendant was indebted to the Hudson Hair Dryer Company upon an account stated in the sum of \$700 for goods and merchandise sold and delivered to defendant at defendant's special instance and request; that the Hudson Hair Dryer Company assigned the account to one M. T. Emanuel, who, in turn, assigned the same to plaintiff. Other than admitting \$280.05 of the alleged indebted-

ness, the answer denied all the material allegations of the complaint.

The court found that no account was ever stated between defendant and the Hudson Hair Dryer Company; that said Hudson Hair Dryer Company sold to defendant goods and merchandise of the value and for which defendant agreed to pay \$280.05, which account plaintiff had acquired by assignment, and gave judgment accordingly. From this judgment, and an order denying his motion for a new trial, made upon a statement of the case, plaintiff appeals, claiming judgment should have been rendered for the full sum of \$700.

Upon the record presented the appeal is without merit. The findings clearly support the judgment, and the statement contains uncontradicted evidence to prove that at the time of making said assignment defendant's indebtedness to the Hudson Hair Dryer Company did not exceed \$280.05, as found by the court. For the purpose of showing that such finding, and the finding that no account was ever stated between the parties, are without support, appellant relies upon a purported document, signed by defendant, which he claims constitutes an account stated, whereby defendant admitted an indebtedness in the sum of \$700. This document, however, was not incorporated in the record, nor does it purport to be authenticated in any manner whatsoever, and hence it cannot be deemed a part of the record or entitled to be considered for any purpose on the appeal. The only reference to the document is in the statement of the testimony of M. T. Emanuel, who testified: "On the 29th day of November, 1910, Mr. H. S. Clarke (president of defendant) and I discussed these transactions, and at the end of that conversation he signed the paper you have just handed me. (Paper introduced in evidence and marked 'Plaintiff's Exhibit A.')" At the end of the transcript, following the clerk's certificate, is printed a document marked, "Plaintiff's Exhibit A," but there is nothing to identify such paper as being the one signed by defendant and introduced in evidence at the trial, or to show that it or any document was used upon the hearing of the motion for a new trial. As disclosed by the record, the purported document is a mere loose sheet of unidentified paper, there being nothing in the body of the statement to show that it constituted a part of the record used upon the hearing, as was made to appear in the case of *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131. This conclusion renders it unnecessary to consider other points discussed by the parties.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; JAMES, J.



(19 Cal. App. 728)

**HENLEY v. PACIFIC FRUIT COOLING & VAPORIZING CO. et al. (Civ. 914.)**

(District Court of Appeal, Third District, California. Sept. 19, 1912. Rehearing Denied by Supreme Court Nov. 18, 1912.)

**1. APPEAL AND ERROR (§ 1012\*)—FINDINGS—CONCLUSIVENESS.**

The court trying a case without a jury must weigh the evidence, and its conclusion, unless clearly unwarranted, must be accepted on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3990-3992; Dec. Dig. § 1012.\*]

**2. EVIDENCE (§ 598\*)—WEIGHT—NUMBER OF WITNESSES.**

The weight of the evidence is not dependent on the number of witnesses, but the court must consider the circumstances to enable it to determine the truth.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2450-2452; Dec. Dig. § 598.\*]

**3. MECHANICS' LIENS (§ 281\*)—ACTIONS TO ENFORCE—AMOUNT OF CLAIM—EVIDENCE.**

In an action to enforce a mechanic's lien for services in the erection of a plant, evidence held to support a finding that plaintiff performed a specified number of days' work at an agreed price.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 565-572; Dec. Dig. § 281.\*]

**4. MECHANICS' LIENS (§ 157\*) — CLAIM OF LIEN—FRAUD—EFFECT.**

Under Code Civ. Proc. § 1203, as enacted by St. 1911, p. 1319, or under section 1203a, enacted by St. 1907, p. 858, providing that no mistakes in a statement of lien shall invalidate the lien unless the mistake was made with intent to defraud, etc., a mistake in a claim of lien required by section 1187 does not invalidate the lien unless the lien claimant was guilty of fraud, which must be clearly proved, and cannot be presumed.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 268-274; Dec. Dig. § 157.\*]

**5. MECHANICS' LIENS (§ 157\*) — CLAIM OF LIEN—FRAUD—EFFECT.**

Where fraud on the part of a lien claimant was not shown, and was not clearly inferable from the facts, his claim of lien could not be defeated merely because it turned out on the trial that the claim as filed was for an amount in excess of the amount due.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 268-274; Dec. Dig. § 157.\*]

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by H. H. Henley against the Pacific Fruit Cooling & Vaporizing Company and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

J. Rollin Fitch, of Oakland, for appellants. Meredith & Landis, of Sacramento, for respondent.

**CHIPMAN, P. J.** This in an action to recover judgment against the company above named for services rendered by plaintiff as "refrigerating and constructing engineer" in

the erection of a precooling and refrigerating plant on certain described premises, situated in the town of Newcastle, Placer county, of which plant defendants are alleged to be the owners; also, that plaintiff he declared to have a lien thereon and for the enforcement thereof. The court found that plaintiff was entitled to judgment against defendant company for the sum of \$528.50 and costs, of which the sum of \$495 was found to be a lien upon the buildings and plant of defendants, described in the complaint. Judgment passed accordingly, from which and from the order denying their motion for a new trial defendants appeal.

[1] Quoting some advice given by the Supreme Court to trial courts, found in *Green v. Soule*, 145 Cal. 102, 78 Pac. 337, as to the duty of the trial court to grant a new trial where the decision is against the weight of the evidence, it is urged that "the decision in this case is clearly against the weight of evidence and against the law." It was said in the case cited: "The trial court cannot rest upon a conflict in the evidence, but must weigh and consider the evidence for both parties, and determine for itself the just conclusion to be drawn from it." We must assume that this is precisely what the learned trial judge did in arriving at a conclusion. And, unless, upon an examination of the entire record, we may be clearly satisfied that such conclusion was unwarranted, it is our duty to accept it and be governed by it.

There is no dispute as to the qualifications of plaintiff to perform the kind of services for which he was employed. With the exception of the testimony of the witness Jones as to the date of plaintiff's arrival at the hotel in Newcastle, a fact otherwise shown, there were but two witnesses called—plaintiff, on his own behalf, and witness Groom, the admitted agent of defendant company, in its behalf.

[2] Appellants seem to overlook the fact that "the weight of the evidence" is not dependent upon the number of witnesses. Trial courts are frequently called upon to solve questions of fact where the witnesses to its existence are equally divided numerically. But there are almost always some circumstances cropping out which enable the court to determine the truth of the matter.

[3] It appeared from the testimony of plaintiff that in March or April, 1907, he received a letter "from the manager of the company, P. M. Groom," who was in Los Angeles, stating that he was organizing a company and wanted plaintiff to "take the position of refrigerating engineer," to which plaintiff replied that he would accept the position; that Groom answered him that he would give him \$5 per day and expenses; that plaintiff was in business for himself in San Francisco, and went east, waiting orders to report; that in the early part of November

plaintiff received a telegram from Groom to report at his office in Los Angeles, where plaintiff arrived November 10, 1907; that he immediately went to work for the company, helping to interest people in the enterprise, assisting in preparing plans, blue prints, and drawings and making estimates; that the company, after about two months, left Los Angeles and came to San Francisco, about January 14, 1908, "to commence building a plant." As to what he did for the company at San Francisco and at Newcastle, he testified: "I was the engineer. I built the machine, this precooling plant that was put in at Newcastle. I was in the employ of this company all the time I was in San Francisco from about January 14th to some time in May. While in their employ in San Francisco, I superintended the building of a plant. I never had done a minute's work for anybody else. Q. Now describe generally to the court the character of this plant you were engaged in, if any? A. It was a 50-ton refrigerating plant—two machines, duplicates—two 25-tons, connecting with a belt wheel, the motor, and condenser, ammonia condenser. I made all that work, did the superintending and construction and building of these compressors and shipped them to Newcastle, and in a general way occupied about the plant as their engineer—that is, it was built under my supervision. Q. When you left San Francisco, where did you go? A. After we got the plant built came to Newcastle. The Pacific Fruit Cooling & Vaporizing Company directed me to go to Newcastle and put in the plant, and said, 'Rush—rush it.' That was the instructions I had. Q. When did you come to Newcastle? A. Came to Newcastle along in June, 1908, I think, as near as I recall now." (He arrived June 16th.) "Q. When you came to Newcastle, what did you do? A. Went to work putting in the plant. I put the plant in the packing house of Mr. Kellogg—George D. Kellogg. During all the time I was in Newcastle I was in the employment of that company. Q. What did you have to do for the company while at Newcastle? A. Erecting the plant—this refrigerating plant. Q. The Court: You mean you erected it with your own hands? A. Yes, sir; your honor please. I was the engineer and directed the work. I worked not only myself, but directed other men. I worked, physical labor, and had other men, too, working under my direction." He testified that he was discharged on October 10, 1908, and his notice of lien was filed on November 7th.

The court found that plaintiff performed 40 days' work between November 10, 1907, and January 31, 1908, as refrigerating and construction engineer for the company, at the agreed price of \$5 per day, aggregating \$200, which the company paid on or about January 31, 1908. Defendants attack this finding on two grounds: First, it is contended that the testimony of plaintiff was that he work-

ed every day except Sundays and holidays during this period, making 71 days; that "it was either 71 days' work and labor, or no days' work and labor"; that "there was no 'middle of the road' proposition." Plaintiff testified to the character of the work done by him during this period, for some of which the court might well have disallowed pay, and no doubt did so, in arriving at a just conclusion. This action of the court was favorable to defendants, and cannot be made the subject of complaint. The court could not have disallowed the claim for the entire time without wholly rejecting plaintiff's testimony, which it did not do. Second. It is claimed by defendants that this \$200 payment, made January 31st, was an advance payment on wages yet to be earned, and Mr. Groom so testified. Plaintiff testified to the contrary, and that it was money owing him by the company at the time. We think the record shows that the court had sufficient ground for accepting plaintiff's testimony on this point.

The court next found that plaintiff by virtue of said contract of employment performed 114 days' work at \$5 per day between February 1, 1908, and June 16, 1908 (the latter date being the day when plaintiff arrived at Newcastle to commence work in installing the machinery in defendants' building and the erection of said plant), for which defendant company had paid him on account \$538 and no more, leaving due plaintiff the sum of \$32 at that time. These 114 days represent all the working days in the months embraced by the period mentioned. Defendants claim that the \$200 payment of January 31st should be added to the \$538, making \$738 as paid. But plaintiff's testimony was that this \$200 payment was for work previously performed, and the court so found.

The next finding is that after June 16th, and to October 9th, inclusive, plaintiff worked 99 days, making \$495, which has support in the evidence, although it is conflicting, and that plaintiff paid \$1.50 for recording his lien. These items, to wit, \$32, \$495, and \$1.50, aggregated \$528.50, for which judgment was entered against defendant company. The services of plaintiff were rendered at San Francisco, in supervising the work of constructing the machinery, and it was for this work the balance of \$32 was found to be unpaid. The court, as we understand the findings and judgment, disallowed a lien for this \$32. The lien, for the sum of \$495, was declared upon the building in which the plant was erected and on the plant itself. This, we think, was a correct determination of the matter, although the court might properly have included in the lien the filing fee of \$1.50.

[4] It is further contended by defendants that the claim of lien, in the light of evidence, shows on its face a violation of section 1187, Code of Civil Procedure, which



declares that "any person who shall willfully include in his claim, filed under section 1187, work or materials not performed upon or furnished for the property described in the claim, shall forfeit his lien." At the close of plaintiff's case defendants made a motion to strike plaintiff's Exhibit A, the claim of lien, "from the records in the case and as evidence, upon the ground that the lien is fatally defective, in that there is a fatal variance between the contract set out in the lien, its time and terms and conditions, and the proof as shown by plaintiff. The Court: My conviction is that the plaintiff has not willfully attempted to assert a lien for something he did not believe he was entitled to—as to the other points I do not think they constitute a fatal variance." The motion was denied. The alleged variance arises out of averments in the notice of the lien which, it is claimed, were not supported by the evidence, of which the following are the principal ones relied upon: That said Groom, as agent of said company during all the times mentioned, was agent of said company, and as such agent employed plaintiff to work upon said refrigerating and precooling plant about April 10, 1907; that plaintiff was to work and labor on said plant at the rate of \$5 per day "and expenses for each and every day commencing on November 10, 1907, on which latter day said work did commence; that by virtue of said agreement plaintiff did render service," and then follows a statement of the number of days' labor performed in the several months, from November 10, 1907, to October 9, 1908, inclusive, aggregating 288 days and amounting to \$1,440 for services and \$385.50 for expenses, which \$1,087.50 is claimed to be due for "labor and services rendered and performed upon, in and about said hereinbefore described refrigerating and precooling plant and said property under and by virtue of the terms of the hereinbefore set forth contract," after deducting all just credits and offsets. It is contended that plaintiff must have known that he was not working on said plant, which was erected at Newcastle after June 11, 1908, when he was employed at Los Angeles and at San Francisco prior to that date; that the court disallowed all claim for expenses, which shows that plaintiff must have known he was not entitled to such claim; that the court allowed plaintiff's claim for a less number of days than as claimed and found that plaintiff was entitled to a lien only for services after June 15, 1908.

Section 1203, Code of Civil Procedure, provides: "No mistake or errors in the statement or demand, or of the amount of credits or offsets \* \* \* shall invalidate the lien, unless the court finds that such mistake or error in the statement of the demand, credits and offsets, or of the balance due, was made with the intent to defraud, or the

court shall find that an innocent third party, without notice, direct or constructive, has, since the claim was filed, become the bona fide owner of the property levied upon, and that the notice of the claim was so deficient that it did not put the party upon further inquiry in any manner." Section 1203, as enacted in 1911 (Stats. 1911, p. 1319), is substantially the same as section 1203a, enacted in 1907 (Stats. 1907, p. 858), so that, if it should be held that section 1203 is inapplicable because passed after the matters herein involved occurred, section 1203a, as enacted in 1907, was in force. Speaking of section 1202, before the enactment of section 1203a, the Supreme Court said, in *Schalbert-Ganahl L. Co. v. Neal*, 91 Cal. 362, 365, 27 Pac. 743, 744: "This section of the statute \* \* \* is penal in its character, and not only must be strictly construed, but the evidence under which it is invoked should be clear and convincing that the violation was willful and intentional." When the motion for a nonsuit was made, there was no evidence before the court bearing upon the question of fraud except the notice of plaintiff's claim and his testimony. Fraud is never to be presumed, and, before a party can be deprived of his right upon a claim of fraud, the facts must be clearly made out. *McCarthy v. White*, 21 Cal. 495, 82 Am. Dec. 754. The court expressed its conviction that the plaintiff did not willfully attempt to assert a lien for something he did not believe he was entitled to. We cannot say that its conclusion was unwarranted.

[5] No fraud having been shown and none being clearly inferable from the facts, the lien cannot be defeated merely because it turns out on the trial that the claim as filed was for too much. *Barber v. Reynolds*, 44 Cal. 519; *Harmon v. S. F.*, etc., R. R. Co., 86 Cal. 617, 25 Pac. 124; *Continental*, etc., *Ass'n v. Hutton*, 144 Cal. 609, 78 Pac. 21. It was not error to refuse to strike plaintiff's Exhibit A, the notice of lien, from the records.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

19 Cal. App. 713

ODELL v. RIHN et al. (Civ. 1,038.)  
(District Court of Appeal, First District, California. Sept. 19, 1912.)

1. ELECTIONS (§ 44\*)—IRREGULARITIES.

When an election has been held in all other respects as prescribed by law, and the voters generally have knowingly had a full opportunity to express their will, such election will not be declared invalid merely because the prescribed statutory notice has not been given.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 29; Dec. Dig. § 44.\*]

2. JUSTICES OF THE PEACE (§ 3\*)—ELECTION—NUMBER.

Conceding that a township is entitled to two justices of the peace, a candidate for such

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



office in an election based on a proclamation calling for the election of one justice cannot contend that, because he received the second highest number of votes, he is elected to office, since it would be presumed, in the absence of a showing, that the electors had no knowledge that two candidates might be voted for, and that they acted upon the information contained in the proclamation.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 5, 6; Dec. Dig. § 3.\*]

### 3. JUSTICES OF THE PEACE (§ 3\*)—TOWNSHIPS—NUMBER—"ELECTED."

Under Pol. Code, § 4014, declaring that any townships containing cities in which city justices are "elected" there shall be but one justice of the peace, a township comprising a city in which by charter a justice is "appointed" is entitled to but one justice; the terms not being synonymous.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 5, 6; Dec. Dig. § 3.\*]

### 4. STATUTES (§ 181\*)—CONSTRUCTION.

Statutes must be read and considered in conjunction with the legislative intent, and then be liberally construed with the object in view of effecting such intent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.\*]

### 5. WORDS AND PHRASES—"ELECTED"—"APPOINTED."

The words "elected" and "appointed" ordinarily are not synonymous. In its limited sense the word "elected" is usually employed to denote the selection of a public officer by the qualified voters of a community. On the other hand, "appointed" is generally understood to mean the selection of a public officer by one person who is empowered by law to make the appointment. In its broadest sense, however, the word "elected" means merely "selected." When used in that sense, the word "elected" is synonymous with the word "appointed."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 458-461; vol. 3, pp. 2829-2836; vol. 8, pp. 7647, 7648.]

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Mandamus proceedings by C. A. Odell against Charles J. Rihn and others. From a judgment for defendants, petitioner appeals. Affirmed.

C. A. Odell, of Richmond, for appellant.  
A. B. McKenzie, of Martinez, for respondents.

LENNON, P. J. Section 4014 of the Political Code of this state declares that, "The officers of a township are two justices of the peace. \* \* \* In townships containing cities in which city justices or recorders are elected there shall be but one justice of the peace, and in townships having a population of less than 5,000 there shall be but one justice of the peace. \* \* \*"

The appellant here, who was the petitioner in the proceeding below, seeks by mandamus to compel the respondents, as the board of supervisors of Contra Costa county, to declare him one of the duly elected justices of the peace of the Fifteenth judicial township in and for said county. Judgment was rendered and entered for defendants, and the appeal is from the judgment upon the judgment roll alone.

The proceeding was heard and determined upon an agreed statement of facts, which was subsequently substantially adopted by the trial court as its findings of fact. The facts of the case, as agreed by the parties and as found by the court, were substantially these: The respondents are and have been ever since the 8th day of November, 1910, the duly elected, qualified, and acting members of the board of supervisors of the county of Contra Costa. The petitioner is and has been for more than one year prior to the 8th day of November, 1910, a resident and qualified elector of the Fifteenth judicial township of the county of Contra Costa. Said township consists entirely of the city of Richmond. Prior to the general election held on the 8th day of November, 1910, the said township had but one justice of the peace. At that election petitioner herein and three other persons were candidates in that township for the office of justice of the peace. The name of the petitioner and the names of the other candidates for the office were printed upon the official ballots used at the election under separate party designations and under the heading, "For Justice of the Peace of the Fifteenth Judicial Township." No persons other than the candidates just mentioned were voted for at said election, and no voter voted for more than one person for justice of the peace of said township. After the election was had, the respondents, as the board of supervisors, made and canvassed the returns thereof, and declared, among other things, that for the office of justice of the peace of said township John Roth, the Democratic candidate, had received 497 votes; that C. A. Odell, the petitioner herein, as the Republican candidate, had received 315 votes; that J. B. Willis, an independent candidate, had received 240 votes; and that B. F. Smith, the Socialist candidate, had received 185 votes—whereupon the respondents, as the board of supervisors, declared said John Roth to be the only person who was elected to the office of justice of the peace for said township.

At the time of the election, the said township had and ever since has had a population of more than 5,000. The city of Richmond, however, is governed by a charter which provides for the appointment of a city justice by the city council. It is conceded here that prior to the general election of November 8, 1910, the Fifteenth judicial township of Contra Costa county had but one justice of the peace, and that the official proclamation of that election called for the election of only one justice for said township. It is further conceded that prior to the issuance of the proclamation for the general election of November 8, 1910, the city council of the city of Richmond had appointed a city police justice, who was then,

and ever since has been, occupying the office and performing the duties thereof, and that his jurisdiction as said city police justice is concurrent and co-ordinate in all matters and things with the jurisdiction conferred by law upon the justice's court of the Fifteenth judicial township of Contra Costa county.

It is the contention of petitioner that said township is, by the provisions of section 4014 of the Political Code, entitled to two justices of the peace; and that, inasmuch as petitioner had received the second highest number of votes cast for the office of justice of the peace at said election, the supervisors should have declared him elected as one of the two justices of the peace to which he claims the township was entitled, regardless of the conceded fact that the election proclamation called for the election of but one justice of the peace, and regardless of the further conceded fact that the city of Richmond then had a duly appointed, acting, and qualified city police justice. In other words, it is the contention of the petitioner that the Fifteenth judicial township of Contra Costa county was, as a matter of law, entitled to two justices of the peace because the township had a population of more than 5,000, and the city of Richmond did not have an "elected" city police justice. From this it is argued that it was the right and the duty of the voters of the township to choose and elect two justices of the peace, notwithstanding the fact that the proper officers, in proclaiming and giving notice of the election, called for the election of but one justice of the peace; and that, inasmuch as the petitioner here received the second highest number of votes cast at the election for the office of justice of the peace, he was the choice of the voters for the second justiceship, and consequently is entitled to be declared elected to the office.

This contention is based upon the assumption that the persons who voted for the petitioner did so with the knowledge and in the belief that the election was being held for the purpose, in part, of electing two justices of the peace. This assumption, however, is not supported by either the petitioner's pleadings or proof. Nowhere in the petition for mandate is there to be found an allegation that a single voter at the election knew or believed that an election was being held for the purpose of electing more than one justice of the peace. The record before us is barren either of averment or evidence that in any single instance any voter cast his vote for more than one candidate for the office of justice of the peace. On the contrary, the trial court found as a fact that "there was no evidence produced that at said election any voter voted for more than one justice of the peace of said township." Even if it be conceded that the Fifteenth judicial township of Contra Costa county

was entitled, under the provisions of section 4014 of the Political Code, to two justices of the peace, nevertheless it cannot be successfully maintained that an election was held on November 8, 1910, for the purpose of electing two justices of the peace in that township. It may be true generally, as counsel for the petitioner assert, that in the event that an election for any particular office provided for by law should have been called and proclaimed by the proper officers, and such election has in fact been held after actual notice thereof and knowledge of its purpose have been conveyed to the electors generally, that notice thereof by official proclamation, if the election was otherwise regular, is not per se an indispensable prerequisite to the validity of the election, or to the right of the electors to vote thereat for any particular office which may be vacant and which should be filled by the people at that election.

[1] In short, it may be conceded to be the general rule of law that, when an election has been held in all other respects as prescribed by law, and the voters generally have knowingly had a full opportunity to express their will, such election will not be declared invalid merely because the prescribed statutory notice has not been given. *Carson v. McPhetridge*, 15 Ind. 327; *Foster v. Scarff*, 15 Ohio St. 532; *Sanchez v. Fordyce*, 141 Cal. 428, 75 Pac. 56; *State v. Orvis*, 20 Wis. 235.

[2] Where, however, as here, it is conceded that the official proclamation called only for the election of one justice of the peace, and no showing is made that the great body of the electors had actual notice and knowledge of the fact that two candidates for the office of justice of the peace might and should be voted for and elected, and that one or more of the electors voted for two candidates for the office of justice of the peace, it cannot be logically said that an election was held by the people to fill more than the one office called for in the official proclamation of the election. In other words, where, as in the present case, there was no notice by official proclamation or in fact that an election was to be held for the purpose of filling two offices, it must be held that in fact there was no election for any office other than the particular office designated in the official proclamation. In the absence of such a showing, it will be presumed that the electors generally acted upon the information conveyed to them by the official proclamation that there was but one justice of the peace to be voted for and elected, and that the voters cast their ballots accordingly. This being so, it must follow that the petitioner was defeated at the general election of November 8, 1910, rather than elected to the office to which he aspired, and that he was properly refused a certificate of election by the respondents. *Foster v. Scarff*, *supra*; *Rogers v. Board*, etc., 11 Mich. 111; *Wood v. Bartling*, 16 Kan. 109; *Cooley's Const. Lim.*



(7th Ed.) 92; Jones v. Gridley, 20 Kan. 584; State v. Goetze, 22 Wis. 363.

[3] Apart from these considerations, we are satisfied that the Fifteenth judicial township of Contra Costa county was not at the time of the election in 1910 entitled, under the provisions of section 4014 of the Political Code, to more than one justice of the peace. That section, as has been noted, requires that there shall be two justices of the peace in every township save and except in townships having a population of less than 5,000 and in those containing cities in which city justices or recorders are elected. As has already been stated, it is conceded that the judicial township in question consists entirely of the city of Richmond which, although it has a population of more than 5,000, is provided by charter with a city justice of the peace, who is appointed by the city council. His jurisdiction and duties are concurrent and co-ordinate with those conferred generally upon justices of the peace throughout the state. It is petitioner's contention that the term "elected," as employed in section 4014, Political Code, should be construed to mean "elected by the popular vote of the people." In this contention we cannot concur.

[4] Statutes must be read and considered in conjunction with the legislative intent, and then be liberally construed with the object in view of effecting such intent. In restricting the number of justices of the peace to one in townships which include cities in which city justices or recorders are elected, it was evidently the legislative intent not to burden the people of the state with the expense of maintaining more judicial officers than were actually necessary to the needs of the people. The narrow construction of the statute here contended for by petitioner obviously would result in defeating the legislative purpose and intent in that behalf, and is therefore to be avoided, if possible.

[5] The words "elected" and "appointed" ordinarily are not synonymous. In its limited sense, the word "elected" is usually employed to denote the selection of a public officer by the qualified voters of a community. On the other hand, the word "appointed" is generally understood to mean the selection of a public officer by one person who is empowered by law to make the appointment. In its broadest sense, however, the word "elected" means merely "selected." When used in that sense, the word "elected" is synonymous with the word "appointed"; and where, as in the case at bar, a public officer has been selected by the votes of several members of a city council, it may be truly said, in the broadest sense of the term, that he was elected. McPherson v. Blacker, 146 U. S. 1, 13 Sup. Ct. 3, 36 L. Ed. 869; Pierce v. Guggenheimer, 44 App. Div. 399, 60 N. Y. Supp. 703; State v. Compson, 34 Or.

25, 54 Pac. 349; People v. Langdon, 8 Cal. 1, 16; Reid v. Gorsuch, 67 N. J. Law, 396, 51 Atl. 457; State v. Williams, 60 Kan. 837, 58 Pac. 476; State v. Harrison, 113 Ind. 434, 16 N. E. 384, 3 Am. St. Rep. 663.

Having in mind the spirit and purpose of the code section under discussion, it seems to us that the word "elected," as used therein, was not intended to apply solely to the election of a city justice by the votes of the people at large, but included as well the selection of a city justice of the peace by the city council or other legislative body in whom the power of election is conferred by law. In other words, it is our opinion that the appointment of a city justice of the peace by the votes of the city council of Richmond was tantamount to the election of such justice of the peace in the sense contemplated by the Legislature, and that therefore the Fifteenth judicial township of Contra Costa county was entitled to have but one justice of the peace at the time of the election in 1910.

The judgment appealed from is affirmed.

We concur: HALL, J.; KERRIGAN, J.

19 Cal. App. 720

**BLANCK v. COMMONWEALTH AMUSEMENT CORPORATION.** (Civ. 1,009.)

(District Court of Appeal, First District, California. Sept. 19, 1912.)

**1. CORPORATIONS (§ 426\*)—CONTRACTS—RATIFICATION.**

A corporation knowingly receiving and retaining the benefit of a contract entered into by its directors without authority may not repudiate the contract or escape liability thereunder.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702-1704, 1707, 1708, 1710-1716; Dec. Dig. § 426.\*]

**2. MECHANICS' LIENS (§ 127\*)—RECORDING OF CONTRACTS—CONTRACTS OF MATERIALMEN.**

The requirement of Code Civ. Proc. § 1183, that contracts over \$1,000 shall be recorded does not apply to the contract of materialmen, and the failure to record such contracts does not render them void.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 174-176; Dec. Dig. § 127.\*]

**3. MECHANICS' LIENS (§ 157\*) — CLAIMS OF LIEN—FRAUD—EVIDENCE.**

Under Code Civ. Proc. § 1203a, providing that no mistake in the statement of a claim of lien will invalidate it unless the mistake was made with intent to defraud, a claim of lien for materials is not void because of the inclusion of materials not actually used in the building, where the inclusion resulted from mistake and was unintentional and not fraudulent.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 268-274; Dec. Dig. § 157.\*]

**4. MECHANICS' LIENS (§ 30\*)—NATURE OF IMPROVEMENT.**

One constructing for a theater an electric sign consisting of a swinging bracket set into the front of the building, and supplying and installing telephone instruments and telephone



equipment for intercommunication between the various portions of the building, and installing for heating purposes gas furnace and connections, and supplying belaying pins consisting of turned pieces of hard wood apparently necessary for the convenient use of the premises, is entitled to a lien therefor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 35; Dec. Dig. § 30.\*]

#### 5. APPEAL AND ERROR (§ 1011\*)—FINDINGS—CONCLUSIVENESS.

A finding on conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

#### 6. PLEADING (§ 126\*)—NEGATIVE PREGNANT.

Where the complaint in a suit to enforce a mechanic's lien alleged that the materials were contracted for at an agreed price which was also the reasonable value thereof, an answer in the form of a negative pregnant was, in effect, an admission that the materials furnished were of the value stated, and the answer raised no issue on the subject.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 261-263; Dec. Dig. § 126.\*]

#### 7. PLEADING (§ 129\*)—ISSUES—ADMISSIONS.

Allegations in a complaint undenied by answer must be taken as true.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 270-275; Dec. Dig. § 129.\*]

#### 8. MECHANICS' LIENS (§ 277\*)—ENFORCEMENT—ISSUES, PROOF, AND VARIANCE.

Where several liens are founded on a statement of an agreed price for materials furnished, and the evidence shows in some instances that no price was agreed on, but further shows that the alleged agreed price in every instance was the reasonable value, the variance between the claims of lien and the proof is immaterial.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 546-554; Dec. Dig. § 277.\*]

#### 9. MECHANICS' LIENS (§ 291\*)—ENFORCEMENT—JUDGMENT—SUFFICIENCY.

A judgment foreclosing mechanics' liens which declares that judgment in specified sums be entered in favor of lien claimants and against defendant, that the several liens be foreclosed against the interest of defendant in the property involved and which directs that defendant's interest be sold, and that in case the proceeds are insufficient a judgment for any deficiency shall be docketed in favor of each claimant and against defendant, provides for a personal judgment only in case of a deficiency, and it is sufficient within Code Civ. Proc. § 1194, describing the requisites of judgments foreclosing mechanics' liens.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 599-605, 607, 610; Dec. Dig. § 291.\*]

Appeals from Superior Court of the City and County of San Francisco; J. M. Seawell, Judge.

Consolidated actions by William A. Blanck, by the Henry Cowell Lime & Cement Company, by E. E. Stewart, and by W. P. Fuller & Company against the Commonwealth Amusement Corporation, and by the American Supply Company against J. E. MacCormac. From a judgment for plaintiffs, defendants appeal. Affirmed.

Edgar C. Levey, George M. Lipman, and Daniel C. Deasy, all of San Francisco, for appellants. Jas. P. Sweeney and Olney, Pringle & Mannon, all of San Francisco, for respondent Wm. A. Blanck. Olney, Pringle & Mannon, of San Francisco, for respondent Henry Cowell Lime & Cement Co. Robert H. Countryman, of San Francisco, for respondent American Supply Co. R. V. Whiting, of San Francisco, for respondent E. E. Stewart. Adams & Adams, of San Francisco, for respondent W. P. Fuller & Co.

LENNON, P. J. These actions were instituted by the plaintiffs therein for the foreclosure of 15 mechanics' liens claimed by the several plaintiffs for materials furnished in the construction of a theater building erected by the defendant upon a certain lot of land in the city and county of San Francisco. The five actions were consolidated in the court below, and judgment rendered therein in favor of the plaintiffs. The appeal is from the judgment and from the order denying the defendant a new trial.

The building in question was erected by the defendant upon leased ground in accordance with the terms of a written contract entered into between the defendant and one Henry C. Farley. The contract for the erection of the building was never recorded. The defendant contends at the outset that the several and various contracts under which materials were supplied in the erection of the building were not binding upon the defendant, and should not have been admitted in evidence, because it was not shown that, although made in the name of the defendant, they were subscribed by the president and secretary of the defendant and executed under its corporate seal. Although the record fails to show that any of the agreements offered and received in evidence as the contracts of the defendant were executed by the parties signing the same under any express authority of the defendant, nevertheless the record does disclose a subsequent ratification of the several contracts sufficient in each instance to hold the defendant liable for the sums due thereunder. The evidence shows, for instance, that all of the contracts were entered into upon behalf of the defendant at different times during the construction of the building by individual directors and officers of the defendant; that the defendant paid for the first lot of materials which was delivered and used; that some of the material delivered for use in the building was rejected and returned by the agent of the defendant, for which credit was sought and given to the defendant; that two of the directors of the defendant had personal knowledge of the erection of the building and observed and inspected it several times during the course of its construction; that the construction of the building was in charge of an agent of the defendant,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to whom the materials were delivered, and who must have known what materials were received at the building and actually used in its construction; and finally that the directors and officers of the defendant subsequently acknowledged the several items claimed to be due, and asked for time in which to pay the same. The record, on the other hand, does not show that the defendant at any time repudiated any of the contracts, or denied receiving the benefits thereof.

[1] Having knowingly received and retained the benefit of contracts entered into by its directors and officers, even though the contracts were without the specific authority of the defendant, it will not now be heard to repudiate those contracts or be permitted to escape the obligations thereof. *Scott v. Superior Sunset Oil Co.*, 144 Cal. 140, 77 Pac. 817; *Underhill v. Santa Barbara*, 93 Cal. 300, 28 Pac. 1049; *Carpy v. Dowdell*, 115 Cal. 677, 47 Pac. 695; *Cummings v. Kearney*, 141 Cal. 156, 74 Pac. 759.

[2] The requirement of section 1183 of the Code of Civil Procedure that all contracts over \$1,000 shall be recorded does not apply to the contracts of the San Francisco Cornice Company, Duthie-Clark Company, and Henry Cowell Lime & Cement Company. These were in each instance the contracts of materialmen; and it is well settled that the failure to record the contracts of materialmen does not render them void. *Hinckley v. Fields Biscuit Co.*, 91 Cal. 136, 27 Pac. 594; *Roebbling Co. v. Humboldt Co.*, 112 Cal. 288, 44 Pac. 568; *Bennett v. Davis*, 113 Cal. 337, 45 Pac. 684, 54 Am. St. Rep. 354; *Bryson v. McCone*, 121 Cal. 153, 53 Pac. 637.

[3] In response to defendant's contention that the claims of lien filed by the Bradley-Martin Company, the Bruce Lumber Company, and the San Francisco Cornice Company were void because of the alleged willful and fraudulent inclusion therein of materials not actually used in the building under construction, it will suffice to say that the trial court specifically found that in each instance the mistakes and errors of the several claims of lien were unintentional and free from fraud. This finding is fully supported by the evidence, and, under the provisions of section 1203a of the Code of Civil Procedure as it existed when the liens were filed and this case decided, no mistake or error in the statement of a claim of lien will invalidate it unless the court finds that such mistake or error was made with the intent to defraud.

[4] A lien was allowed to the Bradley-Martin Company for an electric sign which consisted of a swinging bracket set into the front of the building. A lien was allowed to the Electric Railway & Manufacturers' Supply Company for supplying and installing telephone instruments and telephone equipment. These telephones were used for intercommunication between the various portions of the building. The Gas Furnace

Company was allowed a lien for a gas furnace and gas connections installed in the building for heating purposes. The Bruce Lumber Company was allowed a lien for belaying pins supplied to and used in the building. It is the claim of the defendant that the materials supplied by the several firms just mentioned were personalty which were not necessary to the construction of the building, and therefore could not be made the subject of a lien. This contention is founded upon the fact that all of the materials mentioned were detachable and portable. There is no merit in this contention. Obviously all of the materials mentioned, save the belaying pins, were apparently necessary to the convenient use and occupation of the premises and were well within the architectural scheme of the building to which they were attached. This being so, they entitled the materialman to a lien just as much as would the plumbing, bathroom fixtures, and other necessary fixtures of an ordinary dwelling.

We do not know, and the record does not show, why "belaying pins" should be necessary in the construction of a theater building. It does appear, however, that the belaying pins used in the construction of this particular building were "turned pieces of hard wood." From this meager bit of information we should judge that the belaying pins were a portion of the millwork used in the building, and, aside from the mere assertion of counsel for the defendant to the contrary, we are unable to discover either in the record or the briefs of counsel any good reason why millwork, even though it assumed the shape of belaying pins, is not the subject of a lien.

[5] The evidence as to the date of the completion of the building is in conflict. This was a question of fact to be determined by the trial court. The finding in this behalf was against the contention of the defendant, and in the presence of a conflict in the evidence the defendant in this court must abide by the finding.

[6] Our attention is called to the fact that the claim of lien of the Electric Railway & Manufacturers' Supply Company for electric supplies is not supported by evidence showing the agreed price or the reasonable value thereof. Plaintiff, however, alleges that the electric supplies were contracted for at the agreed price of \$49.35, which it was also alleged was the reasonable value of the same. The answer of the defendant with reference to this particular item was in the form of a negative pregnant. This was not a denial of the allegation of the complaint. It was, in effect, an admission that the electric supplies furnished for and used in the building were of the value stated in the complaint, and therefore the answer of the defendant raised no issue upon the subject of value.

[7] The allegations of the complaint with



reference to the claim of lien of the Duthie-Clark Company for installing the gridiron and fire escape, and the allegations of the complaint concerning the claim of M. C. Baker & Sons for electrical work, stand undented by the defendant's answer. Consequently these allegations must be taken to be true. This being so, it would be a waste of time and words to further discuss defendant's contention that these particular claims of lien are not supported by the evidence.

[8] If there be a variance between the several claims of lien, as claimed by the defendant, and the proof offered in support thereof, the variance in each instance is non-substantial and immaterial. The several liens are founded upon the statement of an agreed price for the materials furnished, while the evidence shows, in some instances, that no price was agreed upon. The evidence further shows, however, that the alleged agreed price of the materials furnished in every instance was the reasonable value thereof, and therefore the statement of the terms of the several contracts, as set forth in the several claims of lien, was substantially correct, and the variance, if any, must be held to be immaterial. *Star Mill & Lumber Co. v. Porter*, 4 Cal. App. 470, 88 Pac. 497; *Lucas v. Rea*, 10 Cal. App. 641, 102 Pac. 822; *Lucas v. Gobbi*, 10 Cal. App. 648, 103 Pac. 157; *Acme Lumber Co. v. Wessling*, 126 Pac. 167. Other objections of minor importance and similar in character to those just enumerated are urged against the validity of the liens of the several remaining lien claimants. Upon an examination of the record we find that they do not possess sufficient merit to warrant a discussion of them further than to say that the variances complained of are in some instances more seeming than real, and that the real variances, if any, are, for the reasons hereinbefore stated, nonsubstantial and immaterial.

[9] Defendant complains of the judgment and seeks a reversal thereof upon the erroneous assumption that the trial court rendered and entered in part a purely personal judgment against the defendant, contrary to the provisions of section 1194 of the Code of Civil Procedure as it stood when the action was commenced and determined. The judgment is not susceptible of any such construction. The sum and substance of the judgment is, after declaring that judgment in certain specified sums be entered in favor of each of the plaintiffs and against the defendant, that the several liens sued upon be foreclosed against the interest of the defendant in the property involved. The judgment directs that the defendant's interest in the property be sold by the sheriff in the manner prescribed by law; and that, "in case the proceeds of such sale do not suffice to pay each of said plaintiffs the full amount for which he has judgment hereunder, then a judgment for any deficiency shall be dock-

eted in favor of each of said plaintiffs and against the defendant Commonwealth Amusement Company."

It will thus be seen that by the very terms of the judgment no judgment except for a deficiency could be docketed against the defendant, and that the judgment itself could not have been enforced as a purely personal judgment against the defendant except in the contingency that a deficiency might be shown by the return of the sheriff. So construed, the judgment does not violate the provisions of section 1194 of the Code of Civil Procedure. *Painter v. Painter*, 98 Cal. 625, 33 Pac. 483; *Central, etc., Co. v. Center*, 107 Cal. 193, 40 Pac. 334; *Kreling v. Kreling*, 116 Cal. 458, 48 Pac. 383; *Hines v. Miller*, 126 Cal. 683, 59 Pac. 142.

The judgment and order appealed from are affirmed.

We concur: HALL, J.; KERRIGAN, J.

19 Cal. App. 742

#### PEOPLE v. BREWER. (Cr. 388.)

(District Court of Appeal, First District, California. Sept. 20, 1912.)

#### 1. CRIMINAL LAW (§ 761\*)—TRIAL—INSTRUCTIONS—CHARGE ON MATTERS OF FACT.

An instruction that the defendant should have the benefit of any doubt the jury might entertain as to whether any particular witness was an accomplice, "and, for the purposes of this case, you must consider such person and such witness an accomplice," was properly refused for its assumption of the fact of guilt within the prohibition of Const. art. 6, § 19.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1738, 1754-1764, 1771; Dec. Dig. § 761.\*]

#### 2. WITNESSES (§ 248\*)—EXAMINATION—RESPONSIVENESS OF ANSWER.

Though an answer of a witness in a prosecution for murder was responsive to only a portion of a question, it was properly retained, where its meaning was cleared by explanatory answers made to questions put to the witness by the court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 861-863; Dec. Dig. § 248.\*]

#### 3. CRIMINAL LAW (§ 690\*)—TRIAL—STRIKING OUT TESTIMONY—RIGHT TO SPECULATE.

Where a witness stated what the deceased replied to his question, introduced as a dying declaration, and there was no objection thereto after he had stated the question put by him to her and before stating the answer, the answer will not be stricken out, as a party cannot speculate on the probable good effect of testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1639-1644; Dec. Dig. § 696.\*]

#### 4. CRIMINAL LAW (§ 366\*)—EVIDENCE—RES GESTÆ.

Where a woman upon whom an abortion had been performed was removed to her home in a dying condition, her answer given at that time in response to a question as to her condition when she went to the defendant's house was a part of the res gestæ, and was properly admitted in a prosecution for her murder.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 811, 814, 819, 820; Dec. Dig. § 366.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**5. CRIMINAL LAW (§ 479\*)—EVIDENCE—OPINION—PHYSICIAN—FEMALE ANATOMY.**

In a prosecution for murder alleged to have been committed in the performance of an abortion, a physician was properly permitted to express an opinion as to whether an opening found in the uterus of the deceased could have been made with a hard rubber syringe, as the strength and firmness of the tissues of the female organs are matters presumably within the knowledge of a physician.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1067, 1068; Dec. Dig. § 479.\*]

**6. CRIMINAL LAW (§ 1036\*)—APPEAL AND ERROR—OBJECTION TO EVIDENCE—NECESSITY OF MAKING BELOW.**

In a prosecution for murder, an objection that a medical witness was improperly permitted to testify that an opening in the uterus of the deceased might have been made by a hard rubber syringe, on the ground that there was no evidence to show what kind of a syringe was used, could not be considered on review, where such objection was not raised below.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1631-1640, 2639-2641; Dec. Dig. § 1036.\*]

**7. HOMICIDE (§ 241\*)—PROCURING ABORTION—NECESSITY TO PRESERVE LIFE—EVIDENCE.**

In a prosecution for an alleged murder caused from the performance of an abortion, evidence held to show that the operation was not necessary to preserve the life of the deceased.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 504; Dec. Dig. § 241.\*]

**8. CRIMINAL LAW (§ 507½\*)—ABORTION—HUSBAND OF DECEASED AS ACCOMPLICE—EVIDENCE.**

In a prosecution for murder caused by the performance of an abortion, evidence held insufficient to show that the deceased's husband was an accomplice of the defendant, so that his testimony could not be admitted against her.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1097, 1264; Dec. Dig. § 507½.\*]

**9. CRIMINAL LAW (§ 941\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DISCRETION OF COURT.**

In a prosecution for murder, the court in the exercise of its discretion properly overruled a motion for new trial on the ground of newly discovered evidence, where the affidavits merely showed matters which were the same as those testified to by the decedent's husband on the trial, and which were intended to show that he was an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2328-2330; Dec. Dig. § 941.\*]

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

M. L. Brewer was convicted of murder, and appeals from the judgment and an order denying a new trial. Affirmed.

Snook & Church, of Oakland, for appellant. U. S. Webb, Atty. Gen., for the People.

HALL, J. The defendant was convicted of the crime of murder in the second degree. Before judgment was rendered she moved the court for a new trial, which being denied and judgment rendered against her of imprisonment in the state prison for the period

of 13 years, she took an appeal to this court from the judgment and order.

The evidence shows that on the evening of September 28, 1911, Annie E. Enrick, then advanced in pregnancy about three months, repaired to the residence of the defendant, also a woman, for the purpose of procuring an abortion to be performed upon her by defendant; that the defendant operated upon her in an attempt to procure an abortion; that said Annie E. Enrick at once became so ill, weak, and faint that it was with great difficulty that she could return from the residence of defendant in Berkeley to her home in East Oakland, though assisted by her husband, who had accompanied her to the residence of the defendant; that she was at once put to bed, and a physician called, who attended her until she died as a result of the operation, at a hospital to which she had been removed.

[1] 1. The court gave all the instructions requested by defendant, with some slight modifications, not complained of, save one, which the court refused. It is the refusal to give this instruction which is first urged as a ground for reversing the judgment. The refused instruction is as follows: "You are hereby instructed that, if you entertain a reasonable doubt as to whether any particular witness in this case was or was not an accomplice, you are to give the benefit of such doubt to the defendant, and for the purpose of this case you must consider such person and such witness an accomplice." We think that this instruction transgressed upon the province of the jury to determine the facts in the case. The concluding language of the requested instruction, "And for the purpose of this case you must consider such person and such witness an accomplice," implies that the crime of murder had in fact been committed, and the corpus delicti fully established; for manifestly there could be no accomplice if no crime had been committed. To follow the rule laid down in the instruction would require the jury to assume that the crime charged had in fact been committed, even though upon the whole case they had a reasonable doubt thereof. This being so, the court was justified in refusing the requested instruction, for the court should not charge the jury with respect to matters of fact. Article 6, § 19, Const.

[2] 2. It is next claimed that the court erred in refusing to strike out the answer to the following question put by the district attorney to the witness, Dr. Webber: "Q. Well, then, do I understand you to say that it is your opinion that in this case death was caused either by the injection of some substance or drug into the uterus, which caused a suppression of urine, or that the suppression of urine was the result of shock induced by the injection of some substance or instrument into the uterus, or both?" The answer to this question was, "It might

be both," and the ground of the motion was that the answer was not responsive. Clearly the answer was directly responsive to the concluding portion of the question. Because of the complex nature of the question the answer was not as clear as it might have been, but the meaning of the witness was at once made perfectly clear by explanatory answers made to questions put to him by the court. The court did not err in the ruling complained of.

[3] 3. It is next claimed that the court erred in refusing to strike out the following question and answer testified to by the witness Hynes as a part of the dying statement of Mrs. Enrick: "Q. Were you in good normal health at the time you visited the house of this woman? A. I was, except for the usual illness of pregnancy." The witness was relating to the jury the statement made to him by the decedent, which statement seems to have been elicited by questions put by the witness to decedent. In this instance the witness stated the question as above indicated, and then stated the answer made thereto. Defendant raised no objection until after the answer was stated, when she moved to strike it out upon the ground that "it does not relate to the cause of death, and is not competent."

We think the court was justified in refusing to strike out the evidence for two reasons:

(a) When the witness stated the question that he had put to the decedent, it was perfectly apparent to what subject-matter any answer that decedent might make thereto would relate. It was then that the defendant should have objected to the witness giving the answer to the question. She should not be allowed to speculate on the chance that the answer might be favorable to her side of the case, and if, on the answer being given it prove unfavorable, to have the right to have it struck out. The same rule should apply as applies where a litigant fails to object to a question put to a witness. Under this rule appellant's motion came too late.

[4] (b) The question put to the dying woman and her answer were in truth part of the *res gestæ* of the operation which resulted in her death, and for that reason were admissible as a part of her dying statement. The situation and condition of the parties at the time of the performance of the acts which result in the death are, we think, without doubt part of the *res gestæ*. This was all that the evidence complained of related to, and for that reason it was admissible.

[5] The fourth point urged for a reversal is that the court overruled the objection of defendant to the question: "I will ask you to state whether or not an opening such as you found in the uterus of Annie E. Enrick could have been made by a syringe, hard rubber syringe?" The objection was that

"It is irrelevant, incompetent, and immaterial, and calls for an expression of opinion on a subject on which the doctor is not entitled to express an opinion."

[6] It is now claimed that the evidence does not show what kind of a syringe was used. This point was not raised by the objection, and cannot now be raised for the first time. There is no merit in the contention that the matter was not such as was the subject of expert testimony. A physician may well be presumed to know more about the strength and firmness of tissues of the uterus and the membrane that closes the natural opening thereto in pregnancy than does a layman, and therefore is better able to judge whether or not an artificial opening therein which he had seen could be made by a given implement. It certainly was within the discretion of the court to allow the question.

[7] 5. It is next urged that the verdict is contrary to the evidence, in that, as it is claimed, it was not shown that the operation was not necessary to preserve the life of the deceased. There is no merit in this contention. It is not at all clear that the proof of such matter devolves upon the people. *Underhill, Crim. Ev. 347; People v. Balkwell, 143 Cal. 259, 76 Pac. 1017.* But conceding, for the purposes of this opinion only, that the fact must be established by the people, the proof upon this point was ample. The evidence shows that Mrs. Enrick was 39 years of age and was the mother of three children, that she went to the residence of the defendant in Berkeley from her residence in East Oakland, and at that time was apparently in perfect health except for the usual symptoms of pregnancy. There being not a word in the evidence to the contrary, this was ample to support the negative proposition that the operation was not necessary to preserve life. It is a matter of common knowledge that it is the rare exception that such an operation is necessary to preserve life, and all the circumstances surrounding and attending the operation performed in this case show without doubt that it was resorted to for no such benign purpose.

[8] 6. It is next claimed that there was no evidence other than that of accomplices that tended to prove defendant guilty. This claim is also without merit. The jury may well have believed that Mr. Enrick was not an accomplice, that he simply went with his wife at her urgent request to the residence of defendant—true, with knowledge of her purpose, but without aiding and abetting therein, or advising and encouraging her therein. There is no pretense that he was present when the operation was performed, or that he assisted defendant therein or spoke to her about the matter. Except that he was the husband of the pregnant woman, his conduct was quite similar to that of the witness in *People v. Balkwell, 143 Cal. 259,*



76 Pac. 1017, who was held not to have been an accomplice. At any rate, we cannot say as matter of law that the evidence was such as to compel the conclusion that he was an accomplice. There is ample in his evidence that tends to show that defendant performed a criminal operation upon Mrs. Enrick. The testimony of Miss Thompson also tends to show the same fact. The jury may well have considered that the statement made by defendant to Miss Thompson, to the effect that Mrs. Enrick was  $2\frac{1}{2}$  or 3 months along in pregnancy when she came to her (defendant), was, considering the circumstances under which it was made, a virtual admission that she had performed the operation in question. The evidence of the physicians amply proves that an attempt to produce an abortion had been committed upon the person of decedent, and that she died as a result thereof.

[9] 7. In support of the claim of newly discovered evidence, defendant presented the affidavits of two persons as to statements made to them by the witness Enrick, husband of decedent. The only claim made in the brief of appellant as to these affidavits is that they tend to prove the husband of decedent an accomplice in the crime committed. We have carefully examined these affidavits, and find nothing in them bearing upon this point that differs materially from the testimony given by the husband himself. The granting or refusing a new trial upon the ground of newly discovered evidence is a matter peculiarly within the discretion of the trial court, and this court never interferes with the exercise of such discretion unless it is clear that such discretion has been abused. *People v. Sing Yow*, 145 Cal. 1, 78 Pac. 235, and cases there cited. No such condition exists in this case.

This disposes of all the points called to our attention by appellant. In conclusion we may add that we have carefully read and examined the entire record, including the evidence, and find no reason to think that the trial of defendant has resulted in a miscarriage of justice by reason of any ruling of the trial court or for any other reason.

The judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(19 Cal. App. 755)

BUTTNER v. KASSER et al. (Civ. 1,039.)

(District Court of Appeal, First District, California. Sept. 20, 1912. Rehearing Denied by Supreme Court Nov. 19, 1912.)

1. PLEADING (§ 214\*)—COMPLAINT—DEMURRER—ALLEGATIONS ADMITTED—CONCLUSION OF LAW.

Where, in assumpsit for use and occupation, the complaint alleged that defendants were in possession under a valid sublease, a further allegation that they were wrongfully

in possession was a mere conclusion of law, which was not admitted by demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.\*]

2. LANDLORD AND TENANT (§§ 80, 209\*)—USE AND OCCUPATION (§ 2\*)—SURRENDER—EFFECT ON SUBLEASE.

While a tenant may surrender his estate to his landlord, yet, if the tenant has created a minor interest as an underlease, he cannot, by surrendering, destroy the charge or affect the estate of the under lessee, and hence, on surrender of a lease by the tenant, the overlord could not recover for use and occupation from a subtenant holding under a valid sublease nor could he recover rent under the sublease, the rent being a mere incident to the reversion which, on the surrender, merged in the greater estate of the landlord.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 350-360, 363-365, 368-371; Dec. Dig. §§ 80, 209; \* Use and Occupation, Cent. Dig. § 12; Dec. Dig. § 2.\*]

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by A. E. Buttner against Joseph B. Kasser and another, doing business under the name of Kasser Bros. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Hugo K. Asher and Jacob S. Meyer, both of San Francisco, for appellants. Sterling Carr, of San Francisco, for respondent.

HALL, J. The action is one to recover for the reasonable value of the use and occupation of certain premises used as a cigar stand by defendants during the period for which a recovery was sought.

It appears from the complaint that on the 9th day of December, 1907, one M. A. Lang was in possession of certain premises including said cigar stand, under a lease from the City Front Improvement Company, a corporation, who were the tenants under a lease of the entire premises, duly deraigned from the owner of the premises. The lease to Lang was for a period of 15 years from April 1, 1907, and the lease held by the City Improvement Company was for a period of 25 years from September 15, 1906. On the said 9th day of December, 1907, said Lang sublet the premises included in his lease (which included the cigar stand) to the Bay Front Improvement Company, a corporation, for a period of 15 years from the 1st day of April, 1907, who entered into possession on said 9th day of December, 1907. Under date of June 1, 1907, the said Bay Front Improvement Company sublet a portion of the premises, to wit, the cigar stand, to defendants for a period of two years from June 15, 1907, by virtue of which lease defendants went into possession of said cigar stand, and, as appears from subsequent allegations in the complaint, so continued until June 25, 1909. On the 17th day of June, 1908, and while defendants were in possession of the cigar stand and premises, sublet to them by the Bay Front Improvement Company, the



lease from said Lang to said company was by mutual consent of said Lang and said company canceled. Though requested so to do by said Lang, said defendants refused to remove from said premises, and, as appears from the complaint, retained possession of the premises sublet to them by said Bay Front Improvement Company until the 25th day of June, 1909. The claim of plaintiff is split into two causes of action because of subsequent transfers and retransfers flowing from said Lang, which have finally resulted in vesting in plaintiff whatever claim Lang might have had to recover against defendants for the value of the use and occupation of the premises sublet to them if he had made no transfer of his rights after the surrender and cancellation of the lease made by him to defendants' lessor. None of the leases, subleases, or assignments pleaded in the complaint contained any inhibition or limitation upon the right to sublet the premises leased or any part thereof. At the time that the City Front Improvement Company surrendered to Lang and the lease from Lang to said company was by their mutual consent canceled defendants were in possession under a valid sublease from said company to them. Defendants did not consent to the surrender or cancellation of the lease to their lessor. Plaintiff in framing his cause of action against defendants has ignored the terms of their sublease, and has sued for the reasonable value of the use and occupation of the premises sublet to them by the Bay Front Improvement Company for the period during which they were in possession under the sublease subsequent to the surrender.

By the demurrer to the complaint the question is thus presented: May a lessor to whom his lessee has surrendered his term ignore the conditions of a valid sublease, under which a subtenant is in possession, at the time of the surrender, to which he does not consent, and compel him to pay the reasonable value of the use and occupation of his tenement regardless of the conditions of his sublease?

[1] We say that this is the question presented by the demurrer. Before discussing it, however, it is convenient to dispose of a contention made by respondent in his brief that appellants by their demurrer admitted certain allegations of the complaint to the effect that defendants were wrongfully in possession of the premises during the period for which a recovery is sought. These allegations were preceded by the allegations which deraign the title of defendants, showing that defendants were in possession under a valid sublease, and are mere conclusions of law. As we shall show in this opinion, a tenant, who has made a valid sublease, may not by a voluntary surrender of his term defeat or affect the term of his subtenant, who has not consented to such sur-

render. It appearing by the specific allegations of the complaint that defendants were in possession under a valid sublease, the allegations that they were wrongfully in possession were conclusions of law, and were worse than useless. Conclusions of law are not admitted by a demurrer. *Ohm v. San Francisco*, 92 Cal. 437, 28 Pac. 580; *Callahan v. Broderick*, 124 Cal. 80, 56 Pac. 782.

We now take up the real question presented by the demurrer to the complaint.

[2] It is contended by appellant that a lessor who accepts from his lessee a voluntary surrender of his term and consents to a voluntary cancellation of the lease cannot ignore the rights of a subtenant under a valid sublease, and compel him to pay the reasonable value of the use and occupation of his subtenement regardless of the terms of his sublease. Applying these general contentions to the facts alleged, defendants state their position in these words: "Defendants contend that under these facts assumpsit will not lie; that their lease from Bay Front Improvement Company has never been terminated and was in full force at all times mentioned in the complaint; and that any claim against the defendants with reference to their occupancy of the premises must flow from and be measured by the provisions of the lease between Bay Front Improvement Company and the defendants, and not otherwise. The action should have been based upon the lease and not for rental value of the premises."

Respondent, on the other hand, contends that the surrenderee cannot sue the subtenant on his lease for want of either privity of estate or contract, and that, therefore, he must have the right to sue for the reasonable value of the premises occupied and held under the sublease. We have examined with care the authorities relied upon by plaintiff as supporting his contention that the surrenderee may sue the subtenant in possession under a valid sublease for the reasonable value of the use and occupation. None of them in our opinion supports his contention. Indeed, the full text of what the court said in *Bailey v. Richardson*, 66 Cal. 416, 5 Pac. 910, cited by respondent, is to the effect that in such a case the subtenant may hold without paying any rent at all. Speaking of a case where the lessee has surrendered to his lessor, the court said: "Although the tenant cannot prejudice the interest of the underlessee, yet he will lose the rent he has reserved upon the underlease, for the rent is incident to the reversion, nor can the surrenderee have it, for, though the reversion to which it was incident has been conveyed to him, yet, as soon as it was so conveyed, it merged in the greater reversion, so that the consequence is that, neither the surrenderor nor surrenderee being entitled to the rent, the underlessee holds without payment of any rent

at all excepting where the contrary has been expressly provided by statute."

The case of *McDonald v. May*, 96 Mo. App. 236, 69 S. W. 1059, cited by respondent, does hold that the surrenderee may not sue the subtenant on the sublease, except where there has been an attornment, but falls far short of holding that an action will lie for reasonable value of use and occupation. On the contrary, it distinctly recognizes the rule that the rights of subtenants "will not be destroyed or impaired by a surrender of the main lease." The court intimates that the rule is a hard one as to landlords, deplored by judges and commentators because it sometimes operates to cut them out of their rent, while permitting a subtenant to retain the premises. In this regard it might be suggested that the original lessor may always protect himself against such a hardship by refusing to consent to a cancellation of the lease, unless accompanied by a surrender of the actual possession of the entire premises, or he may take an assignment of the rentals under the sublease.

The case of *Murphy v. Hopcroft*, 142 Cal. 43, 75 Pac. 567, is also relied on by respondent as sustaining his theory of the right of a surrenderee to recover the value of the use and occupation as against a subtenant. We have examined the case, and fail to see that it touches the question here involved at all. Neither do any of the authorities cited by respondent support his contention that the surrenderee may in an action against the subtenant ignore the conditions of the lease under which the subtenant holds. It is not doubted but that upon a re-entry for forfeiture of the lease held by the sublessor the rights of the sublessee under his sublease will terminate. But the authorities are uniform to the effect that by a voluntary surrender of the lease by the lessee to his lessor no rights of a sublessee holding under a valid sublease can be affected. In such a case the interest and term of the subtenant continue as if no surrender had been made. *Jones on Landlord and Tenant*, § 552. "A tenant may surrender his estate to his landlord, but if he have since its commencement created some minor interest out of it, or have made an underlease, he cannot, by surrendering, destroy the charge or affect the estate of the underlessee." *Bailey v. Richardson*, 66 Cal. 416, 5 Pac. 910. To the same effect are *Satterlee v. Bliss*, 36 Cal. 516; *Ritzler v. Raether*, 10 Daly (N. Y.) 286; *Eten v. Luyster*, 60 N. Y. 252; *Oshinsky v. Greenberg*, 39 Misc. Rep. 342, 79 N. Y. Supp. 853; *Adams v. Goddard*, 48 Me. 212; *Morrison v. Sohn*, 90 Mo. App. 76; *Cuschner v. Westlake*, 43 Wash. 690, 86 Pac. 948; *Mitchell v. Young*, 80 Ark. 441, 97 S. W. 454, 7 L. R. A. (N. S.) 221, 117 Am. St. Rep. 89, 10 Ann. Cas. 423. While none of the cases above cited was a case where suit was brought by

the surrenderee to recover rental from the subtenant, yet the principle laid down in these cases that the rights of the subtenant cannot be affected by such surrender must govern the determination of this case.

One of the rights of the subtenant is to hold his term upon compliance with the conditions of his lease. He can be compelled to pay only such rental as was reserved in his lease, and may be entitled to a discharge from such rental on such conditions and for such breaches of his lease by his lessor as are provided for in his lease. None of his rights in these regards may be defeated or affected, without his consent, simply by the consent of his lessor and the overlord. To permit the subtenant to be charged for the value of the use and occupation, without regard to the terms of his lease, because his lessor had surrendered to the overlord, would be to permit his rights to be defeated by the voluntary action of his lessor. As before stated, it is not doubted but that the subtenant may be defeated of his term by a forfeiture of the lease under which his lessor holds. No such condition exists in this case. It is simply a case of the cancellation of a lease by the mutual consent of the lessor and lessee after such lessee had made a valid sublease to a subtenant. While such cancellation is effectual as between the lessor and lessee, it cannot affect the rights of the subtenant. See authorities cited, *supra*.

The court erred in overruling the demurrer, and for that reason the judgment is reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

19 Cal. App. 735  
KING et al. v. FRAGLEY et al. (Civ. 985.)  
(District Court of Appeal, Third District, California. Sept. 19, 1912.)

1. DEEDS (§ 208\*)—SUFFICIENCY OF EVIDENCE—DELIVERY—CONDITIONS.

In an action to quiet title wherein it was claimed that a deed executed by defendant was intended to operate as a will and take effect only in case defendant's husband survived her, evidence held to support a finding that the deed was delivered absolutely and unconditionally with intent that it should be an absolute conveyance.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 625-632; Dec. Dig. § 208.\*]

2. DEEDS (§ 56\*)—DELIVERY—RETENTION BY GRANTOR.

After an actual delivery of a deed to a grantee, the fact that it is placed in a box to which the grantor has access and of which she retains possession does not affect the validity of the delivery.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 117-123, 125; Dec. Dig. § 56.\*]

3. DEEDS (§ 181\*)—DELIVERY—OPERATION AND EFFECT.

After a deed has been executed voluntarily and freely and delivered to the grantee, neither its subsequent destruction by the grantor nor



any other act by the grantor can affect the title thereby conveyed.

[Ed. Note.—For other cases, see Deeds, Cent Dig. § 553; Dec. Dig. § 181.\*]

Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by Charles A. King and another, as executors of Martin F. Fragley, against Sarah Fragley and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

Jos. H. Creely, of Oakland, and M. L. Rawson, of San Leandro, for appellants. Geo. E. De Golia, of Oakland, for respondents.

BURNETT, J. [1] This was an action to quiet title, and, as stated by appellant, the only question raised upon the trial was whether or not a certain deed executed on the 2d day of November, 1909, by Sarah Fragley to her husband, Martin Fragley, operated as a valid transfer and whether it was delivered or not. The trial court found that said deed was prepared by an attorney employed by the grantee, "and on November 2, 1909, at the said home of Fragley and his wife, and in the presence of John C. Quinlan, Charles A. King, one of the executors named in the will, and Hamilton Bauer, a notary public and attorney at law, said Sarah executed said deed, acknowledged the same before said notary public, and then and there freely and voluntarily physically handed to, and delivered to, said Martin Fragley her said deed, so executed and acknowledged, conveying back to him said 'San Leandro property'; saying to him in substance, 'Here, papa, is the deed you want.' \* \* \* That it was intended by said Sarah Fragley when she delivered to her said husband, Martin F. Fragley, on November 2, 1909, said deed of November 2, 1909, conveying back to said Martin said 'San Leandro property,' that said deed was to be an absolute conveyance by her to her said husband of said property, with the full knowledge and agreement on her part that such deed was to convey back to her husband said 'San Leandro property' to the end that said will was to remain unchanged, and she was to receive from her husband's estate, upon his death, property and money to the value of about \$9,000, and no more. \* \* \* That said deed of November 2, 1909, was on said day delivered by said Sarah to her said husband absolutely and unconditionally." The only question for us to determine is whether those findings are supported by the evidence, and of this, after reading the transcript, we can entertain no kind of doubt.

Hamilton A. Bauer, the notary public who took the acknowledgment of the grantor of said deed, testified: "She signed it right in front of me, in my presence. I never saw it before the time she signed that, but she executed that right in my presence. I asked

her if she acknowledged that. She said, 'Yes.' I put my certificate on. I filled in the written part. I put the seal on, too. I had a pocket seal which I put on." Being asked whether or not there was any conversation at that time and place between Mr. and Mrs. Fragley, or between Mrs. Fragley and any of the parties, that this deed was to be operative as a will of Sarah Fragley, he replied: "I did not hear anything of that sort. As I recollect, Mr. Quinlan told him he had made out a will for him." He was asked the following question: "This deed, this paper, ever referred to as being a will, or to act or operate as a will? A. No, sir; I don't think there was anything of that sort. Q. State whether or not at that time and place there was any conversation or remark concerning this deed, so that it would have no force or effect if Mrs. Fragley outlived her husband? A. I did not hear anything of that sort; no, sir."

Mr. Charles A. King, a witness who was present at the time, testified as follows: "I think I was invited on the day before the execution of the deed by Mr. Quinlan, who was Mr. Fragley's attorney, to be at Mr. Fragley's home at 11 o'clock on the morning of November 2d, on this date of the execution of the deed. I was present at that time, and that deed was signed by Mrs. Fragley and acknowledged by Mr. Bauer on that morning. The deed was handed to Mr. Fragley at the request of Mr. Quinlan, who asked her to make delivery to Mr. Fragley of that deed. She did so. A general conversation was taking place, and Mrs. Fragley obtained the box, which was a wooden box but had the appearance of a tin box, in which he kept some insurance policies and other private papers, deeds, notes, and mortgages, and so forth. He dropped the deed into the box, and Mrs. Fragley removed it, I think, to their bedroom, in which it was generally kept in the closet there." Being asked the question, "At the time that Mrs. Fragley handed the deed to her husband, did she say anything to him?" he answered, "There might have been something said about 'Here is the paper, papa.' She generally called him 'papa.' Or, 'Here is the deed.' She did that at the request of Mr. Quinlan, as I remember distinctly. He wanted an absolute tender of the deed to Mr. Fragley. Q. You mean by 'tender' physical delivery? A. Yes, sir; physical delivery. The deed having been drawn, as I understood, for that purpose; the deed having been drawn and executed for that purpose."

John C. Quinlan, a witness for plaintiffs, testified as follows: "I prepared this deed at the request of both Mr. and Mrs. Fragley—Sarah Fragley and her husband, Martin F. Fragley. The request was made probably a week or so before I prepared this deed. Mr. Fragley asked Mrs. Fragley

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



whether or not she would be willing to deed back to him the Fair Oaks street property and the San Leandro property. She said, 'Yes,' she would be willing to do anything that he wanted her to do. As far as she was concerned, she was quite willing to take what was given her in the will which had been already prepared and drawn and executed by Mr. Fragley. In the presence of Mrs. Fragley, Mr. Fragley asked her whether or not she would not deed back to him the Fair Oaks street property and the San Leandro property. She said, 'Yes, papa, I will do whatever you want to do. If you want it done that way, all right.' I said to Mrs. Fragley that she had been given certain legacies and bequests in the will. I had already read to her the will. She says that was all right; that was all she wanted. At the time of the execution of the deed I was present, Mrs. Fragley was present, Mr. King was present, and Mr. Hamilton Bauer was present; Mr. Fragley, also. I don't think there was any one else present. I went into the house, as had been arranged by Mr. and Mrs. Fragley the evening before. I went into the house with the notary, Mr. Bauer, on the morning of November 2d. Mr. Fragley was sitting in the front windows in an armchair. He had been sick for some time before that. He was sick at that time. He was sitting up, I think, with a blanket thrown around him. I introduced Mr. Bauer to him as the notary. I believe Mr. King was inside at the time. He shook hands with him. I told Mr. Fragley that we were all ready to have the papers signed up—referring to the deeds. Now Mrs. Fragley was present, I am quite sure, during that conversation, because she opened the door for me, I believe, when I was going in. She was in the parlor with me, with the rest of us, during that conversation. I then produced the deeds, and again I told Mrs. Fragley she was getting the Fair Oaks street property under the will, together with \$3,000. She said, 'All right,' and signed this deed. As soon as the deed was signed by Mrs. Fragley, it was handed by Mrs. Fragley over to Mr. Fragley in my presence. I believe I requested Mrs. Fragley to deliver the deed to her husband. In fact, I am sure I did. Q. What did she say, if anything, when she handed it to him? A. She said, 'Here it is.' I believe that is the way she handed the deed over to her husband. 'Here it is, papa.' I think that is the way she said it. Q. At any time of the times you have spoken of, was there any objection of any kind or nature by Mrs. Fragley against the executing and delivery of that deed? A. No, sir; there was absolutely no protest whatever made by Mrs. Fragley. Everything was freely and voluntarily done, without any duress, fraud, menace, or undue influence by any person whatsoever. Q. Did you at any time prior to the execution of this deed explain to Mrs.

Fragley why the deed was drawn and should be executed? A. I believe I explained to Mrs. Fragley. I know I explained to Mr. Fragley, and I believe I explained to Mrs. Fragley that if she was satisfied with the Fair Oaks street property and the \$3,000 given her in the will, that unless this deed was given back to Mr. Fragley, she could come in if she wanted to, or was so disposed, and secure her widow's share in addition to this property. Q. In order to make an adjustment of matters after the will had been prepared, you told her the reason why Mr. Fragley wanted this deed by which she conveyed back to him the San Leandro property? A. Exactly, in order to see that the provisions in the will, as Mr. Fragley wanted it, were carried out. In other words, he wanted Mrs. Fragley to get the Fair Oaks street property and \$3,000. He did not want her to get any more. Q. That was explained by you to her or by him in your presence? A. Yes. Q. At the time the deed was signed and acknowledged and handed to Mr. Fragley, what was Mrs. Fragley's mental and physical condition, as you observed it? A. Mrs. Fragley's mental and physical condition was very well, as far as I could see. I had been at Mr. Fragley's house on several occasions in connection with his affairs, and on every occasion I met Mrs. Fragley there she was up and around and attending to Mr. Fragley, who was ill. Q. State whether or not Mrs. Fragley had any appearance at that time as to being ill herself; at the time the deed was executed, did she have any appearance of being ill at that time or not? A. No, sir; Mrs. Fragley was waiting on Mr. Fragley. Mr. Fragley was the one that was sick. Q. Now, state whether or not in any of the conversations held at the Fragley household on November 2, 1909, between Mr. Fragley or Mrs. Fragley and yourself, in which you were present, anything was said upon the subject-matter that this deed, plaintiff's Exhibit A, was intended by her to take the place of a will by her for the purpose of doing away with the necessity for probate proceedings after the death of Mrs. Fragley? A. There wasn't any expression of that idea at all. Q. State whether or not at any time on that day of November 2, 1909, or at any time before that time, any agreement or undertaking was had between Mrs. Fragley and her husband, any engagement or understanding was had between Mrs. Fragley and her husband, in your presence or with your knowledge, that the deed (plaintiff's Exhibit A) should not be recorded nor that it should not take effect until said Sarah Fragley should die before her said husband? A. There was no mention made of the fact that Mrs. Fragley was about to die. There was no mention made of the fact that Mr. Fragley was only to get this property in case of Mrs. Fragley's death. As I stated before everything

that was being done so far as I had to do with it was in contemplation of Mr. Fragley's death, and not in contemplation of Mrs. Fragley's death. Q. State at any of those conversations on November 2d, or at any time prior thereto, whether there was any understanding or agreement on the part of any of the parties that, in the event of Mrs. Fragley surviving her said husband, said deed (plaintiff's Exhibit A) was to be of no force or effect or to be canceled or destroyed? A. There was no understanding whatever. That matter was not thought of at all. Q. This property went into the estate to equalize matters that they had agreed upon among themselves? A. Yes, sir." These questions, it may be said, were aimed at the theory of appellants.

There is much more evidence in the record to the same effect, but we deem it unnecessary to quote it. Giving full credit, as we must, to the foregoing testimony, the conclusion is irresistible that the deed was executed and delivered by the grantor to the grantee, absolutely and unconditionally, and that immediately upon its delivery all the interest of the grantor was vested in the grantee. It seems unnecessary to cite authorities as to the legal proposition involved, since the principle is so well established.

It is true there was evidence introduced by the defendant—principally the testimony of the grantor—that the delivery of said deed was conditional; that there was an understanding between the grantor and the grantee that the deed was not to take effect unless the grantor died before the death of the grantee; but this only created a conflict in the evidence. Besides, it must be said that the grantor was impeached by witnesses called in behalf of the executors.

[2] Some contention is made by appellants that, since the deed was placed in a box to which the grantor had access and which she retained in her possession, such reservation and possession of the deed was fatal to a valid delivery; but it is perfectly apparent that it is entirely immaterial what became of the deed after it was actually delivered to the grantee. The cases cited by appellants (*Bury v. Young*, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186, *Kenney v. Parks*, 125 Cal. 150, 57 Pac. 772, and *Moore v. Trott*, 156 Cal. 353, 104 Pac. 578, 134 Am. St. Rep. 131), discuss an entirely different situation.

[3] In view of the well-established rule, it would be a singular position to take that, after a deed has been executed and unconditionally delivered, and thereby the title to the property vested in the grantee, if the grantor has the opportunity afterwards to get possession of the deed and destroy it, this circumstance would affect the title of the grantee. The fact is, of course, that, if the deed is executed voluntarily and freely and delivered to the grantee with the in-

tention of vesting the title in him, no subsequent act of the grantor could affect the title thereby conveyed.

After an examination of the record, we are satisfied that the findings of the court and the conclusions drawn therefrom are abundantly supported, and that there is no merit whatever in the appeal.

The judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

19 Cal. App. 765

COOK v. TERRY et al. (Civ. 981.)

(District Court of Appeal, First District, California. Sept. 20, 1912.)

1. RECEIVERS (§ 47\*)—APPOINTMENT—CONSTRUCTION OF ORDER—"RECEIVER."

Though the mandatory words of an order directing the delivery of possession of property to a person "as receiver" pending an action were addressed to another than the "receiver," they necessarily carried with them an authorization to the person designated as "receiver" to take possession as such, and the order is sufficient as an appointment, since a receiver is a person authorized to take possession of property in litigation for the purpose of preserving it for whichever of the litigants the court may finally determine is entitled thereto.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 72; Dec. Dig. § 47.\*

For other definitions, see *Words and Phrases*, vol. 7, pp. 5993-5997; vol. 8, pp. 7780-7781.]

2. RECEIVERS (§ 212\*)—BOND FOR APPOINTMENT—DAMAGES—ATTORNEY'S FEES—NECESSITY OF PAYMENT.

In an action on a bond given for the appointment of a receiver, the plaintiff could not recover attorney's fees where such fees had not been paid up to the time of the trial, but only a note given therefor.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 422; Dec. Dig. § 212.\*]

3. RECEIVERS (§ 212\*)—ACTION ON BOND FOR APPOINTMENT—DAMAGES—ATTORNEY'S FEES—ASSESSMENT ON RETRIAL.

Under Civ. Code, § 3283, which provides that damages may be awarded in a judicial proceeding for detriment resulting after the commencement thereof, or certain to result in the future, proof of attorney's fees paid in an action in which the appointment of a receiver was sought may be shown upon a retrial of an action on the bond given for the appointment, though they had not accrued at the time of the first trial because not paid.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 422; Dec. Dig. § 212.\*]

Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Action by Fred R. Cook against S. W. Terry and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

W. M. Beggs and R. C. McComish, both of San Jose, for appellant. S. G. Tompkins and R. F. Robertson, both of San Jose, for respondents.

HALL, J. This is an appeal from an order denying plaintiff's motion for a new trial.

The action was brought upon a bond given

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



by defendant Terry as principal, and the corporation defendant as surety, in accordance with the requirements of section 566, Code of Civil Procedure, for the purpose of procuring the making of an order appointing a receiver by the superior court of Santa Clara county, in an action then pending in said court wherein said Terry was plaintiff and said Cook was defendant. The bond was in the usual form, and was in the penal sum of \$1,000, and conditioned as required by said section.

In support of the allegations of the complaint that the court made an order appointing one W. T. McDonald receiver in the said action, and directed and authorized him to take charge of the personal property described in the complaint, plaintiff upon the trial "offered in evidence from the records in the case of Terry v. Cook the original of what purported to be an order appointing the receiver in said action." Omitting the title of the court and action, said order is as follows: "It appearing to the satisfaction of the court that Fred R. Cook has in his possession and control the following described property [here follows the description of certain personal property], which is the subject of litigation in this action and which is held by him, on motion of R. F. Robertson, Esq., the attorney for the plaintiff, it is hereby ordered that said Fred R. Cook deliver possession of the said property to W. T. McDonald, as receiver, pending this action and subject to further direction of the court." This order bore date March 25, 1910, the date of the bond sued on, and was signed by the judge of the court.

Defendants lodged an objection to the introduction of this order upon the ground that it was not an order appointing a receiver. The court sustained the objection, and the instrument was not admitted in evidence; and, as it was the only order ever made appointing or attempting to appoint a receiver, the court was obliged to find against plaintiff upon his allegation as to the appointment of a receiver, and gave judgment for the defendant.

The ruling of the court above set forth presents the vital question upon which this appeal hinges. If no order was ever made appointing a receiver, there was no consideration for the bond sued on, and no recovery could be had thereon.

[1] The determination of the effect of the order in question is not without difficulty. It certainly is most informal as an order of appointment, and not at all in conformity with such orders as usually made. It does not in direct language appoint a receiver, and yet it is clear from the language used by the court in the order that the court intended that McDonald should accept and take possession of the property in litigation, and hold the same pending the determination of the action, subject to the order of the court. Such are the particular functions and duties

of a receiver. A receiver is a person authorized to take possession of property in litigation for the purpose of preserving it for whichever of the litigants the court may finally determine is entitled thereto. The order in question, though very informally worded and not at all to be commended as a model for future orders, in substance and effect gave authority to McDonald to take possession of the property and hold it pending the action. While the mandatory words of the order were directed to Cook, the defendant in the action, and directed him to deliver the property described to McDonald, as receiver, the same words necessarily carried with them an authorization to McDonald to take possession thereof as receiver, and to hold possession subject to the future order of the court. He was thus constituted a receiver, and, as the record shows, subsequently and before entering upon his duties gave a bond as such. We must look to the substance and effect of the order rather than to its mere form.

That our conclusion, as to the proper construction of the order in question, is correct is supported, we think, by the following authorities: *Gibbes v. Greenville & Columbia R. R. Co.*, 15 S. C. 304; *Lyons-Thomas Co. v. Perry Co.*, 88 Tex. 468, 27 S. W. 100; *Kimbrough v. Orr Shoe Co.*, 98 Ga. 537, 25 S. E. 576, and *Fulton v. Davidson*, 3 Heisk. (50 Tenn.) 614.

In none of the cases above cited was the action upon the bond given for the appointment, but in each of them the rights of the litigants depended upon the sufficiency of the order as an order for the appointment of a receiver. In none of said cases was the person in terms appointed as a receiver; but in each case he was held to be such because of the authority given him and the duty imposed by the order. Indeed, in *Lyons-Thomas Co. v. Perry Co.*, supra, the judge in vacation refused to appoint a receiver, but apparently by consent made an order authorizing a person, to whom a conveyance in trust had been made, which was attacked in the proceeding, to execute the trust under the direction and control of the court. The judge had no jurisdiction in vacation to appoint a trustee, but did have power to appoint a receiver. The court found no difficulty in upholding the order as one appointing a receiver.

The order offered in this case was in substance sufficient as an appointment of a receiver, and the court erred in sustaining the objection thereto, and for this reason the order should be reversed.

[2] Plaintiff sought to recover damages for interruption to his business, and also on account of fees paid to an attorney for procuring a dissolution of the order appointing the receiver. The evidence showed that, although he had given a note for the attorney fees, he had not up to the time of the trial paid anything thereon. Attorney's fees can-



not be recovered in such an action as this unless they be actually paid. *Willson v. McEvoy*, 25 Cal. 170; *Prader v. Grimm*, 28 Cal. 12; *Lott v. Mitchell*, 32 Cal. 24.

[3] Upon a retrial it is possible that this defect in proof of damages may be met, for "damages may be awarded in a judicial proceeding for detriment resulting after the commencement thereof, or certain to result in the future." Civ. Code, § 3283; *McLennan v. Ohmen*, 75 Cal. 558, 17 Pac. 687; *Hicks v. Herring*, 17 Cal. 566.

The order is reversed, and the cause remanded for a new trial.

We concur: LENNON, P. J.; KERRI-GAN, J.

19 Cal. App. 762

HARRISON v. POWERS et al. (Civ. 1,033.)  
(District Court of Appeal, First District, California. Sept. 20, 1912.)

RECORDS (§ 15\*)—ACCESS TO RECORDS OR FILES.

Under Code Civ. Proc. § 1892, providing that every citizen may inspect a copy of any public writing except as otherwise expressly provided, and section 1894 providing that public writings comprise official documents and public records of private writings, a board of education may be compelled by mandamus to permit a citizen to inspect and copy its census reports, though the purpose of such inspection is to use the information obtained in canvassing for the sale of books to school children, such right, if sought to be exercised for no unlawful or scandalous purpose, but in aid of a lawful, though private, business, may not be denied.

[Ed. Note.—For other cases, see *Records*, Cent. Dig. §§ 19, 20; Dec. Dig. § 15.\*]

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Petition by C. D. Harrison for a writ of mandate against J. E. Powers and others, constituting the Board of Education of the City and County of San Francisco. From a judgment overruling a demurrer to the petition and directing that the writ issue, defendants appeal. Affirmed.

Percy V. Long and John F. English, both of San Francisco, for appellants. P. L. Benjamin, of Oakland, for respondent.

HALL, J. Plaintiff, a citizen of this state, filed a petition in the superior court praying for a writ of mandate to compel the defendants to permit him to inspect and make a copy of the census reports of school children in the official custody of defendants, and which privilege or right the defendants had denied to plaintiff.

Defendants demurred to plaintiff's petition, and at the same time filed an answer, affirmatively setting up substantially that plaintiff's only purpose in seeking to inspect and copy such reports was that he might use the information thus obtained in canvassing for the sale to school children of certain

books in which he was interested. The court overruled defendants' demurrer, and sustained plaintiff's demurrer to defendants' answer, and gave judgment that the writ issue as prayed for. From this judgment defendants appealed to this court.

Section 1892 of the Code of Civil Procedure of this state provides that "every citizen has a right to inspect and take a copy of any public writing of this state except as otherwise expressly provided by statute." Section 1894 of the same Code provides that "public writings are divided into four classes: (1) Laws; (2) judicial records; (3) other official documents; (4) public records, kept in this state, of private writings."

It is not contended by appellant that the census reports in question are not official documents. It is conceded that they are. It is not contended that they are such documents or public writings as are by any statute of this state expressly or at all exempted from the general language of section 1892, Code of Civil Procedure, above quoted. It is, however, contended by appellants that plaintiff may not enforce, by the writ of mandate, the right given him by the express language of the statute, because his purpose is to use the information he may obtain from the exercise of such right in his private business. The decisions of the courts of last resort in this country are to the contrary. That is to say, where the statute expressly confers the right upon the citizen to inspect or to copy a public record, and he seeks to exercise such right for no unlawful or scandalous purpose, but in aid of a lawful though private business, the statutory right may not be denied him by the officer having the custody of the public record, and, if denied by the officer, will be enforced by the appropriate action of the court. To this effect may be cited the following authorities: *Burton v. Tuite*, 78 Mich. 363, 44 N. W. 282, 7 L. R. A. 73; *Hanson v. Elchstaedt*, 69 Wis. 538, 35 N. W. 30; *West Jersey Title & Guaranty Co. v. Barber*, 49 N. J. Eq. 480, 24 Atl. 381; *Nash v. Lathrop*, 142 Mass. 29, 6 N. E. 559; *State v. McMillan*, 49 Fla. 243, 38 South. 666, 6 Ann. Cas. 537; *People ex rel. German American L. & T. Co. v. Richards*, 99 N. Y. 623, 1 N. E. 258; *Kalamazoo Gazette Co. v. Kalamazoo County Clerk*, 148 Mich. 460, 111 N. W. 1070; *State v. Ellsworth*, 61 Neb. 444, 85 N. W. 439; *State v. Rachar*, 37 Minn. 372, 35 N. W. 7; *State v. Long*, 37 W. Va. 266, 16 S. E. 578; and *Boyd v. Burke*, 55 U. S. (14 How.) 575, 14 L. Ed. 548.

In several of the cases above cited the action was by title insurance companies, where the information sought and the abstracts from the records were for the use of the plaintiff in aid of its general business. The case at bar comes clearly within the rule sustained by the above authorities.

In the case of *Colnon v. Orr*, 71 Cal. 43, 11

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Pac. 814, cited by appellant, it was decided that the document involved was not a public record. What was there said about the want of a beneficial interest in the petitioner has no application to a case, such as is the case at bar, where the right is sought in aid of the lawful business of the applicant. In none of the other cases cited by appellant (Buck v. Collins, 51 Ga. 391, 21 Am. Rep. 236; Land Title Warranty Co. v. Tanner, 99 Ga. 470, 27 S. E. 727; Cormack v. Wolcott, 37 Kan. 391, 15 Pac. 245; and Bean v. People, 7 Colo. 200, 2 Pac. 909) was the privilege sought to be enforced expressly or at all given by the statute. In each case the petitioner was seeking something more than was given him by the statute, and such cases are not in point.

The judgment of the trial court is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

19 Cal. App. 700

MACMULLAN v. KELLY, Treasurer of County of Alameda. (Civ. 936.)

(District Court of Appeal, First District, California. Sept. 19, 1912.)

1. APPEAL AND ERROR (§ 854\*)—TRUSTS (§ 365\*)—REVIEW—DEMURRER—REASONS FOR DECISION.

An order general in terms, sustaining a demurrer to a complaint specifying several grounds, must be affirmed where the demurrer is well taken on any of the grounds assigned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3430; Dec. Dig. § 854;\* Trusts, Cent. Dig. §§ 568-573; Dec. Dig. § 365.\*]

2. MANDAMUS (§ 143\*)—LACHES.

The rule that a party seeking relief by mandamus must avail himself of the writ promptly, and that where, by lapse of time, evidence is lost or third parties acquire rights growing out of the existing state of affairs, the relief will be denied, must be considered in its entirety, and a delay of several years in instituting mandamus to compel the treasurer of a county to refund taxes on unsecured personal property does not justify denial of relief on the ground of laches.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 282-285; Dec. Dig. § 143.\*]

3. TRUSTS (§ 365\*)—ENFORCEMENT—LACHES.

Mere lapse of time and delay are matters of minor importance in the doctrine of laches as applied in an action for the enforcement of an express trust except, where it appears that the cestui que trust has, in addition to the lapse of time, indicated an intention to waive the trust, or, while not waiving it, has by his neglect placed the trustee or persons dealing with him in a position so unfavorable as to render an enforcement of the trust inequitable.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 568-573; Dec. Dig. § 365.\*]

4. PLEADING (§ 193\*)—LACHES—MANNER OF RAISING DEFENSE—DEMURRER.

The defense of laches may be interposed generally by demurrer, where the complaint shows laches on the part of the plaintiff sufficient to justify refusal of relief sought, and, in

the absence of such a showing, the defense may be made by answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 428-443; Dec. Dig. § 193.\*]

5. LIMITATION OF ACTIONS (§ 103\*)—EXPRESS TRUSTS—ENFORCEMENT—LIMITATIONS—LACHES.

The statute of limitations and the doctrine of laches operate against the enforcement of an express trust only from the time the trustee assumes a position of hostility to the trust, and a claim of laches founded solely on any lapse of time cannot be sustained.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 506-510; Dec. Dig. § 103.\*]

6. TAXATION (§ 535\*)—PERSONAL PROPERTY TAX—REFUNDING.

Right to refundment of money collected as excess taxes on unsecured personalty is not dependent on the act of the auditor in actually entering in the assessment books the notations required by Pol. Code, §§ 3827, 3828, as they are not intended for the information of the county treasurer in receiving and refunding excess taxes, but are prescribed primarily as a matter of bookkeeping, and secondarily for the information and protection of the taxpayer.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 991-995; Dec. Dig. § 535.\*]

7. TAXATION (§ 535\*)—REFUNDING OF TAXES—NECESSITY OF WARRANT.

Pol. Code, § 4101, subds. 7, 8, prohibiting county treasurers from distributing moneys in the county treasury except on county warrants issued by the auditor, is limited to county moneys, and an auditor's warrant is not a prerequisite to a refunding of money collected as excess taxes on unsecured personalty.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 991-995; Dec. Dig. § 535.\*]

On petition for rehearing. Denied.

For former opinion, see 124 Pac. 93.

Brewton A. Hayne, of San Francisco, for appellant. Wm. H. Donohue, of Pleasanton, and W. H. L. Hynes, of Oakland, for respondent.

LENNON, P. J. In this proceeding the petitioner sought by mandamus to compel the respondent, in his official capacity as treasurer of the county of Alameda, to pay to the petitioner upon assigned claims several amounts of money totaling the sum of \$42.09, which it was alleged had been by petitioner's assignors paid to the then assessor of Alameda county as taxes on unsecured personal property for the fiscal year 1902-03. The petition alleges that the several sums sued for and paid as taxes for that year were collected by the assessor in accordance with the provisions of chapter 8 of the Political Code, upon the basis of the rate of taxation fixed for the preceding year, and that in each instance the several sums so paid were in excess of the amounts which subsequently actually became due for such taxes, based upon the rate of taxation which was finally fixed by the proper authorities for that year. The petition further alleges that the several sums sued for were by the assessor paid into the county treasury of Alameda county,



where they now remain in charge of and in the possession of the respondent as treasurer of said county.

The petition for a writ of mandate was not filed in the superior court of Alameda county until February 7, 1910; and it affirmatively appears from the allegations thereof that no demand for the return of the money paid as taxes in excess of the amount required by the rate of taxation for the fiscal year 1902-03 was made upon the treasurer of Alameda county until January 19, 1910.

Respondent interposed a demurrer to the petition for a writ of mandate, which, among other grounds thereof, specified (1) that the petition did not state facts sufficient to entitle the petitioner to the relief prayed for; (2) that the petition was uncertain, in this: that it was not alleged therein that the auditor of Alameda county, as required by the provisions of section 3828 of the Political Code, had entered on his books the alleged excess of taxes sued for and which it was alleged had been paid into the county treasury; that it was not alleged in the petition that the books of the county auditor showed that any excess tax was due to the petitioner; and (3) that the proceeding was barred by the provisions of section 338 (subdivision 1) and section 343 of the Code of Civil Procedure.

The demurrer was sustained with leave to amend. Petitioner declined to amend, and judgment was rendered and entered accordingly for the respondent, from which the petitioner has appealed upon the judgment roll.

[1] Upon the first hearing of this case in this court, the question as to whether or not the proceeding was barred by the statute of limitations was the only one considered and determined. The demurrer, however, as has been noted, was based upon several grounds other than the statute of limitations. The order of the lower court sustaining the demurrer was general in its terms; and even if it be assumed, as counsel for the petitioner assert, that the trial court erroneously based its ruling solely upon the ground that the proceeding was barred by the statute of limitations, the judgment must nevertheless be affirmed if it can be ascertained, as is contended by respondent, that the demurrer was well taken upon any of the grounds assigned therefor. *People v. Central Pac. Co.*, 76 Cal. 29, 18 Pac. 90; *Schrist v. Rialto Irrigation District*, 129 Cal. 640, 62 Pac. 261.

We were in error, therefore, in assuming that the correctness of the trial court's ruling upon the question of the statute of limitations was the only point to be considered and decided upon this appeal. Aside from these considerations, we were prompted to grant a rehearing because of the earnest insistence of counsel for the respondent that, if further argument of the case could be had,

it would be shown beyond the peradventure of a doubt, not only that we were in error in holding that the transaction pleaded by petitioner constituted an express continuing trust, but that the petition was essentially defective in not alleging that the auditor of Alameda county had performed his duty in the premises.

Upon the subject of an express trust, no argument was advanced and no authorities were presented at the rehearing of the case which were in any wise different from the argument and authorities originally urged and cited. The reargument of the case has confirmed rather than shaken us in our first conclusion that the fund of excess taxes which may be accumulated in a county treasury by virtue of the provisions of the several sections of the Political Code relating to the collection and payment of unsecured personal property taxes constitutes an express continuing trust, against which the statute of limitations does not commence to run until the trust, with the knowledge or upon the demand of the taxpayer, has been repudiated.

In so far, therefore, as the statute of limitations is concerned, we hold to the opinion first expressed, which, in its pertinent parts, is as follows:

"It is the duty of county assessors to collect taxes on all personal property at the time the assessment is made or at any time before the first Monday of the following month of August, when, in the opinion of the assessor, such taxes will not be sufficiently secured by a lien upon the real property of the taxpayer. The amount of personal property taxes which must be so collected depends upon and must be governed by the rate of taxation on personal property fixed for the previous year in the state and county and the several districts in which the personal property is taxable (Pol. Code, §§ 3820, 3821, 3823); and 'When the rate is fixed for the year in which such collection is made then, if a sum in excess of the rate has been collected, such excess shall not be apportioned to the state, but the whole thereof shall remain in the county treasury, and must be repaid by the county treasurer to the person from whom the collection was made, or to his assignee, on demand therefor.' Pol. Code, § 3824. It is the duty of the county auditor to note on the assessment book, opposite the name of each taxpayer, the amount collected for taxes, and, when the rate of taxation for the year has been fixed, he must enter opposite the name of each taxpayer the amount of the excess or deficiency, if any, in the tax as collected by the assessor. Pol. Code, §§ 3827, 3828.

"It is the contention of petitioner that the fund of excess taxes which may be accumulated in the county treasury, in accordance with the sections of the Political Code here-in quoted and referred to, constitutes a con-



tinuing trust fund, against which the statute does not commence to run until there has been a demand by the owner for the return of the money, and refusal by the treasurer to pay the same. We are of the opinion that this contention is well founded, and that the lower court erred in sustaining the respondent's demurrer upon the ground that the cause of action stated in the petition was barred by the statute of limitations. The purpose and effect of section 3824 of the Political Code, under which county assessors are empowered to collect taxes on personal property in advance of the actual fixing of the rate of taxation for the fiscal year in which such taxes are collectible, have been distinctly defined by our Supreme Court in the case of *Corbett v. Widber*, 123 Cal. 154 [55 Pac. 764]. It was there said, in effect, that the moneys paid into the county treasury in excess of the rate finally fixed did not belong to the county, but in the aggregate constitute a trust fund of which the county is the custodian, and the treasurer but a bailee who holds the moneys so paid subject to the demands of the rightful owners. Subject to the provisions of section 852 of the Civil Code, an express trust is created 'as to the trustor and beneficiary by any words or acts of the trustor indicating with reasonable certainty (1) an intention on the part of the trustor to create a trust; and (2) the subject, purpose and beneficiary of the trust \* \* \* and as to the trustee, by any acts or words of his indicating with reasonable certainty (1) his acceptance of the trust, or his acknowledgment, made upon a sufficient consideration, of its existence; and (2) the subject, purpose and beneficiary of the trust.' C. C. §§ 2221, 2222. The legislative intent to create a trust, as well as the subject-matter, purpose, and beneficiary of the trust, are clearly indicated by the terms of the several sections of the Political Code relating to the collection of personal property taxes; and a trust created thereby is undoubtedly an express trust, which continues in existence until the individual amounts which go to make up the accumulated trust fund of excess taxes are called for by the taxpayers or their assigns. *Miller & Lux v. Batz*, 142 Cal. 447 [76 Pac. 42]; *McGuire v. Inhabitants of Linneus*, 74 Me. 344.

"It is a rule of law in this and other jurisdictions that the statute of limitations does not begin to run in favor of a defendant chargeable as the trustee of an express trust during the life of the trust. In order to set the statute in motion, it is necessary that such a trustee, by some act or declaration, positively and unequivocally repudiate the trust, and that notice of such repudiation be brought home to the beneficiary. This rule is so well settled and so generally recognized that no argument is necessary to support its reiteration here. There is no conflict of authority upon the subject, and of the many

cases which have arisen in this jurisdiction where the rule has been declared and applied the following may be cited: *Baker v. Joseph*, 16 Cal. 173; *Ord v. De La Guerra*, 18 Cal. 67; *Schroeder v. Jahns*, 27 Cal. 274; *Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384; *Hearst v. Pujol*, 44 Cal. 230; *Janex v. Throckmorton*, 57 Cal. 368; *Zuck v. Culp*, 59 Cal. 142; *McClure v. Colyear*, 80 Cal. 378, 22 Pac. 175; *Roach v. Caraffa*, 85 Cal. 436 [25 Pac. 22]; *Fox v. Tay*, 89 Cal. 339 [24 Pac. 855, 26 Pac. 897, 23 Am. St. Rep. 474]; *Luco v. De Toro*, 91 Cal. 405 [18 Pac. 866, 27 Pac. 1082]. Section 3824 of the Political Code clearly contemplates that each successive county treasurer shall account for the fund of excess taxes which may be accumulated in the county treasury, and reported as a continuing fund, which is subject to depletion solely by the demands of the owners thereof; and as the transaction pleaded by the petitioner in the present case constituted an express trust, which was not repudiated by respondent until demand was made upon him by petitioner for performance of the trust, the statute of limitations commenced to run only from the date of the demand. *Miller & Lux v. Batz*, 142 Cal. 447 [76 Pac. 42]."

Our opinion in the first instance upon the trust phase of the case was founded largely upon a consideration of the two California cases of *Corbett v. Widber*, supra, and *Miller & Lux v. Batz*, supra. A further consideration of those cases confirms and compels, we think, the conclusion that the plaintiff's complaint states a cause of action for the enforcement of an express continuing trust, against which the statute of limitations commences to run only from the alleged repudiation thereof.

The case of *Corbett v. Widber*, like the present case, was a proceeding in mandamus to compel the county treasurer to refund a certain sum of money collected as excess taxes upon unsecured personal property. There, as here, the assessor was directed and empowered by law to collect unsecured personal property taxes in advance upon the basis of the tax rate previously established for the preceding year. Then, as now, it was the law that in the event that the taxes so collected for the current year should exceed the amount of taxes finally determined to be due the excess "must be repaid by the county treasurer to the person from whom the collection is made or to his assignee on demand therefor." Pol. Code, §§ 3820, 3824. And the Supreme Court, in construing the transaction and the statute out of which it arose, decided that "the excess moneys so received by the treasurer are no part of the moneys of the \* \* \* county; and, if the aggregate of them be denominated a fund, it is in no sense a public fund of the \* \* \* county. It is a trust fund in the custody of the city and under the im-

mediate charge of its treasurer. The treasurer is but a bailee, holding the moneys subject to the demands of the rightful owners."

Although the character of the trust, whether express or implied, was not questioned nor definitely declared in the case of *Corbett v. Widber*, supra, the reasoning of the case as a whole lends color to the conclusion that the trust created by the several Code sections under consideration constitutes an express, continuing trust. However that may be, all doubt as to the nature of such trust is removed, it seems to us, upon a reading of the case of *Miller & Lux v. Batz*, supra, wherein the petitioner, as the assignee of an original purchaser of swamp lands sought to compel a county treasurer to prorate and distribute a certain sum of money which had been paid into the county treasury by the petitioner's predecessors and assignors on account of the purchase of swamp lands under the provisions of a statute, which in effect required the county treasurer to receive and retain all moneys arising from the sale of swamp and overflowed lands, and divide the balance thereof remaining, after deducting all amounts chargeable against the district in which such lands were sold, pro rata among the original purchasers or their assignors "on demand." In that case the principal questions discussed and decided, as in the case at bar, involved the creation of a trust, either express or implied, and the applicability of the statute of limitations; and the Supreme Court there decided that the county treasurer held the money in controversy as the trustee of an express trust, against which the statute of limitations did not begin to run until the demand provided by statute was made, or until the trust was otherwise repudiated.

The case of *McGuire v. Inhabitants of Linneus*, supra, which was cited and relied upon in part to support the rule announced in *Miller & Lux v. Batz*, supra, is strongly in point here, and deserves more than a mere mention. In that case the plaintiff sought to recover a soldier's share of a surplus sum created by statute which, in certain contingencies, was to be shared pro rata by soldiers who had without previous bounty served upon the defendant's quota. There the court held that the Legislature by statute "created a trust in the surplus money received by the towns, and the towns by force of the statute and their vote of appropriation were constituted trustees, to hold the money for the soldiers until called for by them. \* \* \* The subject-matter and purposes of the trust, as well as the persons to take the beneficial interest therein, are clearly ascertained. Although the cestuis que trust are not specifically named they are so described that they can be ascertained, and the list furnished by the town to the equalization commissioners must contain their names. The relation of trustee and cestui que trust

being shown to have subsisted between these two parties, the possession of the money by the town was not adverse to that of its cestuis que trust until a repudiation of the trust \* \* \* evidenced by an intention to hold it adversely. \* \* \* The only evidence of such intention is the refusal to perform the demand. \* \* \* Assuming this is a sufficient disavowal of the trust, the statute would begin to run from that date."

The case of *Zuck v. Culp*, 59 Cal. 142, is in principle very much akin to the case at bar. In that case it was held that, where money had been deposited to be kept until demanded, "the transaction constituted an express trust, and the statute of limitations does not commence to run until demand."

We are unable to perceive how the case at bar in its essential features of law and fact can be exempted from the rule declared and followed in the cases herein cited; and therefore the reasoning of those cases should and must control the decision here in so far as the questions of the creation and character of the trust and the application of the statute of limitations are concerned.

[2] In arriving at the conclusion stated in our original opinion and reiterated here, we were not unmindful of the several cases cited by the respondent in support of his contention that, if plaintiff's cause of action was not barred by any statute of limitations, it should at least in a proceeding for mandamus be declared stale, because of petitioner's laches in not making a demand for the return of the money within a reasonable time after the right to make a demand had accrued.

The rule in this behalf, as we understand it and as we believe it to be declared in the several authorities cited and relied upon by the respondent, is summoned up and succinctly stated in section 87 of *Merrill on Mandamus* as follows: "The courts require those who would avail themselves of the assistance of this writ to be prompt in the enforcement of their rights. By the lapse of time the necessary evidence is lost, and third parties may acquire rights growing out of the existing state of affairs. Where the parties have been guilty of unreasonable delay in applying for the writ, the courts have not hesitated to refuse such relief, unless the delay was accounted for to their satisfaction. In determining what will constitute unreasonable delay regard should be had to the circumstances that justified the delay, to the nature of the case and the relief demanded, and to the question whether the rights of the defendant or of other persons have been prejudiced by such delay."

This rule, however, cannot be applied to the pleaded facts of the present case without straining to the point of breaking the reason and spirit of the rule. True it does not appear from the petition for the writ in the present case that there was any good reason



why the plaintiff or his assignors should have delayed for several years before making demand for that which was rightfully due; but the necessity for the application of the rule under discussion should not be determined solely upon the mere presence or absence of a single requirement of the rule. On the contrary, the rule, in conformity with the spirit and purpose of its creation, should be applied in its entirety; and the necessity of its application should be determined from a consideration of the nature and circumstances of the particular case in which the rule is invoked. *Perry on Trusts* (6th Ed.) 230; *Bryan v. Kales*, 134 U. S. 126, 10 Sup. Ct. 435, 33 L. Ed. 829; *Platt v. Platt*, 58 N. Y. 646; *Anderson v. Northorp*, 30 Fla. 612, 637, 12 South. 318.

[3] In applying the doctrine of laches, not only the lapse of time, but the conduct of the parties to the transaction, must be considered. Mere lapse of time and delay are matters of minor importance in the consideration of the doctrine of laches as applied to an action for the enforcement of an express trust, save in those cases where it appears that the cestui que trust has, in addition to the lapse of time and delay, indicated an intention to waive the trust, or, while not waiving the trust, has by his neglect placed the trustee or other persons dealing with the trustee in a position so unfavorable and unreasonable as to render an enforcement of the trust unjust and inequitable. 2 *Beach on Trusts*, etc., § 671, p. 1541; *Rochefoucauld v. Boustead*, 1 Law Rep. Chan. Div. (1897) p. 196; *Dusenbery v. Bidwell*, 86 Kan. 666, 121 Pac. 1098; *Platt v. Platt*, 58 N. Y. 646.

[4] Generally the defense of laches may be interposed by demurrer where the complaint in any given case shows laches upon the part of the plaintiff sufficient to justify a refusal of the relief sought, and, in the absence of such a showing, the defense may be made by answer when the facts of the case warrant such a defense. *Bryan v. Kales*, supra. In the present case, however, it does not appear upon the face of the petition, nor is it thus far claimed by the respondent, that the situation of the parties with reference to the fund in suit has been materially changed by the delay in making demand for the performance of the trust, or that such delay has resulted in the loss of material evidence or adversely affected the rights of innocent third parties. If the money in suit was paid into the county treasury, as alleged in the petition, presumably it is still there, and, being there, it must under the law be held by the county treasurer for the taxpayers until demand therefor has been made. *Corbett v. Widber*, supra. Obviously the petitioner and his assignors were, upon the facts presented by the petition, the only persons who could possibly be injured by not making the statutory demand within a reasonable time after the right thereto accrued.

[5] In brief and in conclusion of this phase

of the case, it is our opinion that the statute of limitations and the equitable doctrine of laches operate against the enforcement of an express trust only from the time that the trustee unequivocally assumes a position of hostility to the trust; and that a claim of laches, founded solely upon a mere lapse of time which in itself is not declared by statute to be a bar, and which is unaccompanied by other considerations which would render the enforcement of the trust inequitable, cannot be sustained. *Rochefoucauld v. Boustead*, supra; *Dyer v. Waters*, 46 N. J. Eq. 484, 19 Atl. 129; *Cooney v. Glynn*, 157 Cal. 583, 108 Pac. 506; *Zuck v. Culp*, 59 Cal. 142; *Schroeder v. Jahns*, 27 Cal. 274; *Roach v. Caraffa*, 85 Cal. 436, 25 Pac. 22; *Anderson v. Northorp*, supra; *Perry on Trusts* (6th Ed.) § 228; *Wood on Limitations*, § 200, p. 461.

[6] We do not think, as was strenuously contended by counsel for the respondent upon the rehearing of the case, that it was essential to the certainty of the petition or necessary to petitioner's cause of action to allege the fact that the auditor of the county of Alameda had actually entered in the "assessment books" the notations required by sections 3827 and 3828 of the Political Code. Nowhere in the several sections of the Political Code relating to the collection and payment of unsecured personal property taxes is there to be found any provision which makes the auditor's entry in the "assessment book" a prerequisite to the repayment of any excess tax which may be found to be due to a taxpayer. Although the Code provides that the "assessment book" shall from time to time and for various purposes be placed in the custody of different county officers (Pol. Code, §§ 3654, 3682, 3732, 3759), it nowhere provides that the county treasurer shall at any time have the custody of the assessment book, or that he shall be required to make reference thereto for the transaction of the business of his office. On the contrary, the county treasurer, independently of anything that may be contained in the assessment book, is required by section 4101 of the Political Code to receive all moneys by law directed to be paid to him, to apply and pay the same as required by law, and to so keep his books that the amount received by him and paid out on account of separate funds shall be exhibited in separate and distinct accounts. By the provisions of section 4102 of the Political Code, the county treasurer is not permitted to receive any money into the county treasury, unless accompanied by the certificate of the auditor provided for by section 4093 of the same Code. Upon the information thus certified to him, the treasurer accounts separately for and segregates into into their proper funds all moneys which by law have been paid into the county treasury. *Meyer v. Widber*, 126 Cal. 252, 58 Pac. 532. It would thus appear that the requirements of sections 3827 and 3828 of the Political

Code were not intended for the information and guidance of the county treasurer in receiving and refunding excess taxes, but were prescribed primarily as a matter of book-keeping, and secondarily for the information and protection of the taxpayer.

[7] There is no merit in the further contention that the petition does not state facts sufficient to constitute a cause of action because it was not alleged therein that the petitioner's demand for the return of the money in question had been previously approved by the auditor. It is true that subdivisions 7 and 8 of section 4101 of the Political Code prohibit county treasurers from distributing moneys in the county treasury except upon county warrants issued by the auditor. This prohibition, however, by the very terms of the section, is expressly limited to county moneys; and, as the particular fund in suit here constitutes no part of the public moneys, it cannot be held that the auditor's warrant is a prerequisite to a refunding of the same. *Corbett v. Widber*, supra; *Trower v. City and County*, 157 Cal. 762, 109 Pac. 617.

This opinion, as we read and understand the briefs of counsel, disposes of every point made in support of the demurrer.

For the reasons stated we are still of the opinion that the lower court erred in its ruling sustaining respondent's demurrer to the petition for a writ of mandate, and it is therefore ordered that the judgment be reversed, and the cause remanded, with instructions to the trial court to overrule the demurrer and require the defendant to answer.

We concur: HALL, J.; KERRIGAN, J.

19 Cal. App. 769

WILLIAMS v. GAREY, County Auditor.  
(Civ. 1,132.)

(District Court of Appeal, Second District, California. Sept. 21, 1912.)

1. OFFICERS (§ 100\*)—COUNTY OFFICERS—COMPENSATION—INCREASE—STATUTORY PROVISIONS.

When a county recorder of Imperial county was elected, that county was a county of the thirty-sixth class, and by Pol. Code, § 4265, his salary was fixed at \$3,000 a year. In 1909 that county was transferred to class 36½, and by Pol. Code, § 4265a, the salary of the county recorder was fixed at \$2,000 a year, with the provision that the recorder might employ as many copyists as might be required, who should be paid by the county. *Held* that, since it did not appear by the terms of that section that an increase in salary would not be effected, it would be presumed that an increase would result, and under Const. art. 11, § 9, providing that the compensation of county officers shall not be increased during their term of office, the change in salary was not effective until the expiration of the term of office of such county recorder.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 152-157; Dec. Dig. § 100.\*]

2. OFFICERS (§ 100\*) — COUNTY OFFICERS — COMPENSATION—INCREASE—STATUTORY PROVISIONS.

Under Const. art. 11, § 9, providing that the compensation of county officers shall not be increased during their term of office, new legislation which will actually or presumptively increase the compensation to be paid to an officer of a county is postponed in its effect until commencement of the new term of office to which the successor of the incumbent may be elected.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 152-157; Dec. Dig. § 100.\*]

3. OFFICERS (§ 100\*) — COUNTY OFFICERS — COMPENSATION — INCREASE — STATUTORY PROVISIONS.

Under Const. art. 11, § 9, providing that the compensation of county officers shall not be increased during their term of office, legislation making a change in the amount of compensation to be paid an incumbent of a county office will be presumed to increase such compensation, and therefore not to be operative upon terms of office then current, unless it clearly appears by the terms of the act that it will not cause an increase in the compensation.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 152-157; Dec. Dig. § 100.\*]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Petition by G. Williams against W. D. Garey as County Auditor of the County of Imperial for a writ of mandate. From a judgment directing the issuance of a peremptory writ, defendant appeals. Reversed, with directions.

Phil D. Swing, of El Centro, for appellant. Shaw, Ross & Dyke, of El Centro, and J. Stewart Ross, of Los Angeles, for respondent.

JAMES, J. [1] Prior to the year 1909, the county of Imperial was classified by the Legislature as a county of the thirty-sixth class. By section 4265 of the Political Code, the salaries of the various county officers for such counties were then fixed. The introductory portion of the section referred to reads as follows: "In counties of the thirty-sixth class, the county officers shall receive as compensation for the services required of them by law, or by virtue of their office, the following salaries." By subdivision 3 of said section it was provided that the county recorder should receive the sum of \$3,000 per annum. While this state of the law existed, John B. Baker was elected as recorder of Imperial county, and he in due time qualified and continued to act as such recorder until the 2d day of January, 1911; that being the date of the expiration of his term of office. The Legislature of the year 1909 amended the statute relating to the classification of counties and provided for a new class to be known as class 36½, which should include all counties having a population of 10,000 and under 10,500. At the same time, and by a separate act, the population of the various counties of the state was ascertained and fixed; Imperial county being accredited with a population of 10,250. In order to pro-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



vide for compensation to be paid to officers of counties of class 36½, a new section was added to the Political Code, numbered 4265a, by act approved March 25, 1909. By this latter legislation changes were made in the amount of compensation theretofore paid to officers of counties of the thirty-sixth class, to which Imperial had belonged, and among the changes so made was one reducing the salary to be paid to the county recorder from \$3,000 to \$2,000 per annum; but it was added that "the recorder may employ as many copyists as may be required, who shall receive as compensation the sum of five cents per folio for recording any instrument or notice except maps or plats, and for copies of any records or papers five cents per folio." The recorder, acting under the authority assumed to be given by the new section of the Political Code, employed the petitioner as a copyist, and petitioner rendered services as such from the 24th day of May, 1909, until the end of December, 1910, for which he claimed to be entitled to payment in the sum of \$1,303.70, of which \$532.22 was paid, leaving a balance due and claimed in his favor of \$771.48. The county auditor refused to issue warrants to petitioner for the balance claimed to be due, and he brought this proceeding for a writ to compel the issuance of such warrants. A demurrer was interposed to his petition in which it was assigned as ground therefor that the petition did not state facts sufficient to constitute a cause of action or entitle petitioner to the relief prayed for, and particularly that payment of the moneys demanded to petitioner would be in violation of section 9 of article 11 of the Constitution of the state of California. The demurrer was overruled, and, defendant declining to answer, peremptory writ of mandate was ordered to be issued as prayed for. From this judgment defendant has appealed.

Section 9 of article 11 of the Constitution of this state provides that "the compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office. \* \* \*" The application of this provision of the Constitution to various acts of the Legislature passed from time to time, affecting the compensation to be paid to county officers, has been the subject of a number of decisions by our Supreme Court, and the question here presented is therefore not a new one.

[2] It has been consistently and uniformly held that, wherever new legislation is made which will have the effect, actually or presumptively, to increase the compensation to be paid to an incumbent officer of a county, such legislation is to be postponed in its effect until the commencement of the new term of office to which the successor of the incumbent may be elected.

[3] And it is further held that where new legislation makes a change in the amount of

compensation to be paid an incumbent of an office, unless it clearly appears by the terms of the legislative act that such change will not operate to increase the compensation theretofore paid, it will be presumed that the compensation is increased thereby, and that the Legislature did not intend the act to be operative upon terms of office then current. *Smith v. Mathews*, 155 Cal. 752, 103 Pac. 199, and cases cited therein; followed by this court in *Applestill v. Gary*, 123 Pac. 228. It is suggested in the brief of respondent that the decision in the case of *Kirkwood v. Soto*, 87 Cal. 394, 25 Pac. 488, is applicable, in which it is held that an additional allowance to a county school superintendent for necessary traveling expenses during his term of office is not in violation of the section of the Constitution quoted. That decision rests upon the asserted ground that there was no increase of compensation made in that case, but that the increase was merely of incidental expenses of the office. That case was later distinguished from the cases of *Chapin v. Wilcox*, 114 Cal. 498, 46 Pac. 457, and *Agard v. Shaffer*, 141 Cal. 725, 75 Pac. 343, and the distinction urged in these latter cases applies, if anything, with added force to the facts here present. The law, as it provided for compensation to be paid the recorder at the time Baker entered upon his term of office, made no allowance whatsoever to the recorder for clerical service or for assistants to aid him in entering upon the records the various instruments or documents required or permitted by law to be recorded. He assumed office with the obligation on his part to perform all of its duties for the gross compensation of \$3,000 per annum. When, by the new act of the Legislature, it was provided that the recorder might employ as many copyists as "may be required," who should be paid out of the county treasury, the effect was to relieve the recorder from the doing of a portion of the work of his office which he had theretofore been required to perform himself in person or by deputies who, if they received compensation, were paid by the official out of the gross compensation allowed to him. It cannot be said, as a matter of fact, that the amount of compensation which the copyists would receive for the doing of the work would exceed the amount of the difference of \$1,000 between the salary formerly provided for and that provided by the new section of the Code; but it does not appear, by the terms of the new section, that such increase would not be worked or that the Legislature intended the new schedule of salaries to be immediately operative. The presumption, therefore, must prevail that an increase of compensation would result, and that the Legislature did not intend that the act should be put in operation prior to the commencement of the new term of office.

The judgment is reversed, with direction to the trial court to sustain the demurrer of defendant as interposed to the petition.

We concur: ALLEN, P. J.; SHAW, J.

19 Cal. App. 773

**BAKER v. GAREY, County Auditor.**  
(Civ. 1,130.)

(District Court of Appeal, Second District, California. Sept. 21, 1912.)

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Petition by Clarence L. Baker for a writ of mandate against W. D. Garey as County Auditor of the County of Imperial. From a judgment directing the issuance of the writ, defendant appeals. Reversed, with directions.

Phil D. Swing, of El Centro, for appellant. J. Stewart Ross, of Los Angeles, and Shaw, Ross & Dyke, of El Centro, for respondent.

**PER CURIAM.** The facts presented by the record in this matter are identical with those in case No. 1,132, entitled *G. Williams v. Appellant* Herein, 127 Pac. 824, and wherein in this court an opinion was this day filed reversing the action of the trial court had and taken therein.

Upon the authority of and for the reasons given in the opinion so filed, the judgment herein is reversed, and the lower court instructed to make an order sustaining the demurrer interposed by defendant to the petition for the writ.

19 Cal. App. 774

**WILLIAMS v. GAREY, County Auditor.**  
(Civ. 1,131.)

(District Court of Appeal, Second District, California. Sept. 21, 1912.)

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Petition by Dixie Williams for a writ of mandate against W. D. Garey as County Auditor of the County of Imperial. From a judgment directing the issuance of the peremptory writ, defendant appeals. Reversed, with directions.

Phil D. Swing, of El Centro, for appellant. J. Stewart Ross, of Los Angeles, Shaw, Ross & Dyke, of El Centro, for respondent.

**PER CURIAM.** The facts presented by the record in this matter are identical with those in case No. 1,132, entitled *G. Williams v. Appellant* Herein, 127 Pac. 824, and wherein in this court an opinion was this day filed reversing the action of the trial court had and taken therein.

Upon the authority of and for the reasons given in the opinion so filed, the judgment herein is reversed and the lower court instructed to make an order sustaining the demurrer interposed by defendant to the petition for the writ.

(19 Cal. App. 775)

**ELDER v. GAREY, County Auditor.**  
(Civ. 1,133.)

(District Court of Appeal, Second District, California. Sept. 21, 1912.)

**OFFICERS (§ 100\*)—COUNTY OFFICERS—COMPENSATION—"INCREASE OF SALARY"—STATUTORY PROVISIONS.**

When a county clerk of Imperial county was elected, that was a county of the thirty-sixth class, and his salary was fixed at \$2,200 a year, which under the express provisions of Pol.

Code, § 4290, was in full compensation for all services rendered by him, his deputies and assistants. In 1909 that county was transferred to class 36½, and by Pol. Code, § 4265a, the salary of the county clerk was fixed at \$2,400 a year, with provision for one deputy at \$900 a year. Held, that the provision for the appointment of a deputy constituted an increase of salary within Const. art. 11, § 9, providing that the compensation of county officers shall not be increased during their term of office, and hence a deputy appointed by such county clerk had no claim against the county for her salary.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 152-157; Dec. Dig. § 100.\*

For other definitions, see *Words and Phrases*, vol. 4, pp. 3516-3517.]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Petition by Irena Elder for a writ of mandate against W. D. Garey as County Auditor of the County of Imperial. From a judgment issuing a peremptory writ, defendant appeals. Reversed, with directions.

Phil D. Swing, of El Centro, for appellant. J. Stewart Ross, of San Francisco, and Shaw, Ross & Dyke, of El Centro, for respondent.

**SHAW, J.** Plaintiff filed a petition in the superior court of Imperial county praying for a writ of mandate to compel the auditor of said county to draw a warrant in her favor for \$1,445, covering salary alleged to be due her as deputy county clerk of Imperial county for the months of June, 1909, to December, 1910, inclusive. A demurrer interposed by defendant was overruled, and a peremptory writ ordered issued as prayed for. From this order and judgment defendant appeals.

It appears that one D. S. Elder was elected county clerk of Imperial county for a term commencing in August, 1907, and expiring January 2, 1911. At the time of his election, Imperial county was a county of the thirty-sixth class, and the compensation of the county clerk of such counties was fixed at \$2,200 per annum, which sum, as provided by section 4290 of the Political Code, was declared to be in full compensation for services rendered by such officer, his deputies, and assistants. By act of the Legislature of 1909, Imperial county was declared to be a county of class 36½, and by section 4265a, Political Code, the compensation of the clerks of such counties was fixed as follows: "Two thousand four hundred dollars per annum; also one deputy, who shall receive a salary of nine hundred dollars per annum." Under and by virtue of this provision the said clerk, on May 24, 1909, appointed petitioner as deputy clerk, and the amount claimed by her is for salary as such official. Section 9 of article 11 of the Constitution provides that "the compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office." The question pre-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



sented, therefore, is whether or not the act providing for a deputy constituted an increase of salary within the meaning of the constitutional provision just cited. We do not regard the question as an open one in this state, and hence no good purpose could be subserved by an extended discussion of the matter. At the time Elder was elected for the term expiring in January, 1911, the law prescribed his duties and fixed his compensation for services, the performance of which under his oath he assumed, at the lump sum of \$2,200 per annum, out of which sum, under section 4290, Political Code, he was required to pay all deputies and assistants whom he might at his option employ. It was held by this court in the case of Newman v. Lester, 11 Cal. App. 577, 105 Pac. 785, following Daggett v. Ford Co., 99 Ill. 334, Dougherty v. Austin, 94 Cal. 607, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161, and Tulara Co. v. May, 118 Cal. 303, 50 Pac. 427, that where the statute at the time of his election provided a fixed salary for the officer and authorized the appointment of a certain number of deputies, whose salaries were also fixed, and all payable out of the county treasury, an act adopted during the term of such officer, increasing the number of his deputies whose salaries were thereby fixed, did not constitute an increase in the salary of such official. These cases, particularly Daggett v. Ford Co. and Dougherty v. Austin, together with Hanson v. Underhill, 12 Cal. App. 545, 107 Pac. 1016, are authority for holding that, where the compensation of an officer at the time of his election is fixed at a lump sum, there being no provision for the appointment of deputies, then the allowance of a deputy during such term constitutes an increase of salary, and hence is obnoxious to the provisions of section 9, article 11, of the Constitution. While the logic and reasoning upon which this distinction is based may not appeal strongly to the writer, nevertheless such distinction has been repeatedly made and must be regarded as settled law.

The judgment appealed from is reversed, and the trial court directed to sustain the demurrer interposed by defendant to the petition.

We concur: ALLEN, P. J.; JAMES, J.

(19 Cal. App. 780)

HARRON, RICKARD & McCONE v. CUTTING. (Civ. 1,048.)

(District Court of Appeal, First District, California. Sept. 23, 1912. Rehearing Denied by Supreme Court Nov. 22, 1912.)

1. SALES (§ 4\*)—LEASE OF PERSONAL PROPERTY—WRITTEN CONTRACT—CONSTRUCTION.

A written contract provided that plaintiff leased to defendant for seven months a set of bending rolls for a total of \$710.85 payable in equal monthly installments; that in case of defendant's default in keeping any of the cove-

nants by him to be performed, without any notice, the instrument should be deemed canceled and all rent paid should belong to the lessor as full payment for the prior use of the property; and that the lessor should be entitled to take the same into his possession. It also provided that, in case of full performance by the lessee, he should then be entitled to purchase the property by paying the lessor \$2. Held, that such contract was a lease and not a sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 7-11; Dec. Dig. § 4.\*]

2. BAILMENT (§ 26\*)—CONTRACT—ACTION FOR RENT—TENDER.

Where a contract for the transfer of certain machinery contemplated that defendant should ultimately become the owner, but did not require that plaintiff tender a bill of sale before final payment, plaintiff was not bound to tender a bill of sale before suing to recover the balance due under the contract designated as rent.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 119-121; Dec. Dig. § 26.\*]

3. BAILMENT (§ 22\*)—PERSONAL PROPERTY—TERMINATION OF CONTRACT.

Where a lease of personal property providing for payment of rent in monthly installments also declared that, on the lessee's failure to perform, the instrument should be deemed canceled and of no further effect as against the lessor, and all rights and interest of the lessee should cease, and the lessor should be entitled to take possession of all the property, such provisions were solely for the lessor's benefit, and hence it was entitled to waive the breach and sue for and recover additional accruing installments of rent.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 103-106; Dec. Dig. § 22.\*]

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by Harron, Rickard & McCone against H. C. Cutting. From a judgment for plaintiff and from an order denying defendant's motion for a new trial, he appeals. Affirmed.

Rehearing denied by Supreme Court; Beatty, C. J., dissenting.

W. H. H. Hart, of San Francisco, for appellant. Chickering & Gregory, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment against the defendant and from an order denying his motion for a new trial. The action was brought to recover the accrued monthly rentals due upon a lease-contract of personal property. On February 21, 1908, plaintiff and defendant entered into a lease, by the terms of which the plaintiff leased to the defendant for the period of seven months a set of bending rolls, at a total rental of \$710.85, payable in seven equal monthly installments of \$101.55, commencing with the 1st day of April, 1908. The instrument, among other things, provided "that upon the failure of the lessee strictly to keep and perform any of the covenants or promises by him agreed to be performed, then and thereupon, without any notice, this instrument shall be deemed to

be canceled and of no further effect as against the lessor, and all rights and interests of the lessee shall cease, and all rent by the lessee theretofore paid shall belong to the lessor as full payment for the prior use of said property; and the lessor shall be entitled to take into his possession all said property." The document further provided that "said lessor further agrees that upon strict performance by the lessee of the foregoing covenants and promises by him to be kept and performed, he shall then \* \* \* have the right to purchase said property by the prompt payment to the lessor of the sum of two (2) dollars." Defendant made the first payment, and the plaintiff, having waited until the time for the other payments had elapsed, and none of them having been made although often demanded, commenced this action for the balance claimed to be due. Defendant asserts that the instrument which is the basis of this action is not a lease but a contract of sale; and that, as no bill of sale of the property was ever tendered, the action cannot be maintained; and that, moreover, whether the instrument be construed as a lease or a contract of sale, the defendant is not liable, because of the provision therein that upon the failure of the defendant to make any monthly payment the contract became terminated.

[1] The instrument in question is a lease. It was so held in an action brought by the same plaintiff against Wilson, Lyon & Co., reported in 4 Cal. App. 488, 88 Pac. 512, where this court passed upon an instrument identical in form with the one here. There the court, in the course of its opinion, said that the defendant took and retained possession of the property, and no question of the title or possession of the property was involved; that the court was merely called upon to construe an instrument and determine the rights of the parties arising thereunder. The instrument was designated a lease, and that as its terms were peculiarly appropriate to instruments of hiring and lease, and as it conferred upon the defendant no right in the property except to use it, and expressly imposed upon it an obligation to pay the plaintiff for such use, it must be construed as a lease. The court, continuing, said that the other terms of the instrument restrictive of the manner in which the defendant might use the property were inconsistent with its ownership by the defendant, and the provision giving the defendant the right to purchase the property for a small sum of money furnished additional grounds for holding the instrument to be a lease. In the case at bar no matter set forth in the answer and no evidence introduced at the trial has any tendency to

show that a sale of the property was intended rather than a lease; and therefore this case comes squarely within the doctrine of the one just cited.

[2] Even if we could regard this as an action for the breach of a contract to purchase, still, as the instrument does not require the plaintiff to tender a bill of sale, such tender would not be necessary before bringing suit. Contracts for the sale of real property are usually construed so that the tender of a deed and the payment of the last installment of the purchase price are regarded as concurrent obligations; but, obviously, the lease-agreement here requiring the execution of no formal document evidencing the transfer of title, cases arising on real estate transactions have no bearing upon the present question.

[3] Defendant also asserts that it was optional with him to terminate the agreement by failing to pay any monthly installment; that upon his failure to pay the second installment the contract was canceled and of no further effect. It is true that one of the clauses of the lease provides that, upon the failure of the lessee strictly to keep and perform any of the covenants of the lease, the "instrument shall be deemed canceled and of no further effect as against the lessor"; that "all rights and interests of the lessee in and to said property shall cease"; and that "the lessor shall be entitled to take into its possession all of said property." But this provision was inserted in the lease-contract for the benefit of the lessor; and, according to all the decisions on the subject, the contract is void only as to the lessee at the election of the lessor. "Clearly appellant misconstrues the force of the language upon which it relies. The language means that by a violation of the terms of the contract the rights of the party violating it cease, and as to that party and to that extent the agreement becomes void and of no effect. It would be a very unreasonable construction to give the language the meaning for which appellant contends. It would work the destruction of the contract itself, and leave the solemn writing as the expression of the mere whim of the parties, for a 'promise which is made conditional upon the will of the promisor is generally of no value, for one who promises to do a thing only if it pleases him is not bound to perform it at all.'" *Central Oil Co. v. Southern Refining Co.*, 154 Cal. 165, 97 Pac. 177. See, also, *Wilcoxson v. Stitt*, 65 Cal. 596, 4 Pac. 629, 52 Am. Rep. 310.

There were no errors in the admission of evidence.

The judgment and order are affirmed.

We concur: LENNON, P. J.; HALL, J.



19 Cal. App. 778

**BALAN et al. v. NATIONAL UNION FIRE INS. CO.** (Civ. 1,136.)

(District Court of Appeal, Second District, California. Sept. 21, 1912.)

**APPEAL AND ERROR (§ 553\*)—RECORD—AFFIDAVIT.**

Where, on review of an action on a fire insurance policy providing that the insurance on the building should be effective only so long as the building was occupied as a private dwelling and on the personal property only so long as it was within the building, the record consisted of the judgment roll only, an affidavit that evidence was introduced below showing the building to have been used and the personal property to have been situated, at the time of the fire, as stipulated in the policy, could not be considered; an affidavit not supplying the place of a statement of facts or bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2461-2471; Dec. Dig. § 553.\*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Moses Balan and another against the National Union Fire Insurance Company. From a judgment for plaintiffs, defendant appeals. Reversed, with directions.

John R. Layng, of Los Angeles, for appellant. Parker & Moote, of Los Angeles, for respondents.

**JAMES, J.** Plaintiffs brought this action to recover for loss sustained by fire, against which they alleged they had been indemnified by defendant under a policy of insurance. The insurance covered a one-story frame building and fixtures, also general household effects and wearing apparel and an outbuilding on the premises. By the terms of the policy, a copy of which was attached to the complaint as an exhibit, the insurance was made effective as to the first-named building while it was "occupied only as a private dwelling," and as to the outbuilding only while the same was being used as such. The policy also provided that the personal property mentioned was insured while it was contained in the dwelling. Plaintiffs alleged in their complaint that the frame buildings, together with all of the property described in the policy of insurance, were destroyed by fire; but the complaint contained no statement showing that the buildings were being put to the particular uses limited by the insurance contract at the time they were destroyed. In the case of *Arnold v. Insurance Co.*, 148 Cal. 660, 84 Pac. 182, 25 L. R. A. (N. S.) 6, it is held, where like conditions of contract and allegations existed, that the complaint failed to state a cause of action. The defendant here seasonably raised the question in the superior court by demurrer to the complaint, but not only was its demurrer overruled, but it was penalized in the sum of \$10 as a condition to its being allowed to file an answer within five days.

The record shows that the demurrer was presented to the court by argument. Respondents do not contend that the complaint is sufficient, but expressly admit in their brief that it fails to state a cause of action under the authority herein cited. We are asked, however, to consider the contents of an affidavit filed in this court showing that, at the trial of the action, evidence was introduced to the effect that, at the time of the destruction of the property described in the insurance policy, the buildings were being used as provided in the policy, and that the personal property was located in the dwelling house. The record on this appeal consists of the judgment roll only; there being no statement of the evidence nor bill of exceptions. An affidavit cannot be used to supply any matter which should have been presented in either of the last-mentioned forms. The question, therefore, as to whether the admission of evidence establishing a material fact essential to a recovery can be made to cure a failure to allege such fact in a complaint calls for no discussion.

The judgment is reversed, with direction to the trial court to sustain the demurrer of defendant to the complaint of plaintiffs and allow plaintiffs to amend their complaint within such reasonable time as may seem to the court to be proper.

We concur: **ALLEN, P. J.; SHAW, J.**

19 Cal. App. 750

**PEOPLE v. RUSSELL.** (Cr. 254.)

(District Court of Appeal, Second District, California. Sept. 20, 1912.)

**1. CRIMINAL LAW (§ 1137\*) — APPEAL AND ERROR—INSTRUCTIONS—INVITED ERROR.**

Where an instruction given at the defendant's request in a homicide case assumed that death resulted from the wounds inflicted and not from want of proper medical attention, the giving of the same instruction on the court's own motion was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.\*]

**2. CRIMINAL LAW (§ 1172\*)—HARMLESS ERROR—INSTRUCTION.**

An instruction defining "willfully" in language of Pen. Code § 7, subd. 1, providing that the word "willfully" implies simply purpose or willingness to commit the act or make the omission referred to and does not require any intent to violate the law or to injure another or to acquire any advantage, was harmless though uncalled for.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.\*]

**3. CRIMINAL LAW (§ 1172\*)—HARMLESS ERROR—INSTRUCTION.**

An unnecessary instruction in the words of Code Civ. Proc. § 2061, subd. 3, that a witness "false in one part of his testimony is to be distrusted in others," is harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.\*]

#### 4. HOMICIDE (§ 268\*) — JURY QUESTION — DEADLY WEAPON.

In a homicide case, it was a jury question whether the knife used by defendant in cutting deceased was a deadly weapon.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 562; Dec. Dig. § 268.\*]

#### 5. HOMICIDE (§ 340\*)—HARMLESS ERROR—INSTRUCTION.

Where the defendant was charged with murder and not with an assault with or otherwise using a deadly weapon, an instruction, that the knife admitted by defendant to have been used in cutting deceased was a deadly weapon, was harmless.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.\*]

#### 6. HOMICIDE (§ 340\*)—HARMLESS ERROR—INSTRUCTION.

Erroneous instructions, stating that certain facts will constitute murder, are harmless where conviction is for manslaughter only.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.\*]

#### 7. HOMICIDE (§ 300\*) — INSTRUCTION — SELF-DEFENSE.

The subject of self-defense was sufficiently covered in a homicide case by an instruction that, if the circumstances were such as to induce a reasonable person in defendant's position to believe he was in imminent danger of great bodily harm, and defendant so believed, he was justified and should be acquitted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

#### 8. CRIMINAL LAW (§ 822\*) — INSTRUCTIONS CONSIDERED AS A WHOLE—HOMICIDE.

The sufficiency and correctness and the charge in a homicide case must be determined from a consideration of such charge as a whole.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.\*]

#### 9. CRIMINAL LAW (§ 406\*)—EVIDENCE—VOLUNTARY ADMISSIONS.

Statements made by the defendant to the chief of police without any threat or promise, being voluntary, were properly admitted in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-917, 920-927; Dec. Dig. § 406.\*]

#### 10. CRIMINAL LAW (§ 1169\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission in evidence of statements made by defendant to the chief of police, if error, was harmless, where they did not constitute a confession of the homicide, but were favorable to defendant rather than otherwise.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169.\*]

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Lester Russell was convicted of manslaughter and his motion for new trial denied, and he appeals. Affirmed.

B. F. Thomas, of Santa Barbara, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was charged by information with the crime of murder. Upon trial he was convicted of manslaughter. He

appeals from the judgment and an order of court denying his motion for a new trial.

On February 12, 1912, defendant and one Ernest Besson engaged in an unfortunate controversy over the payment of one dollar due from the defendant to the latter. A fist fight followed, during which defendant used a knife upon Besson, inflicting four wounds, one of which, as found by the jury, caused his death, which occurred eight days later.

The record discloses evidence tending to prove defendant's guilt. Indeed, we do not understand counsel to question the sufficiency of the evidence to justify the verdict, his discussion thereof being for the purpose of showing the prejudicial character of numerous alleged erroneous rulings of the court, both in giving and refusing to give certain instructions. The instructions given by the court of its own motion, including those requested, a large part of which were given, cover some 42 pages of typewritten matter; hence, whatever may be said as to the fairness of the court's charge, it cannot be said the jury were not fully instructed.

[1] 1. Appellant insists that the death of deceased followed, not as a direct result of the wounds themselves, but was caused by the want of proper medical attention. Upon this theory it is argued that instruction No. 4, inasmuch as it assumed that the wounds caused his death, was highly prejudicial to defendant's rights. Without entering into a discussion as to the effect of the instruction, it is sufficient to say that the court, at defendant's request, gave an instruction in *hæc verba* identical with that of which he here complains. Under the circumstances his rights could not have been prejudiced by reason of the alleged erroneous ruling.

[2] 2. Complaint is made that the court instructed the jury that the word "willfully," when applied to the intent with which an act is done, does not require any intent to violate the law or injure another. Not only did the court define the term in the language of the statute (subdivision 1, § 7, Pen. Code), but, conceding that the giving of the instruction was erroneous by reason of being uncalled for, it is impossible to perceive how it could in any manner have prejudiced defendant's rights.

[3] 3. It has been repeatedly held that the ruling of a court in giving or refusing to give an instruction embodying the declaration (subdivision 3, § 2061, Code Civ. Proc.) that "a witness false in one part of his testimony is to be distrusted in others" does not constitute reversible error. The form of the instruction complained of, as a whole, is unobjectionable and not only states a principle of law declaring a rule by which jurors should be guided in considering the evidence, but "applies to that class of instructions which contain only mere common-



place matters that the jurors would be apt to know about and act upon in the absence of instructions." *People v. Corey*, 8 Cal. App. 728, 97 Pac. 907; *People v. Hower*, 151 Cal. 638, 91 Pac. 507; *People v. Grill*, 151 Cal. 597, 91 Pac. 515.

[4, 5] 4. As to whether or not the knife, admitted by defendant to have been used by him in cutting deceased, was a deadly weapon, was a question of fact to be determined by the jury. *State v. Drumm*, 156 Mo. 216, 56 S. W. 1086; *People v. Fuqua*, 58 Cal. 247. Hence the court erred in telling the jury that the knife so introduced was a deadly weapon. Defendant, however, was not charged with an assault with or otherwise using a deadly weapon, and therefore, while there was no occasion for instructing the jury upon the subject at all, nevertheless, under the circumstances shown, it is clear that defendant's rights were not prejudiced by reason of the ruling.

[6] 5. The court gave a number of instructions based upon the prosecution's theory of the case, stating that certain acts, if committed under the circumstances named, would constitute the crime of murder, all of which are attacked as erroneous by appellant. Inasmuch, however, as the jury in acquitting defendant of the crime of murder found that he did not commit the acts, it is apparent that, conceding the giving of the instruction to have been erroneous, defendant was in no way prejudiced by the rulings. *People v. Besold*, 154 Cal. 363, 97 Pac. 871; *People v. O'Neal*, 67 Cal. 379, 7 Pac. 790.

[7] 6. The court instructed the jury to the effect that, when persons engage in a fist fight, the blows passing between them being unlikely to occasion death, if death ensues it is manslaughter; and that if persons meet originally on fair terms, and, blows having been interchanged, one in the heat of passion draws a deadly weapon, and inflicts a deadly injury, it is manslaughter. Defendant attacks these instructions upon the ground that they omit the element of self-defense, a right which it is claimed may be invoked at any time by the one who finds himself in imminent danger of great bodily injury. Conceding the correctness of appellant's contention, the objection is fully answered by an instruction given as follows: "You are instructed that if the circumstances in this case were such as to induce a reasonable person in defendant's position to believe that he was in imminent danger of great bodily injury, and that the defendant did then believe that such danger existed, or reasonably appeared to exist, at the very time that he stabbed Ernest Besson, then he was justified in killing the said Ernest Besson, and you should acquit him."

[8] 7. We have carefully examined appellant's objections to other instructions given, but find no error in the rulings of the court

thereon. The charge must be considered as a whole, and so considered it not only covers every possible theory which could be based upon the evidence, but contains nothing calculated to prejudice the substantial rights of defendant.

8. An examination of the alleged errors due to the refusal of the court to give certain instructions requested by defendant shows that where such instructions constituted a correct exposition of the law the subject was fully and fairly covered by the charge given.

[9, 10] 9. Defendant objected to the admission in evidence of statements made to the chief of police upon the ground that such statements were not voluntary. The objection was overruled, and the ruling is assigned as error. The statements were made in the absence of any promise or threat, and were therefore voluntary. Moreover, they did not constitute a confession, but were statements of facts favorable rather than otherwise to defendant. The ruling was without prejudicial error. *People v. Weber*, 149 Cal. 325, 86 Pac. 671; *People v. Stokes*, 5 Cal. App. 205, 89 Pac. 997. Other assignments of error based upon rulings of the court in admitting and excluding evidence are likewise without merit.

As disclosed by the record, the case is an unfortunate one where the youth of the defendant, coupled with his conceded good reputation as a peaceful, quiet citizen, strongly appeals to the writer; but in the exercise of the functions of this court we are unable, with the assistance of able counsel appointed by the court to defend him, to find any prejudicial error in the record which would justify the court in making an order setting aside the verdict of the jury, which recommended him to the mercy of the court.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

19 Cal. App. 786

CLARK et al. v. VAN TORCHIANA et al.  
(Civ. 1,046.)

(District Court of Appeal, First District, California. Sept. 25, 1912. Rehearing Denied Oct. 25, 1912.)

1. APPEAL AND ERROR (§ 854\*) — ORDER GRANTING NEW TRIAL—REVIEW.

An order granting a new trial, based solely on the insufficiency of the evidence to support the verdict against two of the three defendants, must be affirmed in whole or in part, where it can be justified on any of the grounds made the basis of the motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3430; Dec. Dig. § 854.\*]

2. NEW TRIAL (§ 170\*)—NATURE OF "NEW TRIAL."

A "new trial" is a re-examination of an issue of fact, and the sufficiency of the pleadings to support a plaintiff's cause of action or maintain any particular defense relied on by de-

fendant is not involved, and cannot be considered on an appeal from an order granting a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 337; Dec. Dig. § 170.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4788-4790.]

### 3. TRESPASS (§ 43\*)—TRESPASS TO REAL ESTATE—BURDEN OF PROOF.

Where, in an action against three defendants for trespass to real estate, two defendants by specific denials of their answers put in issue so far as they were concerned every allegation of the complaint, plaintiff, under the general issue, had the burden of showing by preponderance of the evidence that the trespass and damage complained of resulted from the joint act of all defendants rather than from the independent, individual action of the third defendant.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 102-111; Dec. Dig. § 43.\*]

### 4. MASTER AND SERVANT (§ 316\*)—INJURY TO THIRD PERSONS—LIABILITY—INDEPENDENT CONTRACTOR.

Where two persons contracted with a third for the construction by him of a street, and he undertook the work under his immediate supervision and control, any damage resulting from his act was the result of his individual and independent act, and he alone was liable therefor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 316.\*]

### 5. NEW TRIAL (§ 8\*) — AS TO PART OF DEFENDANTS.

Where, in an action against three persons for trespass to real estate, the admitted facts and evidence showed the trespass by one of the defendants and the resulting damages, a verdict against him must stand in the absence of error during the trial, though the verdict as against the codefendants must be set aside for want of evidence to support it.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 11; Dec. Dig. § 8.\*]

### 6. APPEAL AND ERROR (§ 1173\*)—REVERSAL—JOINT TORT-FEASORS.

The common-law rule that the reversal of a joint judgment against several joint tortfeasors for error against one necessitates a reversal as to all has been modified, and under Code Civ. Proc. §§ 578, 579, a verdict against several defendants sued jointly may be vacated as to one defendant and continued in effect as to codefendants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4562-4572; Dec. Dig. § 1173.\*]

### 7. APPEAL AND ERROR (§ 705\*)—QUESTIONS REVIEWABLE.

Where the record shows that trespass to real estate resulted in actual damages in excess of \$500, and the jury returned a verdict for \$500, the question of punitive damages is not before the court for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2943; Dec. Dig. § 705.\*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Charles P. Clark and another against H. A. Van Torchiana and others. From an order granting a new trial, plaintiffs appeal. Affirmed in part and reversed in part.

Cassin & Lucas of Santa Cruz, for appellants. W. P. Netherton, of Santa Cruz, for respondent Torchiana. Netherton & Torchiana, of Santa Cruz, for respondents Anderson and George C. Pratchner Co.

LENNON, P. J. This is an appeal, upon a bill of exceptions, from an order granting a new trial in an action for damages for trespass to real property.

The plaintiffs, for cause of action, pleaded practically the following facts: The plaintiffs were the owners of a lot of land peculiarly adapted to residence purposes in the city of Santa Cruz. Plaintiffs purchased this land from the defendants Anderson and Torchiana, and as a part of the consideration for its purchase said defendants agreed with the plaintiffs to cut and construct a public street immediately south of the southerly boundary line of said lot. Subsequent to the sale of the lot the defendants Anderson and Torchiana and the Pratchner Company jointly commenced to construct the proposed street upon lands previously surveyed and staked out, and which, if followed, would have kept the course of and location of said street free and clear of plaintiffs' lot. The defendants in the construction of said street knowingly and willfully and without the knowledge or consent of the plaintiffs deviated from the surveyed line of said proposed street, and entered upon the plaintiffs' lot at the southeasterly part thereof, and removed therefrom large quantities of earth and soil, and constructed said street through a portion of said lot, all to plaintiffs' damage in the sum of \$750.

The several defendants answered separately. They, in effect, denied all of the material allegations of the complaint. In addition, however, the answer of the defendant Anderson averred that the construction of the proposed street "was a neighborhood affair, to which all the neighbors beneficially interested donated funds and land, and that the only obligation which this defendant took upon himself was to donate his interest in part of the land covered by said proposed street, and to pay one-half of the total cost of construction less the amount paid by all the neighbors with the exception of his codefendant, H. A. Van Torchiana, who agreed to pay the other half; that he acted as agent for all the interested parties, and engaged the contracting firm, the George C. Pratchner Company, a corporation, to cut said street in accordance with the survey previously made, \* \* \* and that he instructed said contracting company to build a good and sufficient grade on and upon the lands conveyed by this defendant and his codefendant Torchiana for the benefit of himself, his codefendant, and all parties interested; \* \* \* that he did instruct said contracting firm of George C. Pratchner & Co. to proceed with

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the construction of said road, and that he let a contract as agent for all the parties beneficially interested in the construction of said road to said George C. Pratchner Company, and that he never knew during the construction of said road that said contractor in any way infringed upon the rights of said plaintiffs or either of them, but was only informed after the road was fully finished that said contractor had made a slight mistake and had cut into a small corner of plaintiffs' land."

Upon the issues thus framed the case was tried by the lower court with a jury, and the trial resulted in a verdict for the plaintiffs, upon which judgment was entered against all of the defendants in the sum of \$500.

Subsequently the defendants interposed a motion for a new trial based upon the grounds (1) a resort by the jury to the determination of chance on the question submitted to them; (2) excessive damages, appearing to have been given under the influence of passion and prejudice; (3) insufficiency of the evidence to justify the verdict; (4) that the verdict is against the law.

[1] A new trial was granted to all the defendants by the lower court for the reason, as specifically stated in the order granting the same, that "there was no evidence whatever to sustain the verdict as to the defendants Anderson and Torchiana."

Notwithstanding the fact that the lower court based its ruling in granting a new trial as to all of the defendants solely upon the insufficiency of the evidence to support the verdict against two of the defendants, the order appealed from must be affirmed in whole or in part if it can be justified upon any of the grounds which were made the basis of the motion for a new trial. This is conceded by the plaintiffs, and it is not disputed that the order granting a new trial, in so far as it affects the defendants Anderson and Torchiana, must be affirmed if it can be fairly said that the record fails to show any evidence whatsoever in support of the verdict against said defendants, or that the record shows a substantial conflict in the evidence as to their participation in the trespass complained of. It is insisted, however, upon behalf of the plaintiffs that the record does not reveal a single valid ground upon which the order granting a new trial as to all of the defendants can be justified; and, furthermore, that the record shows without conflict ample evidence to support the verdict not only as against the defendant Pratchner Company, but as against the defendants Anderson and Torchiana as well. Plaintiffs further contend that, even if we should agree with the trial court that the evidence is insufficient to support the verdict against the two last-named defendants, the verdict and judgment rendered and entered against Pratchner Company should not be disturbed, because the evidence upon the whole case

without conflict supports the verdict against that particular defendant.

The case was tried in the lower court apparently upon the theory that the defendants Anderson and Torchiana had interposed and relied upon the defense that the trespass complained of was committed by an "independent contractor." The point is now made by the plaintiffs that the affirmative allegations of the respective answers of these two defendants did not state facts sufficient to constitute such a defense. This point cannot rise upon an appeal, such as we have in the present case, from an order granting a new trial.

[2] A new trial is a re-examination of an issue of fact, and the sufficiency of the pleadings to support a plaintiff's cause of action, or maintain any particular defense relied upon by a defendant, is not involved in a re-examination of an issue of fact; and therefore cannot be considered upon an appeal from an order granting a new trial. *Martin v. Matfield*, 49 Cal. 42; *Brisson v. Brisson*, 90 Cal. 323, 27 Pac. 186; *Crescent Feather Co. v. United Upholsterers' Union*, 153 Cal. 433, 95 Pac. 871; *Riverside Water Co. v. Gage*, 108 Cal. 240, 41 Pac. 299.

[3] Whatever the theory of the defense may have been, and aside from the question of the technical sufficiency of the respective answers of the defendants Anderson and Torchiana to support any particular defense relied upon by them, it is certain that these two defendants, by the specific denials of their answers, put in issue, so far at least as they were concerned, every material allegation of the plaintiffs' complaint. Under the general issue thus raised, the burden was upon the plaintiffs to show by a preponderance of the evidence that the trespass and damage complained of resulted from the joint act of all of the defendants rather than from the independent, individual act of the defendant Pratchner Company. This the plaintiffs utterly failed to do. In this behalf, we do not deem it necessary to narrate and review the evidence in detail.

[4] It will suffice to say that the record of the evidence adduced at the trial and upon the whole case shows, we think, clearly and conclusively and without conflict that, although contracted for and authorized by the defendants Anderson and Torchiana, the work of constructing the street in question was undertaken and done wholly by and under the sole and immediate supervision and control of the defendant Pratchner Company, and that the damage resulting to plaintiffs therefrom was the individual and independent act of the defendant Pratchner Company. This being so, the defendants Anderson and Torchiana could not be held legally liable for the trespass and damage to plaintiffs' lot; and under the instructions of the trial court, which clearly and correctly stated the law upon this phase of the case, the jury should have rendered a verdict in favor

of rather than against the defendants Anderson and Torchiana.

It follows from what has been said that it was not only the right, but the duty, of the lower court to grant the last-named defendants a new trial, and that, in so far as they are concerned, the order appealed from must be affirmed.

[5] With reference to the defendant Pratchner Company, the record, we think, reveals ample evidence to support the verdict and judgment rendered and entered against it. The fact that this particular defendant had trespassed upon plaintiffs' lot in constructing the street in question was not denied by the answer of any of the defendants, nor was this fact disputed at the trial. In so far as that defendant was concerned, the magnitude of the trespass and the amount of damage resulting therefrom were the paramount issues raised by the pleadings. Upon the question of the extent of the trespass and the resulting damage, the evidence, save in minor matters, was free from conflict. Generally it was shown that in the construction of the street some 220 cubic yards of earth were excavated and removed from the plaintiffs' lot; and that, in order to restore the lot to its former condition, the excavation would have to be refilled, and to do this successfully it would be necessary to build a retaining wall. The cost of refilling and building the retaining wall was estimated by plaintiffs' witnesses to be \$540.50.

These are undisputed facts in the case. True, it was testified to by witnesses for the defense that the peculiar formation and character of plaintiffs' lot would not support a retaining wall such as was admitted would be necessary to withstand the pressure exerted by the weight of the material which would be used in the refilling. Under the pleadings in this case, it is doubtful if such testimony was properly admitted in evidence; but, however that may be, it was not opposed to the plaintiffs' proof of the necessity for refilling in order to restore the lot to its original condition and value, nor did it tend to disprove or contradict plaintiffs' case as to the extent and the measure of the damage suffered by them. On the contrary, its tendency was to increase plaintiffs' proof of damage by showing that it was impossible at any cost to restore plaintiffs' lot to its original condition. In short, the admitted facts of the case, coupled with the evidence adduced at the trial, were amply sufficient, upon the question of trespass and the issue of damages, to support the verdict against the defendant Pratchner Company. In the absence of a showing of error in other respects sufficient to support the remaining grounds of the motion for a new trial, the verdict and judgment rendered and entered against the Pratchner Company

must stand. Evidently the lower court was impelled to grant a new trial as to all of the defendants from a mistaken notion that, if it was found that a new trial was rightfully due to one or more of the defendants, it must necessarily be granted as a matter of law to all of the defendants, merely because they were all jointly charged with participating in the trespass complained of.

[6] It was the common-law rule that the reversal of a joint judgment against several joint tort-feasors for error against one defendant necessitated a reversal of the judgment as to all of the defendants. This rule has been materially modified if not entirely superseded by statute in this state; and now it is the rule that, if a verdict and a judgment be given against several defendants who have been sued jointly the verdict and judgment, if found to be erroneous as to any one of the defendants, may be vacated as to that one only, and continue in full force and effect as to the remaining defendants. Code Civ. Proc. §§ 578, 579; *Nichols v. Dunphy*, 58 Cal. 605; *Cole v. Roebeling Construction Co.*, 156 Cal. 443, 105 Pac. 255; *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 Pac. 513.

[7] Counsel on both sides have discussed at some length the question as to whether or not the jury under the evidence was justified in rendering a verdict for punitive damages. From our reading and understanding of the evidence, it clearly appears, and practically without conflict, that the trespass complained of resulted in actual damage to the plaintiffs in a sum in excess of \$500. The jury's verdict was for but \$500; and, if plaintiffs' proven damages exceeded that amount, we are at a loss to perceive how any question of punitive damages can arise on the record.

For the reasons stated, the order appealed from is affirmed as to the defendants Anderson and Torchiana, and it is reversed in so far as it purports to grant a new trial to the defendant Pratchner Company.

We concur: HALL, J.; KERRIGAN, J.

164 Cal. 101

CONNELLY v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 5,817.)

(Supreme Court of California. Oct. 31, 1912.  
Rehearing Denied Nov. 30, 1912.)

1. TAXATION (§ 538\*)—RECOVERY OF TAXES VOLUNTARILY PAID.

A tax voluntarily paid may not be recovered back.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 999, 1000; Dec. Dig. § 538.\*]

2. TAXATION (§ 542\*)—PAYMENT OF TAXES UNDER PROTEST — RECOVERY—STATUTORY PROVISIONS.

Pol. Code, § 3819, authorizing payment of taxes under protest and an action for the recovery thereof does not limit the right of ac-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



tion to attacks on the assessment but authorizes an action attacking a tax levy.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1003–1005; Dec. Dig. § 542.\*]

### 3. TAXATION (§ 542\*)—PAYMENT OF TAXES UNDER PROTEST — RECOVERY — STATUTORY PROVISIONS.

A taxpayer who, within one month after payment of taxes under protest, filed with the board of supervisors verified claims and demands for the repayment of the taxes, and who showed that such taxes were not repaid, brought himself within Pol. Code, § 3804, providing for the refunding of taxes illegally collected.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1003–1005; Dec. Dig. § 542.\*]

### 4. MUNICIPAL CORPORATIONS (§ 964\*)—BONDS — TAX LEVY—VALIDITY.

Under San Francisco charter requiring the auditor to transmit to the supervisors an estimate of the probable expenditures of the city and county government for the next ensuing year, and the amount required to meet the interest and sinking funds for outstanding and funded debts, authorizing the issuance and sale of bonds, providing for an annual tax levy to pay the annual interest on such bonds and the proper aliquot part of the indebtedness incurred, as well as under the general law, a tax may be levied only for bonds which have become an obligation.

[Ed. Note.—For other cases, *Municipal Corporations*, Cent. Dig. § 2043; Dec. Dig. § 964.\*]

### 5. TAXATION (§ 2\*)—STATUTORY AUTHORITY.

The state or any county taking the property of an individual by way of taxation must have express statutory authority therefor, and all tax laws must be strictly construed in favor of the individual, and inconvenience to a municipality does not justify the taking of property under the power of taxation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 2; Dec. Dig. § 2.\*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by E. P. Connelly against the City and County of San Francisco. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

J. P. Langhorne and George W. Lane, both of San Francisco (J. Delmore Lederman, of San Francisco, of counsel), for appellant. Percy V. Long, City Atty., and Jesse H. Steinhart, Asst. City Atty., both of San Francisco, for respondent.

**HENSHAW, J.** This is an action brought under sections 3819 and 3804 of the Political Code to recover from defendant \$1,446.42 taxes paid by property owners under protest, for which verified claims were filed with the board of supervisors seeking a refund. The taxes so paid were levied by the supervisors in the general levy of the city and county of San Francisco for municipal purposes for the fiscal year 1904–05. They were levied for the purpose of raising money wherewith to pay interest on, and to provide a redemption fund for, certain municipal bonds. The issuance of these bonds had been voted upon favorably at an election called for that pur-

pose, and upon January 25, 1904, an ordinance was passed ordering their issue. In *Law v. City and County of San Francisco*, 144 Cal. 396, 77 Pac. 1014, it was held that bonds for one of the purposes, namely, the Telegraph Hill Improvement, had not been voted by the people. As to these bonds, the tax levied for interest and sinking fund is admittedly void. This, however, is a minor consideration. The principal ground of attack is that, at the time of the tax levy, concededly none of the bonds had been sold or contracted to be sold, and that therefore there then existed no bonded indebtedness legally authorizing such tax levy. The facts are conceded; the conclusion disputed.

[1] The municipality (respondent herein) first contends that the taxes were voluntarily paid and therefore not the subject of an action for recovery. *Dear v. Varnum*, 80 Cal. 89, 22 Pac. 76.

[2] Further it is contended that section 3819 of the Political Code limits the right of action to attacks upon the assessment, and that in the case at bar the attack is upon the tax levy. This is entirely too narrow a construction to be put upon this provision of the Code. See *Hellman v. City of Los Angeles*, 147 Cal. 653, 82 Pac. 313.

[3] Moreover, the allegations of plaintiff's complaint bring him within the provision of section 3804 of the Political Code. Herein the complaint alleges that the plaintiff's assignors did, within one month after their payment of the taxes, file with the board of supervisors verified claims and demands for the repayment of the taxes so paid under protest, and that the same has not, nor has any part thereof, been repaid or refunded. This allegation is not denied, and additionally is found by the court to be true.

Respondent's position is thus stated from its brief: "First. That the fact that a debt was not an existing debt at the time of the tax levy would not constitute an objection to the tax levy itself, since the entire taxation scheme of the city and county of San Francisco is based upon an estimation of debts to be incurred, but not actually incurred at the time of the tax levy. Second. That the fact that the bonds might never be sold would not be a proper objection to the tax, because practically the greater part of every tax levy under the charter of the city and county of San Francisco is designed to meet contemplated expenses which may never be incurred. Third. That neither the Constitution nor the charter prohibit a tax such as the tax in this case. Fourth. That to hold in favor of plaintiff would be to establish a doctrine that would seriously impede the sale of municipal bonds."

[4] The first three propositions may be considered together. Under the first proposition it is pointed out that a tax levy under the charter of the city and county of San

Francisco is to a very large extent anticipatory. The auditor transmits to the supervisors "an estimate of the probable expenditures of the city and county government for the next ensuing year." Charter of San Francisco, pt. 3, c. 1, § 3. Other provisions are pointed out; all showing that the tax levy to meet the running and operating expenses of the city and county of San Francisco is not to meet existing obligations, but is based upon estimates of future expenses, and the levy is to meet such expenses. Respondent's position in this regard is unquestionably true. True it is that neither the Constitution of the state nor the charter in express terms prohibits such a tax as was here levied. It does not follow, however, as declared in respondent's second proposition, that, because the greater part of the tax levy under the charter of the city and county of San Francisco is designed to meet contemplated future expenses which may never be incurred, therefore the tax levy for bonds unsold and uncontracted for is valid. While there is no express inhibition in the Constitution nor in the charter against the levying of a tax under the indicated circumstances, certain general principles of law forbid it. While it is true that under charter authorization the costs of the municipal government are estimated in advance and taxes levied to meet them, and while it is true, in a limited sense, that the obligation for which a particular tax is levied may not be incurred, as that the taxes collected for street assessment may be greater than the amount actually expended, even when this results no injury follows to the taxpayer. The funds are carried over and serve to reduce the general tax levy of the succeeding year. When it comes, however, to the funded indebtedness of the city, the law makes special provision in many forms for the payment of the principal and interest of such obligations. From the beginning to the end, elsewhere, as well as in the charter provisions, such a bonded indebtedness or obligation does not exist and is not recognized as a funded obligation unless the bonds themselves have actually been sold or their sale contracted for. "The debt represented by any bond would not exist or be created until the bond is issued by the company; that is, delivered to a third person for a valuable consideration." *Merced R. & E. Co. v. Curry*, 157 Cal. 730, 109 Pac. 264; *Dudley v. Board of Commissioners*, 80 Fed. 672, 26 C. C. A. 82. See, also, *Clark v. Los Angeles*, 160 Cal. 45, 116 Pac. 722. While none of the charter provisions bears specifically upon bonds of the character here voted, yet throughout the charter, wherever bonds are mentioned, only those bonds which have been sold or whose sale has been contracted for are considered obligations of the city, and only as to such is provision made to meet such obligation by taxation. Thus the charter deals elaborately with the issuance of bonds to pay for

public improvements, provides how such bonded indebtedness may be voted and incurred, provides that such bonds when issued may be sold from time to time by the supervisors as required, and provides (section 12, art. 12) that, at the time of the annual tax levy, the supervisors shall levy and collect annually a tax sufficient to pay the annual interest on such bonds, and also the proper aliquot part of the indebtedness so incurred. Again, in section 2 of article 3, the auditor, in making up his estimate, shall "state the amount required to meet the interest and sinking funds for all outstanding funded debts." Article 3, § 2, provides that the general tax levy, "exclusive of the state tax and the tax to pay the interest and maintain the sinking funds of the bonded indebtedness of the city and county," shall not exceed a given amount. Section 14 of article 3 provides that the supervisors shall, from time to time, provide "for the payment of the interest and principal of the bonds for which the city is liable." Thus, without further citations, it is made certain by the charter provisions, as it is under general law, that only for those bonds which have become an obligation of the city may a tax be levied. Were the construction contended for by respondent to prevail, it might result—and we are advised in this case it has resulted—in grave injustice to the taxpayer. The city might levy taxes year by year for bond interest and bond redemption and never sell a bond. At the end of each year it might transfer this fund to its general fund and use it for other purposes. At the end of any number of years of such practice, if the bonds eventually should be sold, the taxpayer would still have to pay into the treasury the full amount for interest and redemption. Aside from the hardship to the taxpayer, this would be to countenance a flat though indirect violation of the charter itself. The supervisors might make a general tax levy to the full amount permitted by the charter, and by the indirect method of this unauthorized bond tax levy secure from the taxpayer large sums of money for the sole purpose of transferring it to the general fund, and so by indirection defeat the express mandate of the law.

[5] Finally, upon this point it may be well to give the language of this court in *Merced County v. Helm*, 102 Cal. 165, 36 Pac. 400: "Any attempt on the part of the state, or of the county as one of the subdivisions of the state, to take the property of an individual for public purposes by way of taxation must find an express statutory warrant, and all laws having this object are to be construed strictly in favor of the individual as against the state." To the argument of inconvenience advanced by respondent under the fourth head, sufficient answer may be made, first, by saying that an inconvenience to the city does not justify the despoiling of its taxpayers; and, second, by reference to



Johnson v. Williams, 153 Cal. 368, 95 Pac. 655.

For the foregoing reasons the judgment is reversed and the cause remanded.

We concur: SHAW, J.; ANGELLOTTI, J.;  
LORIGAN, J.; MELVIN, J.

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164 Cal. 107

McDOUGALD, City and County Treasurer, v.  
LOW et al. (S. F. 6,115.)

(Supreme Court of California. Nov. 6, 1912.)

**1. WILLS (§ 587\*)—"RESIDUE"—RIGHTS OF RESIDUARY LEGATEES.**

The "residue" in the law of wills and administration is what remains after paying the legacies of the will and the debts and expenses of administration, and the residue must be distributed in kind to the residuary legatees.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1279, 1281-1291; Dec. Dig. § 587.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6169-6171; vol. 8, p. 7789.]

**2. TAXATION (§ 895\*)—INHERITANCE TAXES—PROPERTY SUBJECT TO—DEDUCTION FOR DEBTS AND EXPENSES OF ADMINISTRATION.**

Where property having its situs in California is not resorted to for the payment of debts of testator dying domiciled in a sister state, or expenses of administration, but passes in kind to the legatee, and there are no debts due creditors in California, and the estate in the state of the domicile is ample to pay all debts and expenses of administration, the property in California is subject to the inheritance tax imposed by St. 1905, p. 341, without deduction for its proportion of the debts and expenses of administration.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1714-1721; Dec. Dig. § 895.\*]

**3. TAXATION (§ 856\*)—"INHERITANCE TAX"—NATURE.**

An inheritance tax is a charge on succession by inheritance or transfer by will.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1673; Dec. Dig. § 856.\*]

For other definitions, see Words and Phrases, vol. 4, p. 3609.]

**4. TAXATION (§ 868\*)—INHERITANCE TAXES—PROPERTY SUBJECT TO—STOCK IN DOMESTIC CORPORATIONS.**

The situs of stock in a domestic corporation is in the state for the purposes of the inheritance tax law (St. 1905, p. 341), and any bequest thereof, which results in its actual transfer in kind, is subject to the tax on its actual value; the part of the estate of testator domiciled in a sister state which is located in such state being amply sufficient to pay the debts and the expenses of administration, and there being no debts due creditors in the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1685-1687; Dec. Dig. § 868.\*]

**5. TAXATION (§ 887\*)—INHERITANCE TAXES—PROPERTY SUBJECT TO—STOCK IN DOMESTIC CORPORATIONS.**

Where testator, domiciled in a sister state where his estate was administered, gave a part of his residuary estate consisting of stock in domestic corporations to a trustee in trust to pay the income to a daughter, with power on the part of the daughter to will such part, the inheritance tax imposed by St. 1905, p. 341, was not enforceable until a transfer under the power, and the court could not require the

trustee to give bond to secure payment of the tax accruing on the exercise of the power.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1709; Dec. Dig. § 887.\*]

In Bank. Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by John E. McDougald, treasurer of San Francisco, against Martha L. Low and another, executors of Charles Adolphe Low, deceased, and others. From a judgment granting partial relief, plaintiff appeals. Reversed, with directions.

Hartley F. Peart, of San Francisco (U. S. Webb, Atty. Gen., of counsel), for appellant. James M. Allen, of San Francisco, for respondents.

SHAW, J. The District Court of Appeal of the First District reversed the judgment of the court below herein. Upon respondents' application, a rehearing was granted and the cause was transferred to this court for decision. Upon further consideration we approve the opinion written by Mr. Justice Hall and rendered by the District Court of Appeal. It is as follows:

"This is an appeal by the plaintiff from a judgment of the superior court fixing the amount of the inheritance tax to be paid on certain shares of stock in three several California corporations, passing upon the residuary clause of the will of Charles Adolphe Low, deceased.

"Plaintiff, as the treasurer of the city and county of San Francisco, brought the proceedings under the provisions of section 17 of the inheritance tax law of 1905. Stats. 1905, p. 341.

"The respondents, the executors of the last will of said decedent, appeared in said proceeding and admitted that the property in question was subject to the inheritance tax under the statute, and the court, upon due proceedings, appointed an appraiser to appraise the said shares of stock, and to report thereon in writing to the court. The appraiser in due time made his report, and the court made findings thereon, filed conclusions of law, and rendered its judgment fixing the amount of the taxes to be paid on account of said shares of stock.

"It appears from the record before us that said decedent died domiciled in the state of New York, where his will was duly admitted to probate and where he left large estate. He also left estate (the shares of stock in question) in this state; that is to say, he owned, and his estate still owns, shares of stock in three several California corporations. There has been no administration of the estate in this state, and the respondents are the executors appointed by the New York court.

"All debts were proved against the estate in the probate proceedings had in the state of New York. There do not appear to be

any debts owing to any California creditors, and the estate in New York greatly exceeds the entire debts and expenses of administration. Indeed, the value of the personal property alone in New York at the time of the death of the decedent exceeded the total debts and expenses of administration by upwards of \$348,000.

"The total value of the estate of decedent at the time of his death was \$1,622,933.89. All the property in California, being the stocks in the California corporations, was of the value of \$296,616.66, which was 18½ per cent. of the total value of the estate.

"The court, in its conclusions of law, held that the property in California subject to the inheritance tax should bear its proportion of the debts proved in New York, and the expenses of administration of the estate of decedent in New York, and accordingly deducted 18½ per cent. of such debts and expenses from the actual value of such property, and assessed the tax upon the remainder thus ascertained. It is this action of the court which presents the principal question to be determined upon this appeal.

"We think the court erred in thus deducting from the property in California the debts proved and expenses incurred in the probate proceedings in New York. It is not pretended that any debts are or were owing to any one in California.

"The court found 'that the property in California is residue, and is to be distributed according to section 7 of the last will and testament of said Charles Adolphe Low.' The seventh section of said will disposes of the 'residue' of the estate.

[1] "Respondents in their brief correctly state that: 'The legatees at bar take by decedent's will the residue; the residue is what remains after paying the legacies of the will and the debts and expenses of administration.' That respondents' conception of what is meant by the residue in the law of wills and administration is correct is amply supported by the following authorities: *Nickerson v. Bragg*, 21 R. I. 296, 43 Atl. 539; *Stevens v. Underhill*, 67 N. H. 68, 36 Atl. 370; *Addeman v. Rice*, 19 R. I. 30, 31 Atl. 429; *Leahy v. Cardwell*, 14 Or. 171, 12 Pac. 307; *Phelps v. Robbins*, 40 Conn. 264; *Webster*, New International Dictionary.

[2-4] "From the finding of the court that this California property is residue, it is apparent that it has or will pass to the residuary legatees free of debts and expenses of administration. In other words, it will be distributed in kind to the residuary legatees. Under our system, the title to property passes either by will or succession upon the death of the decedent, subject of course to the payment of the debts and other charges of administration. Where, as in this case, property having its situs in this state is not in fact resorted to

for the payment of debts or expenses, but passes in kind to the legatee, and there are no debts due creditors in this state, and the estate in the state of the domicile is ample to pay all debts and expenses of administration, we see no reason why any deduction should be made from the actual value of the property that actually does pass in kind to the legatees. The inheritance tax is a charge upon succession by inheritance or transfer by will. In *re Wilmerding*, 117 Cal. 281, 49 Pac. 181. The situs of stock in a corporation is in the state of the incorporation, for the purposes at least of the inheritance tax law (*Murphy v. Crouse*, 135 Cal. 19, 66 Pac. 971, 87 Am. St. Rep. 90), and any bequest thereof which results in its actual transfer in kind should subject it to payment of the inheritance tax upon its actual value.

"There are no decisions of any appellate court of this state upon the point involved in this appeal, but the decision of the Supreme Court of Tennessee in *Memphis Trust Co. v. Speed*, 114 Tenn. 677, 88 S. W. 321, supports the doctrine that no deduction should be made on account of debts not shown to have been paid out of the property situate in Tennessee. In the case just cited, the domicile of the decedent was in Mississippi, where the principal administration was had. Ancillary administration was had in Tennessee, and the debts that the executor sought to deduct from the value of the estate in Tennessee, which consisted solely of stock in Tennessee corporations, were owing to Tennessee creditors; yet the court held that as it had not been shown that the debts in question had been paid from the estate in Tennessee, but that the estate in Tennessee remained intact for distribution, no deduction should be made from the value of the property in Tennessee. This case goes further than we are required to go, for in the case at bar there are no debts due California creditors.

"It has been decided in New York that, where a decedent leaves estate in different states, the debts due New York creditors should be deducted from the value of the estate in New York, though thus exhausting the New York estate, while the entire estate of decedent was perfectly solvent, and an apportionment of the debts to the estate in different states would leave a balance to be taxed in New York under its inheritance tax law. *Matter of King*, 71 App. Div. 581, 76 N. Y. Supp. 220 (affirmed on appeal in 172 N. Y. 616, 64 N. E. 1122, no opinion); *Matter of Grosvenor*, 124 App. Div. 331, 108 N. Y. Supp. 926; *Matter of Grosvenor*, 126 App. Div. 953, 111 N. Y. Supp. 1121 (affirmed in 193 N. Y. 652, 86 N. E. 1124, with memorandum citing *Matter of King*, supra).

"As a corollary to the rule laid down in the above-cited New York cases, it ought to follow that no deduction should be allowed, in a perfectly solvent estate at least, on account



of debts due nonresident creditors or expenses of foreign administration not shown to have been paid or to be paid out of the California assets.

"For the reasons above set forth, we think the court erred in making the deduction.

[5] "One-fourth of the residue of the estate of the testator was given to trustees in trust to pay the net income therefrom to one of the daughters of the testator, with power to said daughter to will such portion to whomsoever she might wish after her death. Appellant contends that the court should have required the trustees to give bond to secure the payment of such tax as may accrue upon the exercise of such power of appointment. It would seem to be a sufficient answer to this contention to say that the statute imposing the tax, and authorizing the proceedings to enforce payment, makes no provision for exacting any such bond. Under the inheritance tax law (section 1), no transfer under the power takes place until the exercise thereof. This we do not understand to be disputed by appellant. Until such event takes place, it cannot be known what, if any, tax will be due thereon. We do not think that the court erred in not exacting a bond from the trustees for the purpose of securing payment of a tax on a transfer of property not yet made, and which, when made, may not require the payment of any tax at all.

"The trial court has all the data and facts in the report of the appraiser and in the facts found by the court upon which to render a correct judgment."

The main reason for the granting of the rehearing was that, as the decedent was a resident of New York at his death, and it was not expressly found that the debts due his New York creditors and the expenses of administration in New York had in fact been paid out of his New York property, there might be a prima facie right in the residuary legatees to have a proportional amount of such New York debts and expenses deducted from the California assets, and to have the California inheritance tax computed only upon the balance.

Upon further consideration we are satisfied that the facts shown by the record were sufficient to raise a presumption that none of the California property would ever be used to pay the New York debts or expenses, and that the California property had passed, or would pass, in its entirety, to the legatees. The circumstances put upon the legatees the burden of showing that said debts and expenses, or some part thereof, would have to be paid out of the California property. As they made no attempt to do so, the court below was justified in finding that the California property was residue to be distributed to the legatees. Its finding of that fact was equivalent to a finding that all said debts and

expenses had been paid, or would be paid, out of the New York property. The other facts found justified this as a conclusion. The New York assets were of the value of \$832,790.38, of which \$538,565.38 was personal property. The said debts and expenses aggregated \$189,-\$36.47. In the ordinary course of procedure, these debts and expenses, if they have not been paid, will all be paid out of the New York property. Hence the California property will go to the legatees without diminution because of these New York debts and expenses, and accordingly the inheritance tax should be computed upon its value without any deduction on account of said New York claims.

The respondents cite the New York decision in *matter of Porter*, 67 Misc. Rep. 19, 124 N. Y. Supp. 677, which declares, in a case somewhat similar, that a pro rata deduction is proper under the facts shown in that case. In that case, however, it does not appear that the assets in the state of the decedent's domicile were sufficient to pay the debts and expenses of administration thereof. That case is therefore distinguishable from the case at bar because this fact does appear here.

The judgment appealed from is reversed, and the trial court is directed to give judgment in accordance with this opinion.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.

164 Cal. 113

PEOPLE v. PRANTIKOS. (Cr. 1,732.)

(Supreme Court of California. Nov. 7, 1912.)

1. HOMICIDE (§ 166\*)—EVIDENCE—MOTIVE.

In a prosecution for murder of a policeman, it is competent as bearing on motive to show that accused was a fugitive from justice, being convicted of murder in Greece, and that a reward had been offered for his arrest.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 320-331; Dec. Dig. § 166.\*]

2. CRIMINAL LAW (§ 365\*)—EVIDENCE—RES GESTÆ.

In a prosecution for murder of a policeman who was shot when running up to the scene of the shooting of another officer by accused, evidence of the shooting and death of such other officer is admissible as a part of the res gestæ.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 807; Dec. Dig. § 365.\*]

3. CRIMINAL LAW (§ 1169\*)—REVERSAL—ADMISSION OF EVIDENCE.

In a prosecution for murder of a policeman who was shot in running up to the scene of the shooting of another officer by accused, the fact that the result of the post mortem examination of the other officer was given in more detail than necessary is not ground for reversal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169.\*]

In Bank. Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.



Poolos Prantikos was convicted of murder, and he appeals. Affirmed.

Jos. T. O'Connor, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, C. M. Fickert, Dist. Atty., and Fred L. Berry, Asst. Dist. Atty., all of San Francisco, for the People.

HENSHAW, J. Defendant was indicted for the murder of Thomas Finnely and suffered conviction of murder in the first degree, with the death penalty imposed. The facts, without controversy, show that the defendant was a fugitive from the justice of the kingdom of Greece, of which he was a subject. He was there accused of the murder of his cousin, John Condos. On the advice of his family, he fled to the United States. According to the laws and custom of his country, he was tried during his absence and found guilty. All this is shown by the testimony of the defendant himself. A nephew of John Condos so slain by the defendant discovered that the defendant was in San Francisco, and on the 26th day of November, 1911, at the Ferry building in San Francisco, pointed out the defendant as a fugitive from justice to Walter Castor, a police officer, who placed the defendant under arrest. The defendant submitted without resistance, and with the officer proceeded quietly for a distance of about 60 feet. Then suddenly he drew a revolver, shot George Condos, shot the arresting officer twice, and fled. Police officer Thomas F. Finnely came running to the scene, and he too, was fired upon by the defendant. One of the witnesses testified that Finnely slipped and fell, and that the defendant shot him while he was down. Both officers died from the effects of their wounds. Condos recovered from his, and the defendant was put on trial for the Finnely murder.

Defendant was a witness in his own behalf. He testified to the facts above set forth touching the accusation against him of the crime of murder, of which he asserted he was not guilty, his flight to America upon the advice of his family, and that he had been wandering about the United States for two years. He testified further that he had been tried and found guilty in Greece of the murder, and that members of the Condos family were seeking him for the twofold purpose of having him returned to Greece for punishment and of securing the reward which the Grecian government had offered for his apprehension. All this had disturbed him greatly "so that he wondered he had any mind left." He had heard that a member of the Condos family was in San Francisco, and determined to leave San Francisco to avoid trouble. For this reason he was at the Ferry building and had purchased a revolver and was armed with it to prevent any member of the Condos family killing him. At the Ferry he was approach-

ed by Condos who, with much vile language, said that he was going to have him sent to Greece to be executed. The police officer then put him under arrest. He knew that the police officer had authority to arrest him. As they walked along, Condos, still talking in Greek, continued his vilification of him and of his family so that "I lost my head and pulled my gun and started to fire." He sought to kill Condos for his insults. He did not mean to kill, and did not know that he had killed, the police officers; from the time that he began to shoot his mind was a blank.

Upon this appeal it is asserted that the defendant was deprived of the fair trial to which the law entitled him by the erroneous admission by the court in evidence of testimony concerning defendant's prior murder, his prior trial and conviction, his escape from justice, and the reward offered for his apprehension. It is not contended that legitimate evidence of these facts would be inadmissible, but rather the contention is that the evidence which was offered was incompetent. Thus Condos was asked if he knew of his own knowledge whether or not there was a reward offered by the Grecian government for the apprehension of the defendant, and answered, "I know." This evidence was clearly admissible. Upon cross-examination, however, the same witness testified, when asked how he knew about the reward, "They wrote out a letter from Greece." The motion to strike out the testimony touching the reward was denied.

[1] Again it is said that the evidence admitted, touching the prior murder in Greece, was incompetent. But Condos testified that the murdered man was his uncle, and that defendant had shot and killed him with a rifle. His testimony is that 15 minutes before the murder he was with Prantikos; that Prantikos left him and killed his uncle. He did not actually see the killing, but saw him running away and went after him to catch him. This evidence was clearly admissible. Summing up upon these matters, appellant admits, as indeed he must, that evidence of his crime in Greece, his flight from justice, his trial and conviction, and the reward offered for his apprehension were one and all admissible as proving a motive for his later crime. *People v. Pool*, 27 Cal. 572; *People v. Durrant*, 116 Cal. 179, 48 Pac. 75. Whatever imperfections existed in the character of the evidence introduced for this legitimate purpose, it is a sufficient answer to say that the defendant himself voluntarily took the witness stand and told a story completely corroborating everything that was testified to by the prosecution, saying in the one particular that he denied having committed the murder in Greece.

[2] Evidence was admitted touching the shooting and the subsequent death of Officer Castor. In view of the nature of the

murder, the shooting of Castor was unquestionably a part of the *res geste*, nor can any valid objection be shown to the proof that Castor subsequently died of his wound.

[3] That testimony touching the results of the post mortem examination was given with more elaboration and detail than necessary cannot be held to be a ground for reversal.

It is finally said that, by the admission of all this evidence, "the defendant was deprived of any defense that rested upon his state of mind." He was not deprived of this defense. He made it, and as bearing upon that defense, and as showing the reason for his disturbed state of mind, he himself testified to many, if not most, of the matters concerning which the prosecution introduced evidence.

The judgment and order appealed from are therefore affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; MELVIN, J.; LORIGAN, J.; SLOSS, J.

164 Cal. 143

PEOPLE v. DONG POK YIP. (Cr. 1,734.)  
(Supreme Court of California. Nov. 9, 1912.)

#### 1. SODOMY (§ 2\*)—ATTEMPT TO COMMIT CRIME.

That accused was interrupted by the sudden and unexpected intrusion of a third person, and his attempt to commit a crime against nature aborted, did not prevent his conviction of an assault with intent to commit the crime.

[Ed. Note.—For other cases, see Sodomy, Cent. Dig. § 3; Dec. Dig. § 2.\*]

#### 2. ASSAULT AND BATTERY (§ 48\*)—"ASSAULT."

An "assault" implies repulsion, or at least want of consent on the part of the one assaulted.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 68; Dec. Dig. § 48.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 532-538; vol. 8, p. 7582.]

#### 3. CRIMINAL LAW (§ 31\*)—OFFENSES—"CONSENT."

"Consent" in law means a voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice proposed by another. "Consent" differs from "assent," and implies some positive action and involves submission; while "assent" means mere passivity, or submission which does not include consent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 35, 36, 50; Dec. Dig. § 31.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1437-1441; vol. 8, p. 7612.]

#### 4. SODOMY (§ 3\*)—CONSENT—ACTS CONSTITUTING.

The mere submission of a boy nine years of age of retarded mental development to an attempted outrage of his person is not such consent as will justify or excuse the crime; and, unless the boy actually and knowingly consented, accused could be convicted, though there was evidence that the boy was ignorant, indifferent, and passive in the hands of the accused, even to the point of submission.

[Ed. Note.—For other cases, see Sodomy, Cent. Dig. § 4; Dec. Dig. § 3.\*]

#### 5. CRIMINAL LAW (§ 1175\*)—HARMLESS ERROR—CONVICTION OF LESSER DEGREE.

Where the evidence clearly would support a verdict for a higher offense, a conviction of a lesser crime included therein will not be set aside.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3179-3182; Dec. Dig. § 1175.\*]

#### 6. CRIMINAL LAW (§ 1175\*)—APPEAL—HARMLESS ERROR—VERDICT.

Where, on a trial for assault, with intent to commit a crime against nature, there was evidence sufficient to support a conviction, a conviction of simple assault must be sustained.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3179-3182; Dec. Dig. § 1175.\*]

#### 7. CRIMINAL LAW (§ 571\*)—ATTEMPT TO COMMIT A CRIME—EVIDENCE.

It is not true, as a rule of law that evidence insufficient to sustain a conviction for a crime is insufficient to sustain a conviction of an attempt to commit the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1272; Dec. Dig. § 571.\*]

#### 8. CRIMINAL LAW (§§ 419, 420\*)—EVIDENCE—HEARSAY EVIDENCE.

The testimony of what accused did and said in the presence of a witness is not hearsay, and anything that accused did or said relevant to the crime charged is admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.\*]

#### 9. CRIMINAL LAW (§ 1044\*)—APPEAL—EVIDENCE—MOTION TO STRIKE OUT.

Where the court could not know the answer of the witness, an objection to a question calling for matter apparently material was properly overruled, and, where the answer contained an improper statement, accused must move to strike out the improper answer or he cannot complain on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2672, 2674, 2675; Dec. Dig. § 1044.\*]

In Bank. Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Dong Pok Yip was convicted of crime, and he appeals. Affirmed.

Charles Stewart and Carroll Cook, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, of San Francisco, for the People.

PER CURIAM. Defendant was tried upon a charge of assault with intent to commit the infamous crime against nature, and was convicted of simple assault. He appeals from the judgment and from an order denying his motion for a new trial.

The alleged victim of the assault was a boy nine years of age. The only evidence given with reference to the episode which culminated in the defendant's arrest was furnished by one Rodrigues, bookkeeper for a certain transportation company at Antioch, and by the boy who was called as a witness by the defendant. Mr. Rodrigues testified that from his office on the wharf he saw the boy and the Chinaman, Dong Pok Yip. The former had been fishing, and the latter had been playing with another lad; but after a



time the witness observed them seated together and the Chinaman was teaching the boy how to fish. Subsequently he noticed the boy fishing while the defendant, who had his arm around the child, was whispering to him. This attracted the particular attention of Mr. Rodrigues, who watched the two from the door of his office. As he was thus observing them, the Chinaman arose, helped the boy to his feet, and they walked hand in hand along the wharf; but as they passed the office they were not holding hands. The boy seemed to the witness to be going willingly, and the latter observed no coercion of any sort on the part of the Chinaman. A few minutes later the witness followed in the direction taken by the boy and the defendant. He found them near an oil tank in some brush, which was about a foot in height in the direction from which he was looking, but high enough to screen them from any one who might look from the opposite side. They were both stooping; the boy, who faced Rodrigues, was in front of the defendant with his back to the latter, and defendant had his hands on the sides of the boy's waist. Rodrigues did not see the lad's person, but he did observe that the back of the boy's overalls hung down and that the Chinaman's trousers were unbuttoned in front. When they saw Rodrigues they quickly changed their positions; the boy slipping one of the suspenders of his "bib overalls" over his shoulder, and the Chinaman fastening the top button of his trousers. When they were thus seen by Rodrigues near the tank, the Chinaman had his hands on the boy's sides. While the little fellow was evidently not a child of even ordinary intelligence, the learned judge of the superior court, who presided at the trial, after a very careful examination permitted him to be sworn as a witness. There were some contradictions in his testimony, but he declared that the defendant had not attempted to do anything to him. He also said that, during all of the time he was with the defendant near the oil tank, they were facing each other. He also testified that the defendant used no force with him and did not take hold of him roughly. According to his testimony, the Chinaman had made a disgusting proposal with reference to the boy's sister, coupled with a promise to give her money, and had exposed his person to the boy.

[1-4] Appellant's contention is that, since the verdict of the jury acquitted the defendant of the higher offense charged in the information, there is no evidence showing an intent on his part to commit any other sort of assault; and that, although very slight physical force is sometimes sufficient to uphold a conviction of assault where a higher crime has been charged, the physical violence is measured by the outrage to the victim's feelings and its use in opposition to the will of that person; and in this case,

the boy being a consenting party, there was no violence to his feelings, and therefore no assault. The fallacy of this argument lies in the failure to consider the youth and the weak mentality of the child. When the case was before the district court of appeal, that court sustained the conviction, and in the opinion, Mr. Presiding Justice Lennon, discussing the matter of consent, said, among other things: "The fact that the defendant was interrupted and his attempt rendered abortive by the sudden and unexpected intrusion of a third party did not make his conduct any the less criminal. *People v. Johnson*, 131 Cal. 512 [63 Pac. 842]. This, of course, assumes that the evidence in the case shows an absence of consent on the part of the boy; for it must be conceded, as contended by counsel for the defendant, that an assault implies repulsion, or at least want of consent on the part of the person assaulted (*People v. Gordon*, 70 Cal. 468 [11 Pac. 762]; 2 Bishop's New Crim. Law, § 35); and, if it could be fairly said that the evidence in the present case compelled the conclusion that the boy knowingly consented to the commission of the crime charged against the defendant, there would be no escape from a reversal of the judgment. We are of the opinion, however, that the evidence upon the whole case falls short of showing that the boy actually and knowingly consented to be the victim of the alleged assault. It may be admitted that the evidence shows that the boy was ignorantly indifferent and passive in the hands of the defendant, even to the point of submission; but there is a decided difference in law between mere submission and actual consent. Consent, in law, means a voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice to do something proposed by another. 'Consent' differs very materially from 'assent.' The former implies some positive action and always involves submission. The latter means mere passivity or submission which does not include consent. *Geddes v. Bowden*, 19 S. C. 1, 7; *Aull v. Columbia, N. & L. R. Co.* [42 S. C. 431], 20 S. E. 302; *Bouvier's Law Dic.* In cases of the character under discussion, the age and mentality of the subject of an indecent assault is important, and should always be considered in determining the presence or absence of consent. The mere submission of a child of tender years or retarded mental development to an attempted outrage of its person should not, in and of itself, be construed to be such consent as would, in point of law, justify or excuse the assault. 2 Bishop's New Crim. Law, § 35, subd. 2. It is neither unreasonable nor unnatural to assume that such a child, in the hands of a strong man, might be easily overawed into submitting without actually consenting. *Hill v. State* [37 Tex. Cr. R. 279, 38 S. W. 987], 39 S. W. 666 [66 Am. St. Rep.

803]. In the case at bar the jury was properly instructed by the trial court that, if the boy consented to the assault complained of, the defendant should be found not guilty. Presumably the jury, in its deliberations, heeded this instruction, but upon weighing the evidence concluded, justly, we think, that the boy victim of the assault merely submitted to the act attempted by the defendant without knowing the nature of the act or realizing the design of the defendant." These views are, in our opinion, correct and are hereby adopted by this court.

If the jury had found the defendant guilty, under the evidence presented, of assault with intent to commit the infamous crime against nature, we would have been compelled to sustain the judgment. The testimony revealed the fact that the defendant had first secured the confidence of the child by giving him some instruction in the art of fishing; that he had then led the little fellow to a secluded place such as would be selected for the commission of the crime charged; that he had then induced the boy to take a position, and he himself had assumed an attitude which clearly indicated his indecent purpose; that previously he had exposed his own person; and that the child's clothing had been disarranged in a manner which comported with the theory of the prosecution regarding the defendant's intent. All of this, coupled with the lack of consent on the part of the little boy, as discussed above, was sufficient to support a verdict of guilty of assault with intent to commit the infamous crime against nature.

[5] Where the evidence clearly would support a verdict for a higher offense, the conviction of a lesser crime necessarily included therein will not be set aside. *People v. Muhlner*, 115 Cal. 306, 47 Pac. 128. The only acquittal in this case was of the major crime charged, but this, as the Attorney General says in his brief, did not "include an acquittal of an intent to take indecent liberties or to practice other lewd and lascivious acts or to commit any other unlawful act such as may constitute an assault."

[6] We conclude, therefore, that the conviction of simple assault must be sustained under the evidence in this case. Nothing said by this court in *People v. Stouter*, 142 Cal. 146, 75 Pac. 780, conflicts with the conclusion reached here. In that case the defendant had been found not guilty of the crime defined by section 288 of the Penal Code, but had been convicted of an attempt to commit said offense. It was held that the superior court erred in giving an instruction after the jury had been out many hours, by which they probably inferred the judge's belief that the defendant should be convicted of an attempt to commit the crime alleged. This court also said: "Moreover, if the evidence was not sufficient to convict the defendant of the act charged, and the

jury so found, it is difficult to see how it was sufficient to find him guilty of an attempt to commit that act. The child herself testified that defendant did not do the act charged in the information; and if a certain condition of her person, claimed by the prosecution to have been proved, and other circumstantial evidence, did not warrant the jury to find defendant guilty of doing the act charged, it was not sufficient to support a verdict of guilty of an attempt to do that act. The jury evidently must have considered the last instruction as giving them a wide power to find the defendant guilty of something, under the general category of an attempt to do the act charged in the information." The language quoted above must be limited to the facts of that case, which, by the way, are not reviewed extensively in the opinion.

[7] It is not true, as a rule of law, nor did the court say in the *Stouter* Case, that evidence which is insufficient to sustain a conviction for a crime would be insufficient to sustain a conviction for an attempt to commit the crime.

[8] Upon the only other important ruling assigned as error by appellant, we adopt the opinion of the District Court of Appeal: "Upon cross-examination of the boy, the district attorney asked, 'What did the Chinaman do at that time?' The witness started his answer by attempting to repeat what the defendant said, whereupon counsel for defendant interrupted with the objection that whatever the defendant may have said was not cross-examination. Upon the objection being overruled, the completed answer revealed the fact that the defendant had offered \$2 for an opportunity of meeting and 'doing something' to the boy's sister. It is now claimed that this testimony was hearsay, and that the objection made at the trial that it was not cross-examination should have been sustained. Obviously what the defendant did, including what he said, was not hearsay, and, in view of the direct examination, it was clearly cross-examination.

[9] "Anything that the defendant may have said which was relevant and material to the commission of the offense was admissible in evidence; and as the trial court could not know, and had no reason to anticipate, the answer of the witness, the objection was properly overruled. Under such circumstances, the fact that the witness narrated a conversation of the defendant, which disclosed a statement of the defendant prejudicial to him and irrelevant to the issue being tried, did not make the ruling erroneous. In such a contingency, the defendant might have availed himself of a motion to strike out the answer, but, not having done so, he will not now be heard to complain."

The judgment and order are affirmed.

BEATTY, C. J., does not participate in the foregoing decision.



164 Cal. 138

In re RANKIN'S ESTATE. (L. A. 3,209.)  
(Supreme Court of California. Nov. 9, 1912.)

1. EXECUTORS AND ADMINISTRATORS (§ 21\*)—  
WILLS (§ 219\*)—PERSONS INTERESTED IN  
WILL—ASSIGNMENT—"HEIR AT LAW."

Where the sole legatee under a will was the mother of the decedent, assignments by her of money due as "heir at law" will be construed as transferring portions of the interest to which she is entitled under the will, and hence her assignee is one interested in that instrument, and as such entitled to petition for probate of the will and for the issuance of letters of administration to himself.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 106-115; Dec. Dig. § 21;\* Wills, Cent. Dig. §§ 527-531; Dec. Dig. § 219.\*]

For other definitions, see Words and Phrases, vol. 4, p. 3265.]

2. EXECUTORS AND ADMINISTRATORS (§ 24\*)—  
PERSONS INTERESTED IN WILL — ASSIGN-  
MENTS—VALUE.

The public administrator, though as against a foreign executor entitled to letters of administration with the will annexed, cannot complain that assignments to a resident, who may be entitled to the issuance of such letters as a person interested under the will, are without consideration.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 132-140; Dec. Dig. § 24.\*]

3. EXECUTORS AND ADMINISTRATORS (§ 21\*)—  
PERSONS ENTITLED TO ADMINISTRATION—  
FOREIGN WILL.

Under Code Civ. Proc. § 1323, providing that, when a copy of a will shall be produced by the executor or any other person interested with a petition for letters testamentary or letters of administration, letters may be granted, a resident to whom the sole beneficiary under a foreign will had assigned sums of money due her as beneficiary is a person interested under the will, and hence, as against the public administrator, entitled to letters of administration with the will annexed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 106-115; Dec. Dig. § 21.\*]

Department 1. Appeal from Superior Court, Riverside County; Paul J. McCormick, Judge.

In the Matter of the Estate of Coun D. Rankin, deceased, on the application of W. C. Fraser for the issuance of letters of administration. From an order issuing such letters, the public administrator appeals. Affirmed.

Purouthington & Adair, of Riverside, for appellant. Lafayette Gill, of Riverside, for respondent.

ANGELLOTTI, J. Deceased died testate on April 3, 1911, in Prince Edward Island, Canada, a resident of said island. By his will he gave all his property to his mother, Annie Rankin, a nonresident of this state, and appointed as executor one Arthur A. Bartlett, also a nonresident. A portion of his property consisted of an orange grove situate in Riverside county, Cal. His will was duly admitted to probate by the court of probate of wills of said island. Subse-

quently a copy of the will and the probate thereof, duly authenticated, was filed in the superior court of Riverside county by one W. C. Fraser, with a petition for its probate in this state and the issuance to him of letters of administration with the will annexed; he claiming to be a "person interested in the will" by virtue of certain assignments of interests in the estate made by said Annie Rankin, the sole devisee and legatee. The public administrator of Riverside county filed his opposition to the granting of such letters to Fraser and his petition for the issuance of such letters to himself. The trial court admitted the will to probate in this state, denied the application of the public administrator, and ordered the issuance of letters of administration with the will annexed to Fraser, as a person interested in the will. The assignments under which Fraser claimed were three in number; each being a written instrument made by said Annie Rankin as "the sole beneficiary under the will" of deceased, and each purporting to assign and transfer to said Fraser a specified sum of money "which may be coming to me as an heir at law of the said Coun D. Rankin, deceased, under the terms of his will." It was shown over the objection of Fraser that the same was immaterial, incompetent, and irrelevant; that no valuable consideration was paid by Fraser for any of said assignments.

This is an appeal by the public administrator from the order of the superior court; the only controversy being as to the respective rights of Fraser and the public administrator to letters of administration with the will annexed.

[1] It is urged that nothing passed to Fraser by virtue of any of the assignments because of the phraseology thereof; each of them being of money "which may be coming to me as an heir at law" of deceased, and Mrs. Rankin taking solely as devisee and legatee. This construction of the assignments is too technical. It is impossible to fairly construe the instruments otherwise than as intended to transfer portions of the interest of Mrs. Rankin as "beneficiary under the will," coming to her "under the terms of" the will of deceased.

[2] It is immaterial, so far as the public administrator is concerned, that nothing of value was paid by Fraser for any of the assignments. Mrs. Rankin, of course, had the right to give any portion of her interest under the will to Fraser if she saw fit to do so, and the public administrator could not be heard to question the effect of the assignments either on the ground that the same constituted mere gifts or that a consideration recited was not in fact paid.

[3] The situation in regard to the assignments being as we have stated, the action of the trial court in awarding letters of administration with the will annexed to Fraser as

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

against the public administrator was correct, in view of the decisions of this court.

Section 1323 of the Code of Civil Procedure, contained in the article relative to probate of foreign wills, provides "when a copy of the will, and the probate thereof, duly authenticated, shall be produced by the executor, or by any other person interested in the will, with a petition for letters," it shall be filed, and that after proper notice and proofs there shall be "letters testamentary or of administration issued thereon." It was squarely decided in *Estate of Bergin*, 100 Cal. 376, 34 Pac. 867, in a contest for letters of administration between the public administrator and a resident devisee under a foreign will; the executor named in the will failing to apply for letters testamentary that the devisee was entitled to letters of administration with the will annexed, as a "person interested in the will," in preference to the public administrator. The court said that the article containing sections 1323 and 1324 of the Code of Civil Procedure dealt especially with the subject-matter of foreign wills, and must prevail over all conflicting provisions "as to all matters and questions arising out of the subject-matter of such article," and that it was clear that, under its provisions, letters of administration "must be granted to a 'person interested in the will' who applies for them, in the absence of a petition by the executors." In *Estate of Engle*, 124 Cal. 292, 56 Pac. 1022, a contest for letters of administration with the will annexed between the assignee of an undivided interest in certain property of the estate from the sole devisee and the public administrator, it was held that the assignment vested in the assignee all the interest that the devisee had by virtue of being the owner of such undivided interest, and made him a person interested in the will within the meaning of section 1323 of the Code of Civil Procedure, and that he was entitled to letters of administration with the will annexed as a person interested in the will, in preference to the public administrator. There has been no change in our law material to the question presented since these decisions were rendered, and there is no decision impairing the effect of the rulings made in the cases just cited. In *Estate of Richardson*, 120 Cal. 344, 52 Pac. 832, it is true that it was held that the superior court had the right, under the circumstances of that case, to appoint the public administrator. The contest there was between the nominee of both the absent executor and a devisee not competent to administer, and the public administrator, and it was simply held, as stated in the syllabus, that "in default of application therefor by such executor, or by a devisee resident in this state, who is entitled to act as administrator, there is no statutory provision requiring the court to appoint the nominee of such executor or of any resident devisee." In *Estate of Coan*, 132 Cal. 401, 64 Pac. 691,

the contest was between a son and a daughter of deceased, each competent to administer and each interested in the will as devisee or legatee. It was held that section 1350 of the Code of Civil Procedure, requiring that where no executor is named in the will, or if the executor named is dead, or incompetent, or renounce or fail to apply for letters, "letters of administration with the will annexed must be issued as designated and provided for in granting of letters in case of intestacy," and section 1365 of the Code of Civil Procedure, prescribing the order in which letters must be granted in case of intestacy, are applicable in the matter of a foreign will "where, as in this case, the controversy as to who shall administer is between parties interested in the will." This may well be for the reason that there is no conflicting provision in the article on probate of foreign wills; that article controlling, as said in *Estate of Bergin*, supra, where there is any special provision thereof in conflict with a provision in another article. In *Estate of Coan*, supra, *Estate of Engle*, supra, and *Estate of Bergin*, supra, were expressly distinguished from the case under consideration as involving a contest for letters "between one interested in the will and the public administrator." *Estate of Brundage*, 141 Cal. 538, 75 Pac. 175, contains nothing in conflict with the views declared in *Estate of Bergin*, supra, and *Estate of Engle*, supra. In that case the person held by this court to be entitled to letters was a resident son of the deceased, who was a devisee and legatee under the will, a person interested in the will. The other party, a corporation authorized to act as administrator, was the nominee of the nonresident executor, the nominee of nonresident heirs and legatees, who by reason of their nonresidence were incompetent to act as administrator, and the assignee of a portion of the legacy of one of the nonresident daughters. It was held in accord with previous decisions that neither the nomination by the nonresident executor, nor the nomination by any heir, devisee, or legatee not himself competent to serve as administrator, or "entitled" to administration, gave the nominee any right. As to the claim that such party was entitled to have its claim considered by reason of the fact that it was the assignee of a portion of a daughter's legacy, the answer was practically that, as such assignee, it could occupy no better position than its assignor, the nonresident daughter, if she were a resident of the state; that in such event the contest would be one between two parties "interested in the will"; and that the son must be preferred to the daughter under the rule declared in *Estate of Coan*, 132 Cal. 401, 64 Pac. 691. The proposition that, as against a person "interested in the will," the public administrator is not "entitled" to letters of administration in the case of a foreign will was referred to in the opinion as being a "well-



settled proposition," and it was stated that this rule is apparently based upon the fact that he is not "interested in the will." None of the other cases cited by learned counsel for appellant requires notice.

From what we have said, it is clear that it is the well-established rule in California that, in the case of a foreign will, a person "interested in the will" is by virtue of that fact alone, if competent to serve as administrator in this state, entitled to letters of administration with the will annexed as against one who, like the public administrator, is not "interested in the will." This is the effect of sections 1323 and 1324 of the Code of Civil Procedure as construed by this court in the cases we have cited.

The order appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.

20 Cal. App. 8

McCONNELL v. IMPERIAL WATER CO.  
NO. 1. (Civ. 1,145.)

(District Court of Appeal, Second District, California. Sept. 26, 1912.)

1. APPEAL AND ERROR (§ 977\*)—NEW TRIAL (§ 154\*)—DISMISSAL OF MOTION.

The matter of dismissing proceedings, on motion for new trial, for lack of diligence in the prosecution thereof is addressed to the court's discretion, the exercise of which will not be disturbed on appeal in the absence of abuse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977; \* New Trial, Cent. Dig. §§ 312, 313; Dec. Dig. § 154.\*]

2. NEW TRIAL (§ 154\*)—PROSECUTION OF MOTION—DISMISSAL—LACK OF DILIGENCE.

Judgment was entered for plaintiff on April 29, 1910, and defendant served its notice of intention to move for new trial and prepared a statement of the case, which was delivered to the clerk on October 5, 1910, and settled, and the engrossed copy was delivered to the judge on December 20, 1910, and filed on April 20, 1911. Defendant not having taken further action, plaintiff, on May 3, 1911, noticed a hearing on the motion, which was had on June 2d, and the motion was denied. On July 17th defendant noticed a motion to set aside the denial of its motion, because the trial judge, when he made the ruling and first settled the statement, was a stockholder in defendant corporation, and the order denying a new trial was set aside. On July 28, 1911, plaintiff noticed a motion for August 25th, to dismiss the motion for new trial for lack of diligence; and on August 11th defendant noticed a motion for new rulings on the motion for new trial, to be made on August 25th, on which day the motion to dismiss was granted. *Held*, that there was no abuse of discretion in dismissing the proceedings.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 312, 313; Dec. Dig. § 154.\*]

Appeal from Superior Court, Imperial County; Frank R. Willis, Judge.

Action by Leslie McConnell, executor of the estate of H. F. McConnell, deceased, against the Imperial Water Company No. 1. From an order dismissing defendant's mo-

tion for a new trial because of unreasonable delay in prosecution, defendant appeals. Affirmed.

W. N. Goodwin, Hunsaker & Britt, of Los Angeles, and R. D. McPherrin, of Imperial, for appellant. Eshleman & Swing, of El Centro, for respondent.

JAMES, J. Appeal from an order made in the superior court dismissing defendant's motion for a new trial because of unreasonable delay in the prosecution thereof.

On April 29, 1910, judgment was entered in this case in the superior court in favor of plaintiff. Defendant thereupon served its notice of intention to move for a new trial and prepared a statement of the case for use at the hearing of such motion. This statement, together with amendments thereto, was delivered to the clerk of the court on October 5, 1910, and on December 3, 1910, the statement was settled by the trial judge and ordered engrossed. The engrossed copy was delivered to the judge on December 20th and was thereafter signed, and was filed on April 20, 1911. On May 3, 1911, defendant not having taken any further action toward securing a ruling on its motion for a new trial, the plaintiff gave notice calling up the motion for hearing, and a hearing was had thereon on June 2, 1911, at which time the court entered an order denying the motion. No objection was then made to the hearing of the motion by either of the parties. Subsequently, and on July 17, 1911, defendant gave notice that it would move to set aside the order of the court denying its motion for a new trial, on the ground that the trial judge, at the time he made the ruling, was a stockholder of defendant company, and therefore disqualified to sit in the matter. It appeared on the hearing, as found by the judge who temporarily sat to hear that motion, that the judge who passed upon the motion for a new trial was a stockholder of defendant company at the time he made the order thereon, and had been such stockholder from the 18th day of August, 1910. The fact was therefore shown that not only was the judge disqualified at the time he heard the motion for a new trial, but was also disqualified at the time he settled the statement of the case. The order denying a new trial was set aside, agreeable to the motion made to that end, and on the 11th day of August, 1911, attorneys for defendant served plaintiff's counsel with a notice that they would move for a new ruling on the motion for a new trial on the 25th day of August, 1911. Prior to the time of the service of this last notice, plaintiff's attorney, on the 28th day of July, 1911, immediately after the order formerly made by the disqualified judge denying a new trial had been vacated and set aside, served notice on defendant that he would, on the 25th day of August, 1911,

move the court to dismiss proceedings on motion for a new trial, on the ground that the same had not been prosecuted with due diligence. On the 25th day of August these motions were both taken up on the calendar of the superior court, and the motion to dismiss the proceedings, being first presented, was by the judge then sitting granted. This appeal followed.

[1] The matter of dismissal of proceedings on motion for a new trial, on the ground of lack of diligence in the prosecution thereof, is one which is addressed to the sound discretion of the court; and, unless an abuse of this discretion is shown, an order made granting or denying such a motion will not be disturbed on appeal. *Galbraith v. Lowe*, 142 Cal. 295, 75 Pac. 831.

[2] In our opinion, no abuse of discretion is shown to justify a reversal of the order appealed from. Between the date of the entry of judgment and that upon which the motion dismissing the proceedings on motion for a new trial was presented and granted, 16 months had intervened. It appears that when the statement of the case was settled the trial judge who settled such bill and subsequently first ruled upon the motion for a new trial had been a stockholder of defendant company for nearly 5 months. We must assume, in the absence of a showing to the contrary, which was not made, that the records of the corporation correctly set forth at all times the names of the persons holding shares of stock. It will be presumed, then, that defendant corporation, having knowledge of the state of its own records, had knowledge of the fact that the superior judge of Imperial county had become one of its shareholders, and of the time when he became such shareholder. There is nothing in the record showing or tending to show that defendant had not such knowledge; and it therefore appears that it allowed a disqualified judge to act upon the motion for a new trial and so cause delay in the proceedings. It was through the act of the defendant that the order made by the disqualified judge was set aside; and even after this was done defendant allowed 13 days to elapse before giving notice that it would seek a ruling on its motion for a new trial. This latter notice was only served after a notice had been given to it by the plaintiff that he would ask the court to dismiss the proceedings on motion for a new trial. Under these facts, it might well appear that the delay of defendant in bringing to a hearing its motion for a new trial was unreasonable and without excuse. We are of the opinion that it was not an abuse of discretion for the trial court to make the order complained of.

The order is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

20 Cal. App. 21

**BURTON v. COLUMBIAN NAT. LIFE INS. CO.** (Civ. 1,015.)

(District Court of Appeal, Third District, California. Sept. 28, 1912. Rehearing Denied by Supreme Court, Nov. 27, 1912.)

**INSURANCE (§ 349\*)—LIFE INSURANCE—FORFEITURE FOR NONPAYMENT OF PREMIUMS.**

A life policy stipulating that it is issued in consideration of a specified premium and of the payment of a like sum on a designated date in every year until seven full years' premiums have been paid, or until the prior death of insured, the balance, if any, of the then current year's premium to be deducted in any settlement, and that the failure to pay any premium when due will void the policy, "except as herein provided," and declaring that after premiums have been paid for three years insured, within 30 days after any default in the payment of a subsequent premium, may avail himself of enumerated options, does not extend the time for the payment of premiums, for the quoted words merely apply to the provision defining the effect of payment of premiums for three years, and do not apply to the provision authorizing insurer to deduct from the face of the policy an unpaid premium, the time for payment of which has been extended, and, where insured failed to pay the second annual premium at maturity, the policy became void.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 891, 895-902, 913; Dec. Dig. § 349.\*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Rose Burton against the Columbian National Life Insurance Company. From a judgment for defendant, plaintiff appeals. Affirmed.

E. A. Holman, of Oakland, for appellant.  
L. A. Redman, of San Francisco, for respondent.

CHIPMAN, P. J. A general demurrer was sustained to the complaint, and defendant had judgment, from which plaintiff appeals. The action was commenced to enforce the payment of a life insurance policy payable to plaintiff, wife of the insured. It appears from the complaint that defendant company issued its policy February 12, 1909, upon the life of Walter B. Burton; that on August 9, 1910, said Walter Burton died; that in the month of August, 1910, plaintiff made due proofs of death and demanded payment under said policy, but defendant denied all liability. It further appears from the complaint "that the current year's premium for 1910 was not paid except as provided for in said policy that said premium be deducted from said \$5,000"; that said plaintiff, since the delivery of said proofs of loss, has given defendant written authority "to deduct any premium unpaid, with interest, from the amount due under said policy, and has elected to take said sum due under said policy in one sum in cash." A copy of the policy sued upon is attached to the complaint as part thereof. The clauses of the policy referred to by counsel and bearing upon the



sufficiency of the complaint are as follows: "The Columbian National Life Insurance Company of Boston, Massachusetts, agrees to pay five thousand dollars to Rose Burton, wife of the insured, hereunder beneficiary, or to such beneficiaries as may have been designated in the manner herein provided, at the home office of the company in Boston, upon receipt of satisfactory proofs of the death of Walter B. Burton, of Berkeley, state of California, the insured, within seven years from the date hereof, less all indebtedness to the company on this policy, together with any unpaid premium or portion of the premium for the then current policy year. This policy is issued in consideration of the sum of eighty-eight 95/100 dollars, the receipt of which is hereby acknowledged, and of the payment of a like sum on the twelfth day of February in every year until seven full years' premiums have been paid or until the prior death of the insured, the balance, if any, of the then current years' premium to be deducted in any settlement hereof. The benefits, conditions and privileges on pages two and three are part of this contract as fully as if recited over the signatures."

Other provisions are as follows: "Failure to pay any premium, or any note given for any premium when due, will void this policy without further notice and forfeit all premiums to the company except as herein provided." "All premiums are payable annually in advance, but they may be paid semi-annually or quarterly \* \* \* if the insured shall in writing request such change in his policy. But no premium or installment thereof shall continue the policy in force beyond the period for which said payment is made. \* \* \*" "After the premiums have been paid on this policy in full for the period of three years, the insured within thirty days after any default in the payment of a subsequent premium may avail himself of the following options." Then follows a statement of several options which need not be stated as the insured did not pay but one year's premium.

It is conceded that no premium was paid except for the first year. The insured died after the time stipulated in the policy for the payment of the second annual premium, and without having made such payment. The premium for 1910 was due and payable in February, and the insured died in August, 1910. Plaintiff's contention is that the company agreed to pay the amount of the policy as provided therein, "less all indebtedness to the company on this policy, together with any unpaid premium or portion of the premium for the then current year"; that, as held in *Pacific, etc., Co. v. Williamsburg Fire Ins. Co.*, 158 Cal. 367, 111 Pac. 4, exceptions in a policy must be strictly construed against the insurer and liberally in favor of the insured, and, where there is ambiguity or doubt,

it must be resolved in favor of the insured. The claim is that there is here a "direct contract to pay to the beneficiary upon death within seven years the sum of \$5,000, less all indebtedness to the company, together with any unpaid premium for the then current year"; that "as there is only one annual premium, and it is expressly contemplated that, if it is unpaid for the then current portion of the year at the time of the death, it is to be deducted, and manifestly provision is thus made for its payment if unpaid, and the policy remains in force and the premium is earned."

But the policy was issued in consideration of the sum \$85.95, the first payment, "and of the payment of a like sum on the twelfth day of February in every year until seven full years' premiums have been paid," etc.; and the policy provides that, "Failure to pay any premium \* \* \* will void this policy \* \* \* except as herein provided." Plaintiff's contention is that the exception referred to is the current year's premium if unpaid, which is to be deducted and the balance paid. In other words, that the reservation by the company of the right to deduct overdue premium from the face of the policy is equivalent to extending the time for the payment for such premium. In reply, counsel for respondent states the matter correctly, as we conceive it to be. We quote from his brief: "The time for the payment of premiums may be and frequently is extended by insurers by an independent agreement. If during such extension the insured dies, the policy of course remains in force, but, except for the provision in the policy authorizing it to do so, the company could not offset the premium against the face of the policy. The beneficiary of a life insurance policy is under no contractual or other obligation to pay the premium. The right to such payment as against the beneficiary is secured by the provision referred to. This provision does not purport to extend the time for the payment of the premium, and such a construction of it would bring it into direct conflict with the clause of the policy requiring all premiums to be punctually paid. Counsel for appellant argues that his construction of the policy is supported by the words 'except as herein provided' in the forfeiture clause. But this is not so. The words 'except as herein provided' imply, of course, that in some instances a total forfeiture does not follow the failure to pay a premium when due. And such is the case. The policy elsewhere provides that, after premiums have been paid for the period of three years, the insured within 30 days after default in the payment of a subsequent premium may avail himself of certain options. This is manifestly the exception referred to in the forfeiture clause. The words 'except as herein provided' were inserted in that clause to harmonize it with

the exception noted. The policy in the case at bar not having been in force for three years, the forfeiture clause should be read, so far as plaintiff is concerned, just as if the words "except as herein provided" had been omitted therefrom. They have no relation whatever to the provision of the policy authorizing the company to deduct from the face thereof an unpaid premium, the time for payment of which has been extended."

Appellant's construction of the contract means that the company engaged to conduct its business on credit, looking to itself alone for the payment of annual premiums from the insured by deducting them from the policy in case of death. A company conducting a life insurance business upon such a basis could not long survive. As was said in *Imperial Fire Insurance Co. v. Coos County*, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231: "All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for nonpayment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion. \* \* \* Delinquency cannot be tolerated nor redeemed except at the option of the company. This has always been the understanding and the practice in this department of business. \* \* \* Nonpayment at the day involves absolute forfeiture, if such be the terms of the contract, as is the case here." To give to the exception the construction contended for by appellant would in effect abrogate all the conditions designed to compel prompt payment, one of which is expressly made a consideration for the continuance of the risk. Of course we are not to make contracts for parties, but, on the contrary, must enforce them however improvidently made. And in insurance contracts we must, as we have seen, resolve doubtful and ambiguous clauses in favor of the insured. We do not think, however, that there can be any doubt as to what part of the policy the exception in question was intended to apply. It would, we think, be unreasonable and without warrant, by the terms of the contract, to hold that the exception applied to unpaid premiums, thus destroying one of the foundation stones on which life insurance is based. Appellant's construction, if adopted, would be notice to all policy holders that they incur no risk by defaulting in the payment of any annual premium for the period of one year. We cannot accept this view of the policy.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

20 Cal. App. 11

CALIFORNIA TITLE INS. & TRUST CO.  
v. KUCHENBEISER et al.  
(Civ. 1,028.)

(District Court of Appeal, First District, California. Sept. 27, 1912. On Denial of Rehearing, Oct. 24, 1912. Denied by Supreme Court Nov. 26, 1912.)

1. MORTGAGES (§ 249\*)—DISCHARGE—PAYMENTS TO MORTGAGEE.

Payments made to the mortgagee after an assignment of the mortgage has been recorded do not discharge the liability unless the mortgagee was the authorized agent of the assignee for collecting the money, or was in possession of the note and mortgage at the time of the payments.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 667-677; Dec. Dig. § 249.\*]

2. MORTGAGES (§ 319\*)—FORECLOSURE—EVIDENCE.

Evidence, in an assignee's action to foreclose a mortgage, held to sustain a finding that the mortgagee was the assignee's agent to collect certain sums which were paid him in satisfaction of the mortgage debt.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 855-863, 875, 913; Dec. Dig. § 319.\*]

3. EVIDENCE (§ 587\*)—SUFFICIENCY—DIRECT AND CIRCUMSTANTIAL.

A fact in issue may, under Code Civ. Proc. § 1870, be proved either by direct or circumstantial evidence, or by facts from which the fact in issue may be inferred.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2436; Dec. Dig. § 587.\*]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by the California Title Insurance & Trust Company, as trustee, against Frederick Kuchenbeiser and others. From a judgment for defendants, plaintiff appeals. Affirmed and rehearing denied.

Olney, Pringle & Mannon, of San Francisco, for appellant. P. R. Lund, of San Francisco, and V. A. Scheller, of San Jose, for respondents.

KERRIGAN, J. This is an action brought to foreclose a mortgage which was given to secure the payment of a promissory note. The appeal is from the judgment in favor of the defendants taken within 60 days after the entry of the same.

[1] Without any actual notice of the assignment of the note and mortgage, the defendants (the mortgagors) paid the Pacific Coast Savings Society (the mortgagee) the amount due on the note. With the exception of a small payment not questioned, all the payments on account of the note and mortgage were made after the assignment thereof to the plaintiff was recorded. It must therefore be held that the defendants had constructive notice of the assignment, and that, unless the mortgagee was the authorized agent of the assignee for the collection of the money due on the note, payment to the mortgagee would not discharge the liability on the note unless it also appeared from the record that the mortgagee was in possession



of the note and mortgage at the time the payments were made. Civ. Code, § 2935; *Rodgers v. Peckham*, 120 Cal. 238, 52 Pac. 483.

[2] To save the case from the application of the doctrine of the case just cited, the defendants took the position in the trial court that the mortgagee had been constituted the agent of the plaintiff, and as such agent received the payments made by the mortgagor, and the court so found. The only point urged by the plaintiff for a reversal of the judgment is that this finding of the lower court is not supported by the evidence. With this contention we cannot agree.

[3] A fact in issue may be proved either by direct evidence of the fact, or by proof of other facts or circumstances from which the fact in issue may be inferred. Code Civ. Proc. § 1870. In the present case there was evidence that a certain deed of trust, under which the assignment in question was made and to which it referred in terms, contained a provision that the plaintiff should give a power of attorney to the Pacific Coast Savings Society (the mortgagee) to collect moneys due it, including this note; that said mortgagee did, as a matter of fact, collect such moneys; that the plaintiff never attempted itself to collect the amounts due on the note in suit, and never notified the defendant (mortgagor) of the assignment to it of the note and mortgage—which, of course, it was unnecessary for it to do if it had constituted the mortgagee its agent for collecting money due on the note—and finally that a similar mortgage made by the defendant to the same mortgagee, and assigned by it to the plaintiff, was released by said plaintiff upon payment thereof being made to the Pacific Coast Savings Society (mortgagee).

We think this evidence ample to sustain the finding of the court that the Pacific Coast Savings Society was the authorized agent of the plaintiff to collect the sums due on said note.

The judgment is affirmed.

We concur: LENNON, P. J.; HALL, J.

#### On Denial of Rehearing.

KERRIGAN, J. On petition for a rehearing by plaintiff and appellant, it is urgently insisted that the items of evidence set out in the opinion of this court filed herein are not legally sufficient to sustain the finding of the trial court that the Pacific Coast Savings Society was the duly appointed agent of the plaintiff to collect the sums due on the note and mortgage sued upon. Upon the hearing of this case in this court no argument, either oral or written, was made by the respondents' attorneys, nor have they filed any in reply to the petition for a rehearing, so that, in a case of apparently much importance to

the respondents, we have been furnished no assistance by their counsel. However, we have re-examined the record, and adhere to the views expressed in our opinion affirming the judgment.

We are satisfied that there is sufficient competent evidence in the record, or evidence received without objection, to warrant the conclusion that the Pacific Coast Savings Society was the duly appointed agent of the plaintiff to collect the sums of money here sought to be recovered. The very deed of trust, by the terms of which the assignment of the mortgage was made to plaintiff, provided that said plaintiff should execute a power of attorney to said society for that purpose, which power was only to be revoked in certain contingencies. The course of conduct of the plaintiff throughout is entirely consistent with this having been done, and is utterly inconsistent with its not having been done. The evidence shows that for many years the plaintiff permitted payments, which by the terms of the note and mortgage were to be made monthly, to be so made to the said society. It further shows that it recognized as valid and effectual payments made by one of the same defendants to the same society upon another mortgage, executed by him, and assigned to the plaintiff by the very same instrument and covered by the same deed of trust forming the basis of the plaintiff's rights here—a mortgage in exactly the same position with regard to the rights of the parties as the one now in suit.

While no single item of the evidence received would be sufficient to prove the agency of the society, yet a consideration of the entire evidence in the case irresistibly forces the mind to the conclusion that the obligation of the plaintiff to appoint said society as its agent for the collection of the sums due under this note and mortgage, had in fact been performed.

The petition for a rehearing is denied.

We concur: LENNON, P. J.; HALL, J.

20 Cal. App. 15

#### CITY OF WOODLAND v. LEECH et al. (Civ. 911.)

(District Court of Appeal, Third District, California. Sept. 28, 1912. Rehearing Denied by Supreme Court Nov. 27, 1912.)

#### 1. MUNICIPAL CORPORATIONS (§ 173\*)—CITY MARSHAL—LIABILITY FOR LICENSE TAX COLLECTED—STATUTORY PROVISIONS.

Municipal Corporation Act (St. 1883, p. 261) § 790, providing that the city marshal shall receive all license taxes and collect the same, and section 751, as amended in 1901 (St. 1901, p. 70), authorizing the board of trustees by ordinance to make the city treasurer the license tax collector, must be read together, and, when so read, the marshal may collect the license taxes unless the board has by ordinance made the city treasurer the license tax collector, and, when that has been done, license

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

taxes collected by the marshal are not collected within the duties of his office, and the sureties on his official bond are not liable therefor.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 399–409; Dec. Dig. § 173.\*]

## 2. MUNICIPAL CORPORATIONS (§ 57\*)—POWERS.

A municipal corporation may exercise only the powers granted in express words, those necessarily or fairly implied in or incident to the powers expressly granted, and those essential to the declared objects of the corporation, but not simply convenient but indispensable.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 144, 148; Dec. Dig. § 57.\*]

## 3. CONSTITUTIONAL LAW (§ 63\*)—DELEGATION OF LEGISLATIVE POWER.

The Legislature may, as is done by *Municipal Corporation Act* (St. 1883, p. 250) § 751, as amended in 1901 (St. 1901, p. 70), confer on the board of trustees of municipalities the power to designate in their discretion the city treasurer as the collector of license taxes; the grant of power being general, within Const. art. 2, § 6, requiring the Legislature by general laws to provide for the incorporation and classification of municipalities.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 108–114; Dec. Dig. § 63.\*]

Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by the City of Woodland against S. A. Leech and others. From a judgment for defendants, plaintiff appeals. Affirmed.

G. E. Whitney, of Woodland (Chas. W. Thomas, of Woodland, of counsel), for appellant. Arthur C. Huston and Harry L. Huston, both of Woodland, for respondents.

**BURNETT, J.** The appeal is from the judgment on the judgment roll. The defendant Leech was not served and did not appear at the trial. He was elected marshal of the city of Woodland, a municipal corporation of the fifth class, and the respondents signed his official bond containing the following condition: "Now, therefore, the condition of this obligation is such that, if the said S. A. Leech shall well and faithfully perform all official duties now required of him by law, and shall well and faithfully execute and perform all the duties of marshal and ex officio superintendent of streets required by any law to be enacted subsequently to the execution of this bond, then this obligation is to be void and of no effect, otherwise to remain in full force and virtue." The action grew out of the fact that said Leech, while acting as marshal, collected quite a sum of money, representing a license tax, and appropriated the same to his own use. The court found that the money collected by him was not by virtue of his office as marshal or ex officio superintendent of streets, and that as such marshal he was not authorized or employed to collect any license in the city of Woodland; nor was it the duty or right of said Leech to collect such licenses, but that, by virtue of an ordinance duly passed by the board of trustees

of said city, it was the duty of the city treasurer to collect all licenses in the city of Woodland. The sureties were therefore exonerated from liability, since their obligation contemplated and embraced only the faithful discharge of official duty on the part of their principal.

It is not disputed—indeed, it is conceded—that the sureties have a right to stand upon the strict letter of their bond, and that the only question involved in the case is whether, under the law, it was the duty of the marshal to collect said license tax. This is to be determined by the construction of sections 751 and 790 of the municipal corporation bill (St. 1883, pp. 250, 261). The former, as amended in 1901 (St. 1901, p. 70), after designating the officers in whom the government of a city of the fifth class shall be vested, contains this provision: "Provided, that the board of trustees may, in its discretion, by an ordinance adopted, published and recorded as required for general ordinances, at least thirty days before a general city election, at which city officers are to be elected, unite and consolidate certain offices by declaring: \* \* \*

(3) The city treasurer elected shall be ex officio city tax collector and license tax collector." Said section 790, in prescribing the duties of the city marshal, provides that "he shall receive from the clerk all city licenses and collect the same." It is not disputed that said section 751 is a later enactment than section 790.

[1] Reading these two sections together, we think no reasonable doubt can exist that, after providing that the marshal should collect these license taxes, the Legislature concluded to authorize the board of trustees in their discretion to relieve the marshal of this duty and impose it upon the city treasurer. This view is immediately suggested by the most casual consideration of the terms employed. We would have no more significant or definite expression of the legislative intention if, in one section, it were enacted that "the marshal shall receive from the clerk all city licenses and collect the same, provided that the board of trustees may, in its discretion, by ordinance empower and direct the city treasurer to collect said licenses." If the two sections were so combined, the learned counsel for appellant would probably not deem it worth while to argue as to what the Legislature intended. It is true that, by said section 751, it is not provided in amplified form that the city trustees may authorize the city treasurer to collect the license tax, but this duty is necessarily implied in the term "license tax collector." When the Legislature empowered the city trustees to make the city treasurer ex officio license tax collector, it could mean nothing else than that they might constitute him "collector of the license tax." Manifestly certain public functions could not be so sentimentously designated, but in the case at bar the public duty is clearly

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and unequivocally set forth by the simple phraseology employed. Appellant suggests some examples wherein more elaboration would be required to make the grant of power specific and certain. The creation of an office, the incumbent being called "health officer," with no duties assigned, would probably not operate to relieve the marshal of his duties imposed by the statute appertaining to the public health. A similar situation would be presented in case of the designation "peace officer," or "police officer," or "executioner." These terms are too vague and indefinite to express any clear legislative intent as to the respective public duties to be performed. But we do not consider such instances analogous to this. The Legislature having authorized the city trustees to impose the duty of collecting these taxes upon the city treasurer, they are necessarily clothed with power to pass such subsidiary acts or ordinances as are incidental and necessary to the exercise of this duty by said treasurer.

[2] No one disputes the rule to be as stated by Mr. Dillon (1 Dillon on Municipal Corporations [4th Ed.] § 89) that: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: (1) Those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable." It follows that we must give effect to the presumption that whatever ordinance was necessary to carry said section 751 into operation was adopted by said city trustees.

[3] We find nothing in the Constitution to preclude the Legislature from delegating this authority to the board of trustees. The condition simply amounts to a grant of power, to be exercised in the discretion of the trustees, to relieve one municipal officer of a ministerial executive duty and transfer it to another. Even if it be regarded as a legislative attempt to confer authority upon the local lawmaking body to create the office of city tax collector, it does not seem to be obnoxious to any constitutional provision. It is manifestly not the case where by ordinance the city trustees attempt to repeal or nullify a statute or to deprive any official of authority conferred by the Legislature, but it presents the instance, as already seen, of the exercise of power expressly delegated by legislative enactment.

It is not, of course, necessary for the Legislature to prescribe the duties of all city officers. This power may be conferred upon the city, and it is certainly competent for the Legislature to authorize the city to make changes in the duties of the various officers when it is deemed for the best interests of the community to do so. The constitutional limitation is prescribed in article 2, § 6,

which provides that: "Corporations for municipal purposes shall not be created by special laws; but the Legislature, by general laws, shall provide for the incorporation, organization and classification, in proportion to population, of cities and towns, which laws may be altered, amended or repealed." It is not disputed that the grant of power in controversy is general in its nature within the contemplation of said constitutional provision, and, conceding that we have an instance of the creation of a municipal office, no reason is apparent why we may not accept, as an accurate statement of the governing principle in the case, the following from 28 Cyc. p. 400: "Municipal offices can only be created by legislation. This creative act may be either immediate when done by the General Assembly in which rests all inherent creative power for corporations, or delegated when the corporation is expressly empowered by charter or general law to create the office for itself. Creation by the municipality can only be effected by means of ordinance or by law. Offices may be created not only by express and positive act of legislation, but also by implication, as where an office is referred to as existing and the duties of the officers are prescribed, but the implication must be plain and certain."

In this connection the case of *DeMerritt v. Weldon*, 154 Cal. 545, 98 Pac. 537, 671, 16 Ann. Cas. 955, is somewhat instructive, although the facts there were different. The question involved was the authority of the city trustees to fix the salary of the marshal according to the following provision in section 855 of the municipal corporation bill: "The clerk, treasurer, marshal, and recorder shall severally receive, at stated times, a compensation, to be fixed by ordinance by the board of trustees, which compensation shall not be increased or diminished after their election or during their several terms of office." It was held that the power was clearly granted to the board of trustees to fix the compensation of the marshal "at any sum it deems proper, free from supervision or review on the part of the courts, subject to the limitation that it may not effectually provide that there shall be no compensation at all, nor practically destroy the office by fixing the compensation at so low a figure that no one would discharge the duties of the office for the compensation fixed. Such a provision by the trustees would conflict with the act of the Legislature and therefore would be void."

Instead of fixing his compensation, the trustees in the case at bar, authorized as they were by said section 751, relieved the marshal of a certain duty which otherwise, under said section 790, he would be required to perform. The effect is not to destroy the office of marshal or to contravene any general law, but the legislation is in furtherance of the general scheme to clothe the local governing body with a large measure of authori-

ty in the determination of the extent and character of the duties to be exercised by their subordinate executive officers. The rule, it may be said as to county officers, is different, and this explains many of the cases cited by appellant, as is indicated by the following quotation from *People v. Wheeler*, 136 Cal. 655, 69 Pac. 435: "For, with relation to county offices, it is the constitutional duty of the Legislature not only to provide for the election of the officers, but also to fix their terms of office, to prescribe their duties, and to regulate their salaries or compensation; and this duty could not be delegated to the board of supervisors or others. Const. art. 2, § 5; *Ventura v. Clay*, 112 Cal. 70 [44 Pac. 488]; *County of Eldorado v. Meiss*, 100 Cal. 274 [34 Pac. 716]; *Farrell v. Board of Trustees*, 85 Cal. 415 [24 Pac. 868]; *County of Los Angeles v. Lopez*, 104 Cal. 258 [38 Pac. 42]; *People v. Johnson*, 95 Cal. 471 [31 Pac. 611]; *Dougherty v. Austin*, 94 Cal. 601 [28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161]; *Dwyer v. Parker*, 115 Cal. 544 [47 Pac. 372]."

We think effect should be given to the intention of the Legislature as declared, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(19 Cal. App. 793)

WILSON et al. v. LEO. (Civ. 1,137.)

(District Court of Appeal, Second District, California. Sept. 25, 1912. Rehearing Denied by Supreme Court Nov. 23, 1912.)

### 1. PROCESS (§ 96\*)—PUBLICATION — SUFFICIENCY OF AFFIDAVIT.

Between the time of the filing of the complaint in October, 1908, and the filing of an affidavit for summons by publication in August, 1911, plaintiff sent two persons, at different times, to where he was informed defendant resided, in order to obtain service, and each person stated that they found the gates of the premises locked, with warnings thereon against vicious dogs, and that a gardener said that defendant was not there, and he did not know when she would be, though once a woman answering defendant's description came out upon the porch, but it was impossible to speak with her because of the dogs, in view of which facts the affidavit averred that defendant could not be found within the state, after diligent search made to find her. *Held*, that the affidavit was insufficient to support an order for service by publication.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 108-120; Dec. Dig. § 96.\*]

### 2. DISMISSAL AND NONSUIT (§ 57\*)—SERVICE.

Plaintiff could resist a motion to dismiss, made for want of service of summons, by showing that defendant was absent from the state, or concealed herself to avoid service.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 129-133; Dec. Dig. § 57.\*]

### 3. APPEAL AND ERROR (§ 1011\*)—CONCLUSIVENESS OF FINDINGS.

Whether defendant was absent from the state, or concealed herself to avoid service, is an issue of fact for the trial court; and

its conclusion will not be disturbed where the evidence thereon substantially conflicts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by C. N. Wilson and another against Martha Herbst Leo. From a judgment of dismissal and an order quashing service of summons, plaintiffs appeal. Affirmed.

W. J. Wood, Charles Lantz, and Davis, Lantz & Wood, all of Los Angeles, for appellants. George H. Kelch, of Los Angeles, for respondent.

SHAW, J. The complaint herein was filed and summons issued on October 31, 1908. On August 22, 1911, plaintiff Lantz filed and presented his affidavit, upon which, in accordance with his prayer, the court made an order directing that service of summons be made by the publication thereof. Affidavit of publication was made and filed October 31, 1911. Thereafter, and more than three years after the filing of the complaint, defendant moved to quash the service of summons so made by publication and dismiss the action; the ground therefor, among others, being the insufficiency of the affidavit upon which the order of publication was made, and that more than three years had elapsed since the filing of the complaint without due return of service of summons. This motion was granted; judgment of dismissal following. Plaintiffs appeal from the orders and the judgment of dismissal.

As appears from the affidavit filed on August 22, 1911, which was nearly three years after the filing of the complaint, the right to the order for service by publication was based upon the ground that, after diligent search to find her, defendant could not be found in the state, and that she concealed herself to avoid the service. Section 412, Code of Civil Procedure, provides that, "where the person on whom service is to be made \* \* \* cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, \* \* \* and the fact appears by affidavit to the satisfaction of the court, or a judge thereof, \* \* \* such court or judge may make an order that the service be made by the publication of the summons." In *Rue v. Quinn*, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732, it is said: "In making the order for the service by publication, the judge acts judicially upon the evidence which the Code requires to be presented to him for that purpose, and can act upon no other evidence than such as is prescribed by the Code." And this evidence, according to the provisions of the Code, must be presented in the form of an affidavit, stating the fact upon which the court bases its conclusion that the party cannot be found, or conceals himself. The order recites that "up-



on reading and filing the affidavit of Charles Lantz, and it satisfactorily appearing therefrom to me that the defendant, Martha Herbst Leo, cannot, after due diligence, be found within the state," etc. It thus appears that at the time of making the order the court was satisfied of the existence of the fact that the defendant could not be found in the state. The question, therefore, presented is whether or not the matters stated in the affidavit were sufficient to establish the fact that defendant could not be found in the state.

[1] The affidavit shows that between the time of the filing of the complaint in October, 1908, and the date of the filing of the affidavit in August, 1911, plaintiffs sent "two persons, at different times," to the place where affiant was informed defendant resided in the county of Los Angeles, for the purpose of obtaining service upon defendant; that each of said persons returned the papers to affiant "with the information that they found the gates of said premises locked, and with signs thereon warning persons from entering the said premises on account of vicious dogs confined therein"; that these persons so attempting to make service of the papers were informed by a gardener upon the said premises that said defendant was not there, and that he did not know when she would be, "though at one of said times a woman answering the description of Mrs. Leo came out of the house located upon said premises, upon the front porch thereof, but that it was impossible for either of said process servers to reach the said house, or to speak with said woman, on account of said guard and of the said vicious dogs. Affiant therefore avers that the said defendant, Martha Herbst Leo, cannot be found within the state of California, after diligent search made to find her therein." This affidavit, in our judgment, was clearly insufficient to justify the making of the order for service by publication. No effort was made to obtain service through the sheriff of the county, whose official duty it is to serve process; nor is it made to appear that the two persons directed to make the service were in any manner qualified to serve papers. Moreover, the statements as to the efforts made by these two persons to serve the summons are based entirely upon the information obtained from them. "This statement is but hearsay, and may be wholly untrue, in fact, without any impeachment of the truthfulness of the affiant." See *Kahn v. Matthai*, 115 Cal. 689, 47 Pac. 698, where it is further said: "Where service of process upon a defendant within the county is attempted to be made by a person other than the sheriff, his affidavit should, as a rule, be required, showing the nature of the effort made to serve the party." Not only measuring the right to the order by the statute, but upon the authority of the case just cited,

we are constrained to hold that the order was inadvertently and improperly made. Since this is true, it must necessarily follow that there was no abuse of discretion on the part of the court in making the order quashing service of summons.

[2, 3] Section 581a, Code of Civil Procedure, imposes upon the court the duty of dismissing an action, "unless the summons shall be served and return thereon made within three years after the commencement of said action." When the motion was made to quash the service and dismiss the action, more than three years had elapsed since the filing of the complaint, and by reason of the order quashing the service of summons there had been no service of summons, nor return thereon; hence defendant was clearly entitled to an order of dismissal, unless as provided for in the exception contained in said section 581a, the failure to serve summons on her was due to the fact that she had secreted herself within the state to prevent the service of summons, or was absent therefrom. While the order of publication, as shown by the recital therein, was based upon the fact, satisfactorily appearing to the court from the affidavit, that defendant could not, after due diligence, be found in this state, and not that she concealed herself to prevent service, we are, nevertheless, of the opinion that the plaintiffs might successfully resist a motion to dismiss, made for want of service of summons, by showing that defendant was absent from the state, or concealed herself to avoid service. This, however, like any other fact in issue, is for the trial court to determine upon the evidence introduced; and where there is a substantial conflict in the evidence touching the issue the conclusion of the trial court will not be disturbed. Conceding that at the hearing affidavits were presented to the court, on behalf of plaintiffs, tending to show that defendant did conceal herself within the state to prevent the service of summons, on the other hand, counter affidavits were filed presenting evidence which strongly tended to prove the contrary. The court having by its order of dismissal determined the issue against plaintiffs, such determination must be deemed conclusive thereon.

For the reasons given, the judgment and orders appealed from are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

20 Cal. App. 1

BRADLEY BROS., Inc., v. BRADLEY.  
(Civ. 1,029.)

(District Court of Appeal, First District, California, Sept. 26, 1912. Rehearing Denied by Supreme Court Nov. 25, 1912.)

1. LIMITATION OF ACTIONS (§ 39\*)—ENFORCEMENT OF TRUST—LIMITATION PERIOD.

A cause of action for establishment of an involuntary trust is barred on the expiration

of four years from the inception of the trust, under Code Civ. Proc. § 343, providing that an action not otherwise provided for must be commenced within four years after the cause of action shall have accrued.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 172, 190-211; Dec. Dig. § 39.\*]

**2. LIMITATION OF ACTIONS (§§ 39, 103\*)—RESULTING TRUST—REPUDIATION—LIMITATION PERIOD.**

Where the entire action is brought to enforce a trust, a cause thereof resting upon the repudiation of a resulting trust is barred upon the expiration of four years under Code Civ. Proc. § 343; the statute commencing to run at the time of notice of repudiation to the beneficiary.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 172, 190-211, 500, 506-510; Dec. Dig. §§ 39, 103.\*]

**3. LIMITATION OF ACTIONS (§ 19\*)—"ACTION FOR RECOVERY OF REAL PROPERTY."**

An action to establish trusts in land, which would, as a matter of law, entitle the plaintiff to be placed in possession, was, in part at least, an "action for the recovery of real property," and its possession, within Code Civ. Proc. § 318, providing that no action for the recovery of real property or the possession thereof can be maintained, unless the plaintiff, his ancestor, predecessor, or grantor, was possessed of the property within five years.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 73-85; Dec. Dig. § 19.\*]

For other definitions, see Words and Phrases, vol. 1, p. 144.]

**4. LIMITATION OF ACTIONS (§ 44\*)—RECOVERY OF REAL PROPERTY — COMMENCEMENT OF PERIOD.**

The five-year limitation prescribed by Code Civ. Proc. § 318, commenced to run against a cause of action to establish an involuntary trust in land, and to secure possession, only from the time plaintiff lost possession, and not from the time of a repudiation of the trust.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 220-232; Dec. Dig. § 44.\*]

**5. APPEAL AND ERROR (§ 704\*)—RECORD—DECISION.**

The general rule that, where the record does not show the evidence, the court's findings of fact and conclusions of law, based on such findings, are conclusive, did not apply to an action which was erroneously determined upon the application of a statute of limitations which in no view of the case had any possible bearing on the issues raised by the pleadings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2900, 2939-2941; Dec. Dig. § 704.\*]

**6. APPEAL AND ERROR (§ 1169\*)—FINDINGS—DECISION.**

A judgment, based upon a conclusion of law which in turn rests upon a single finding of fact which is obviously foreign to the issues raised by the pleadings, will not be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4531-4539; Dec. Dig. § 1169.\*]

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Bradley Bros., Incorporated, against Giles Bradley. From a judgment for defendant, plaintiff appeals. Reversed.

Hillyer, Stringham & O'Brien, of San Francisco, for appellant. John T. Thornton and Leo C. Lennon, both of San Francisco, for respondent.

**LENNON, P. J.** The plaintiff in this action sets up in three counts three distinct causes of action, all of which relate to and affect the title and the possession of several separate pieces of real estate situate in the county of Santa Clara.

Plaintiff alleges in its complaint that within five years preceding the commencement of the action it had the seisin and was in the possession of the several pieces of property in controversy. The complaint is not entirely free from ambiguity as to whether the plaintiff or the defendant was in the actual possession of the property at the precise time of the commencement of the action. No demurrer, however, was interposed upon this ground, and the complaint, when read and construed in conjunction with the prayer, warrants the inference that it was the purpose of the pleader to allege that, although the plaintiff had been in possession of the property at some time within five years of the commencement of the action, the defendant held the actual possession at the time of such commencement.

Each of the plaintiff's causes of action was founded upon the theory that the defendant holds the legal title to the property in dispute as trustee, in trust for the plaintiff, by virtue of involuntary and resulting trusts. The prayer of the complaint, in effect, was, among other things, that the defendant be declared to be the trustee for the plaintiff as to all of the property described in the complaint, and that the legal title thereto and the possession thereof be conveyed and restored to the plaintiff. At the trial of the case the third cause of action attempted to be set up in plaintiff's complaint was abandoned, thus leaving for the consideration of the trial court only the question of the defendant's trust relation to the two pieces of property involved and described in the first and second counts of plaintiff's complaint.

The action was commenced November 12, 1908; and it was alleged that the trust pleaded in the first cause of action was violated by defendant on December 26, 1903. The trust pleaded in the second cause of action was alleged to have been repudiated by the defendant within five years of the commencement of the action. The defendant, by his answer, denied all of the material allegations of the complaint, and, in addition to admitting a repudiation of the alleged trusts in the manner and at the time pleaded by the plaintiff, interposed as a defense to the action the statute of limitations as embodied in sections 343 and 318 of the Code of Civil Procedure.

The facts alleged in the first cause of ac-



tion were substantially as follows: Richard Bradley, plaintiff's grantor and predecessor in interest, purchased and paid for the land described in the first cause of action; but at his request the deed to said land was made out and recorded in the name of one Joseph L. Taafe by the vendor, Green. The property was conveyed to Taafe on December 15, 1898. The legal title thereto remained in and was held by Taafe up to December 26, 1903, when he, without the consent of plaintiff's grantor, Richard Bradley, conveyed the property by deed of this date to the defendant, Giles Bradley.

Assuming the allegations of the complaint to be true, the legal title was, in the first instance, undoubtedly in Taafe as a resulting trustee for the plaintiff's grantor, Richard Bradley; and the conveyance from Taafe to the defendant, Giles Bradley, merely transferred the outstanding legal title to the defendant as an involuntary trustee of Richard Bradley or his successors in interest.

It appears from the allegations of the second cause of action that one Robert J. Butler and wife were the owners of the parcel of land therein described; and that Richard Bradley, plaintiff's grantor, purchased said land from the Butlers and paid the price therefor. He requested that the deed therefor be made, executed, and recorded in the name of the defendant, Giles Bradley. This request was complied with, and subsequently and within five years, but more than four years preceding the commencement of the action, the defendant expressly repudiated the resulting trust thereby created.

It will thus be seen that the purpose of the action in part was to procure a decree declaring that the defendant held the legal title to the property in dispute in trust for the plaintiff under an involuntary trust in the first instance, and by virtue of a voluntary resulting trust in the second instance.

The case was tried without a jury, and judgment rendered and entered for the defendant upon the single finding of the ultimate fact that both causes of action finally relied upon by the plaintiff were barred solely by the provisions of section 343 of the Code of Civil Procedure. The appeal is from the judgment, and the case comes here upon the judgment roll alone.

The only point presented upon the record before us involves the correctness of the trial court's finding that plaintiff's causes of action were barred by the provisions of section 343, rather than by the provisions of section 318, Code of Civil Procedure.

In the absence of full findings upon all of the material issues raised by the pleadings, the judgment must stand or fall with the trial court's finding of fact that the plaintiff's causes of action were barred solely by the provisions of section 343, Code of Civil Procedure.

It is plaintiff's contention that the paramount purpose of the action is the recovery

of real property and the possession thereof; and that therefore the limitation provided by section 318 of the Code of Civil Procedure is the only limitation of time which could be successfully invoked to bar and defeat plaintiff's cause. On the other hand, counsel for defendant insist that the sole purpose of the action was to establish, in the first instance, a constructive trust, and, in the second instance, a resulting trust, both of which were barred by the provisions of section 343 of the Code of Civil Procedure, which declares that "an action for relief not heretofore provided for must be commenced within four years after the cause of action shall have accrued."

[1] If the present action, in its entirety, could be considered as one instituted solely for the enforcement of the trusts specified therein, it is certain that plaintiff's first cause of action, which is founded upon the allegation of the creation of an involuntary trust, would be barred upon the expiration of four years from the inception of the trust. In other words, the four-year limitation prescribed by section 343, Code of Civil Procedure, would commence to operate against plaintiff's first cause of action immediately upon the execution of the conveyance alleged to have been made, in the first instance, from Taafe to the defendant.

[2] The same limitation of time would commence to run against plaintiff's second cause of action from the time of the repudiation by the defendant of the resulting trust therein alleged, or rather from the time the notice of repudiation was brought home to the beneficiary. *Hecht v. Slaney*, 72 Cal. 363, 14 Pac. 88; *Nougues v. Newlands*, 118 Cal. 102, 50 Pac. 386; *Norton v. Bassett*, 154 Cal. 411, 97 Pac. 894, 129 Am. St. Rep. 162; *Barker v. Hurley*, 132 Cal. 21, 63 Pac. 1071, 64 Pac. 480; *Butler v. Hyland*, 89 Cal. 575, 26 Pac. 1108; *Luco v. De Toro*, 91 Cal. 405, 18 Pac. 866, 27 Pac. 1082; *Odell v. Moss*, 130 Cal. 352, 62 Pac. 555.

[3] Plaintiff insists, however, that the finding and enforcement of the specified trusts were not the only purposes of the action, but that it had for its purpose as well the conveyance of the property and the restoration of its possession to the plaintiff. From this it is argued that the action, in its entirety, must be considered and disposed of as one for the recovery of real property, and for the recovery of the possession thereof, within the meaning of section 318, Code of Civil Procedure.

In support of this contention the plaintiff relies mainly, if not entirely, upon the rule declared in the case of *Murphy v. Crowley*, 140 Cal. 141, 73 Pac. 820, where it was said, in effect, that the nature and purpose of a civil action must be determined largely from the allegations of the plaintiff's complaint, and in a measure by the character of the relief sought and necessarily incident to the

purpose and final determination of the action.

The primary purpose of the action in the case of *Murphy v. Crowley* was to set aside a conveyance of a tract of land alleged to have been procured by fraud and undue influence, and to enforce an alleged trust as to another tract. Incidentally the plaintiff there asked to have her title in one-half of each tract quieted, and at the same time sought to recover the possession thereof as against the defendants, who were alleged to be in adverse possession.

Although the gist of that action was the alleged fraud or mistake whereby the defendants obtained the legal title to the land in controversy, it was nevertheless held that, inasmuch as the complaint alleged facts which, as a matter of law, entitled the plaintiff to the possession of the property, the action was in reality one for the recovery of real property.

The purpose of the present action was, in effect, first, to determine who was the real owner of the property in dispute, and then to compel a conveyance of the legal title and the restoration of the possession thereof to the rightful owner. In other words, the pleaded facts of the present case showed that the plaintiff, upon the establishment of the trusts alleged, would, as a matter of law, be entitled to a decree placing it in possession of the property in controversy. *Payne & Dewey v. Treadwell*, 16 Cal. 220, 243; *Garwood v. Hastings*, 38 Cal. 216; *Goodnow v. Parker*, 112 Cal. 437, 44 Pac. 738; *Haggin v. Kelly*, 136 Cal. 481, 69 Pac. 140; *Daniels v. Dean*, 2 Cal. App. 421, 84 Pac. 332.

[4] This being so, and applying the rule announced in *Murphy v. Crowley*, there is no escape from the conclusion that the present action must be considered and treated as an action, in part at least, for the recovery of real property and the possession thereof, within the meaning of section 318, Code of Civil Procedure. Accordingly, the five-year period prescribed by that section is the only limitation of time which can be properly invoked and applied in bar of the plaintiff's causes of action; and that limitation would commence to operate only from the time when the plaintiff lost the seisin or the possession of the property in suit, rather than from the time of the alleged repudiation of the trusts involved. *Goodnow v. Parker*, 112 Cal. 437, 443, 44 Pac. 738; *Murphy v. Crowley*, supra; *Daniels v. Dean*, supra; *Union Ice Co. v. Doyle*, 6 Cal. App. 284, 92 Pac. 112; *Unkel v. Robinson* (Sup.) 126 Pac. 485.

[5] In the case of *Murphy v. Crowley* the question of the applicability of the statute of limitations arose, and was decided upon an appeal from a judgment rendered upon an order sustaining a demurrer to the plaintiff's complaint; while the point presented for decision here comes to us upon an appeal from a judgment rendered after a trial was

had upon the issues raised by the pleadings. In the present case counsel for the plaintiff and the defendant have assumed that the correctness of the lower court's finding might be properly determined solely upon a consideration of the nature of the action as revealed by the plaintiff's complaint; and the point is not made that upon the record before us the question involved could not be considered at all. This, however, in our opinion, presents the only debatable question in the case. It is the rule generally that, in the absence of a bill of exceptions or a statement of the case showing the evidence adduced at the trial, the findings of fact as made by the lower court are conclusive upon appeal to this court; and if the conclusions of law deduced from the findings of fact necessarily follow as a matter of law the judgment founded thereon will not ordinarily be disturbed.

The rule, however, cannot be applied to the situation here. Ordinarily a material defect in the findings is fatal to the judgment; and clearly no judgment should be sustained upon the findings alone, where it affirmatively appears that no such findings could have been properly made in any possible view of the case.

[6] Presumably the action was tried within the issues raised by the pleadings; but, even if this were not so, we cannot conceive a plausible theory of the case, or a possible turn in the evidence, which would take the case out of the category of an action for the recovery of real property, as defined in *Murphy v. Crowley*. However that may be, it is certain that no judgment in any given case could be sustained if it was based upon a conclusion of law which in turn rested upon a single finding of fact which was obviously foreign to the issues raised by the pleadings. For instance, if the lower court in this case had found as a fact that the plaintiff's causes of action were barred by the provisions of section 346, Code of Civil Procedure, which limits the time within which an action may be commenced to redeem a mortgage, it could not be successfully contended that such a finding would support the judgment. The present situation, we take it, is no different from the supposed one.

It is apparent, even in the absence of a record showing the evidence, that the action was erroneously determined upon the application of a statute of limitations which in no view of the case had any possible bearing upon the issues raised by the pleadings; and, if this be so, then it must be held that neither the lower court's conclusion of law, nor the judgment based thereon, are supported by the single finding of fact that the action was barred by the provisions of section 343, Code of Civil Procedure.

The judgment appealed from is reversed.

We concur: KERRIGAN, J.; HALL, J.



20 Cal. App. 48

**PEOPLE v. VON PERHACS. (Cr. 408.)**

(District Court of Appeal, First District, California. Oct. 4, 1912.)

**1. RAPE (§ 52\*)—EVIDENCE—SUFFICIENCY.**

Evidence held to support a conviction of rape on a female child under 16 years of age.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-74, 76; Dec. Dig. § 52.\*]

**2. CRIMINAL LAW (§ 1160\*)—CREDIBILITY OF WITNESSES—WEIGHT OF EVIDENCE—NEW TRIAL.**

The weight of the evidence and the credibility of the witnesses are in the first instance for the jury; and, when a verdict has been rendered, such questions rest with the trial judge in passing on a motion for new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.\*]

**3. CRIMINAL LAW (§ 1160\*)—VERDICT—CONCLUSIVENESS.**

A conviction approved by the trial court will not be disturbed on appeal unless it obviously appears that the testimony on which the conviction was had is, when considered with the undisputed facts, so inherently improbable as to be impossible of belief.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.\*]

**4. CRIMINAL LAW (§ 941\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.**

A new trial on the ground of newly discovered evidence, which is merely cumulative, is properly denied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2328-2330; Dec. Dig. § 941.\*]

**5. CRIMINAL LAW (§ 939\*)—NEWLY DISCOVERED EVIDENCE—DILIGENCE.**

A new trial for newly discovered evidence is properly denied in the absence of a showing that with reasonable diligence the newly discovered testimony could not have been had at the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2318-2323; Dec. Dig. § 939.\*]

**6. CRIMINAL LAW (§ 942\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—IMPEACHING EVIDENCE.**

Newly discovered evidence, merely impeaching the testimony of a witness for the prosecution, is not ground for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2316, 2331, 2332; Dec. Dig. § 942.\*]

**7. CRIMINAL LAW (§ 776\*)—GOOD CHARACTER OF ACCUSED—INSTRUCTIONS.**

An instruction that evidence of good character is evidence on the question of guilt, to be considered with the other facts, that one object in presenting the evidence is to induce the jury to believe, from the improbability, that a person of good character should have committed the crime charged, but if the jury are satisfied, beyond a reasonable doubt, that accused is guilty, he must be convicted, notwithstanding the evidence of good character, properly submits the issue of good character by declaring that, if after weighing all the evidence, including that of good character, the jury believe accused guilty beyond a reasonable doubt, they must convict him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1838-1845; Dec. Dig. § 776.\*]

**8. CRIMINAL LAW (§ 785\*)—EVIDENCE—CREDIBILITY OF WITNESSES.**

On a trial for rape, an instruction in the language of Code Civ. Proc. § 1844, that the direct evidence of one witness, who is entitled to full credit, is sufficient proof of any fact that the provision attaches to the testimony of prosecutrix, and that, if the jury are satisfied, beyond reasonable doubt from her testimony, that accused raped her, he must be convicted, though no other witness has testified to the same effect, given in connection with a requested charge that the testimony of the prosecutrix should be viewed with great caution, merely states that, though the jury should be cautious in accepting the uncorroborated testimony of prosecutrix, nevertheless they are not required to acquit accused merely because her testimony is uncorroborated, and so construed the instruction is correct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1774, 1776-1781, 1889-1894; Dec. Dig. § 785.\*]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Lajos Von Perhacs was convicted of crime, and he appeals. Affirmed.

Philip C. Boardman and A. L. O'Grady, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., for the People.

**LENNON, P. J.** The defendant in this case was convicted of the crime of rape. The information charged the defendant with having committed an act of sexual intercourse with a female child who was at the time under the age of 16 years and not his wife. The defendant has appealed from the judgment and from an order denying him a new trial.

The insufficiency of the evidence to support the verdict, the alleged erroneous modification of certain requested instructions, and the refusal of the lower court to grant a new trial upon alleged newly discovered evidence are the only points urged for a reversal.

[1] It is earnestly insisted, upon behalf of the defendant, that the verdict of the jury is not supported by the evidence, because the testimony of the prosecuting witness, taken as a whole, was so highly improbable that it is unworthy of belief. The facts upon which the prosecution sought and secured a conviction are substantially as follows: At the age of 13 years the prosecutrix was placed by her father in the home of and under the care and control of the defendant. The defendant was the father of several minor children, two boys and a girl, all of whom resided with him. The prosecutrix remained in the defendant's home and under his control for a period of two years or thereabouts, during all of which time she was cared for and treated as a member of his family. When the prosecutrix first entered the home of the defendant, she slept in the parlor of his residence, but shortly thereafter she was assigned by the defendant's mother-in-law—who apparently was also a member of his family—

to a couch, which was located in the same room that the defendant and his wife occupied as a sleeping apartment. The prosecutrix was but 15 years of age at the time the defendant is alleged to have had intercourse with her. Her story, in effect, was that, shortly after she was received into the home of the defendant, he frequently fondled and caressed her. Sometimes this would occur when she was alone with the defendant, but oftentimes the defendant kissed and caressed her in the presence of his wife. Finally the defendant, on the 16th day of May, 1911, after he had retired with his wife for the night, and after the lights in the apartment had been extinguished, left his bed, went over to the prosecutrix, who had also retired, and sought her permission to share her bed. To this the prosecutrix objected and audibly protested. He pleaded, however, with her, and finally, upon the assurance of the defendant's wife that no harm was meant, she assented.

Without going into further details, the defendant on this occasion, notwithstanding the presence of his wife in an adjacent bed, eventually succeeded in accomplishing an act of sexual intercourse with the prosecutrix. Upon four succeeding nights the conduct of the defendant was repeated. Subsequently it developed that the prosecutrix was pregnant, and in course of time she gave birth to a child. Upon the trial the defendant and his wife both flatly contradicted the testimony of the prosecutrix at every point. In support of the claim that the evidence is insufficient to maintain the verdict, it is argued that it is inherently improbable that the defendant would attempt to perpetrate the offense charged against him in the presence of his wife, and that it is altogether inconceivable that the latter, who was the mother of a girl of about the same age as the prosecutrix, would acquiesce in and encourage its commission. While it must be conceded that there is much force in this contention, it is nevertheless not an argument directed against the weight of the evidence and the credibility of the prosecuting witness. Doubtless such an argument was addressed to the jury, and presumably it was by them given the consideration which it deserved.

[2] The weight of the evidence and the credibility of the witnesses are in the first instance peculiarly within the province of the jury when deliberating upon the guilt or innocence of a defendant; and, once their verdict has been rendered, the determination of such questions rests solely with the trial judge in passing upon a motion for a new trial.

[3] His conclusion as to the sufficiency of the evidence to support the verdict will not be disturbed by this court save in those rare cases where it obviously appears that the testimony upon which the conviction was had is in and of itself, or when considered in conjunction with the undisputed facts of the

case, so inherently improbable as to be impossible of belief, and therefore must be considered to be in effect no evidence at all. *Fowden v. Pacific Coast S. S. Co.*, 149 Cal. 151, 86 Pac. 178; *De Arellanes v. Arellanes*, 151 Cal. 443, 90 Pac. 1059; *Stout v. State*, 22 Tex. App. 339, 3 S. W. 231.

The story of the prosecutrix in the case at bar is so out of the ordinary, and so revolting in many of its details, as to be startling in the extreme; and, while we doubt very much that its counterpart is to be found in the annals of criminal jurisprudence, nevertheless we are not prepared to say that it is so inherently improbable as to be absolutely unworthy of credence. Standing alone, the story of the prosecutrix is difficult to believe; but it is not unbelievable merely because it portrays an exceptional depth of domestic depravity. To so hold would be, as was said in the case of *Stout v. State*, supra, "purely a speculative attempt to sound the depths of human depravity and to assign arbitrary rules beyond which desire and passion are to be held incapable of seducing or impelling human nature." But, apart from these considerations, the record reveals the fact that the defendant, during his incarceration in the county jail, practically confessed his guilt to a fellow prisoner. In that behalf the defendant was quoted as saying: "I am like any other man. I like a young chicken. I did very wrong, but I can't help it. I think I will get out of it." This testimony was strengthened rather than shaken by a vigorous and searching cross-examination. The witness who gave it left the stand unimpeached; and, although the defendant subsequently became a witness in his own behalf, he did not attempt to explain or deny the statements attributed to him, notwithstanding that they were tantamount to a confession of guilt and were certain to weigh heavily against him in the deliberations of the jury.

Under the rule above stated, we would be powerless to disturb the judgment, even if the verdict upon which it was founded had rested solely upon the uncorroborated testimony of the prosecutrix; and, when considered in connection with the defendant's undisputed admission of guilt, the credibility of the story told by the prosecutrix is taken out of the realm of speculation, and such testimony becomes more than sufficient to support the verdict and judgment. Many matters of evidence are adverted to in detail by counsel for the defendant in an effort to support the claim of insufficiency of the evidence to sustain the verdict and judgment; but these likewise were matters exclusively for the jury to determine, and it would serve no useful purpose to specifically detail and discuss them here.

[4] The defendant's motion for a new trial was grounded in part upon the claim of newly discovered evidence; and, in support of the



motion, the affidavits of three witnesses, who had testified on behalf of the defendant at the trial, were used. Their testimony had been introduced for the purpose of impeaching the statement of the prosecutrix that she habitually slept upon a couch in the same room with defendant and his wife. To the surprise and discomfiture of counsel for the defendant, their testimony tended to corroborate rather than discredit the story told by the prosecutrix. The affidavits of these witnesses were to the effect that, when testifying at the trial, they were so excited and disconcerted that they gave false and mistaken testimony upon the subject of where the prosecutrix was in the habit of sleeping, and that, if the defendant was granted a new trial, they would testify that the prosecutrix did not sleep in the same room with the defendant and his wife. Assuming all this to be so, and assuming further that these witnesses were in a position to testify upon the subject from their own knowledge, their modified testimony would be but corroboration of other witnesses to the same effect who so testified, and therefore, at its best, would be merely cumulative. A new trial will not be granted because of newly discovered evidence which is merely cumulative. This rule is so well settled and generally so well understood that we need not support it by the citation of authorities.

[5] The affidavits of several prisoners in the county jail were also offered and received upon the hearing of the motion for a new trial, which tended in some slight degree to impeach the evidence of the witness who testified to the defendant's admission of guilt. No showing was made, however, in explanation of the failure to produce these affiants as witnesses at the trial, and it does not appear that with reasonable diligence their testimony could not have been had in the first instance.

[6] Moreover, the only tendency of their testimony, if it had been produced, would have been to impeach the testimony of a witness for the prosecution, and therefore it was not of a character to warrant the granting of a new trial. *People v. Anthony*, 56 Cal. 397; *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *People v. Holmes*, 126 Cal. 462, 58 Pac. 917. In its entirety, we are satisfied that the showing made in support of the motion for a new trial upon the ground of newly discovered evidence was insufficient, and therefore the motion was properly denied.

[7] The defendant requested the court to give to the jury the following instruction: "Evidence of good character is evidence relevant to the question of guilty or not guilty, and is to be considered by you in connection with the other facts and circumstances in the case. One object in laying it before the jury is to induce the jury to believe, from

the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution, and in this connection you must take it into consideration." This instruction was given as requested, with the modification by the trial court that, "If you are satisfied to a moral certainty and beyond a reasonable doubt that the defendant is guilty as charged in the information herein, it will be your duty to so find him, notwithstanding such evidence of good character." Counsel for the defendant insists that the requested instruction as modified is contradictory and confusing, and that the modification might be construed by the jury to mean that they were at liberty to entirely disregard the evidence of the defendant's good character. The instruction, as modified by the court, correctly and without conflict stated the law (*People v. Shepardson*, 49 Cal. 630; *People v. Ashe*, 44 Cal. 288; *People v. Bell*, 49 Cal. 485); and no confusion as to its meaning could possibly arise in the minds of the jury except upon a strained and unreasonable interpretation of the language employed. The plain meaning of the instruction as a whole was that if, after weighing all the evidence, including that of the good character of the defendant, the jury believed him guilty beyond a reasonable doubt, they should bring in a verdict accordingly, notwithstanding the fact that the defendant had previously borne a good reputation.

[8] At the request of the defendant, the trial court also charged the jury that, "Where, as in this case, the prosecution relies for a conviction of the defendant upon the testimony of the prosecutrix alone, and no other witnesses are called by the state to testify directly to the time or place or circumstances of the alleged offense, then and in such case you should view such testimony with great caution, and it is the duty of the court to warn the jury of the danger of a conviction upon such testimony." In this connection the court further charged, in the language of section 1844 of the Code of Civil Procedure, that, "The direct evidence of one witness who is entitled to full credit is sufficient proof of any fact \* \* \*"; and then proceeded to say, "This provision of the law attaches to the testimony of Catherine Clark (the prosecutrix); and therefore, if you are satisfied to a moral certainty and beyond a reasonable doubt from her testimony that the defendant had sexual intercourse with her within the meaning of the allegations of the information herein, it will be your duty to resolve that proposition of fact on the side of the people, notwithstanding that no other witness has testified to the same effect." Counsel for the defendant would have us construe these instructions to mean "that the direct testimony of Catherine

Clark, who is entitled to full credit, is sufficient proof of the fact testified to by her." Obviously the instructions complained of cannot be so construed without transposing the language used and deliberately distorting the very evident purpose and intent of the instructions to advise the jury that, although they should be cautious in accepting the uncorroborated testimony of the prosecutrix, nevertheless they were not required to acquit the defendant merely because her testimony was uncorroborated. Such is the law; and in our opinion the instructions complained of could not have been given by the jury the interpretation claimed by counsel for defendant.

This disposes of all the points raised by the defendant. The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; HALL, J.

(49 Cal. App. 797)

DAVIS v. DAVIS et al. (Civ. 1,158.)

(District Court of Appeal, Second District, California. Sept. 25, 1912. Rehearing Denied by Supreme Court Nov. 23, 1912.)

**1. MORTGAGES (§ 275\*)—TRANSFER OF PROPERTY—ASSUMPTION OF DEBT—LIMITATIONS AS A DEFENSE.**

Where the purchasers of property upon which was a mortgage already barred by limitations assumed payment of the mortgage debt as part of the price, they could not set up such limitations to prevent collection of the debt by foreclosure.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 772-781; Dec. Dig. § 275.\*]

**2. LIMITATION OF ACTIONS (§ 143\*)—NEW PROMISE—ASSUMPTION BY THIRD PARTY.**

Where a party agrees to pay to a third party a debt which another admits owing, he cannot avoid paying same by limitations which ran in favor of the original debtor.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 578-583; Dec. Dig. § 143.\*]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Thomas Davis against W. J. Davis and others. From the judgment and an order denying a new trial, plaintiff appeals. Reversed.

Tanner, Taft & Odell, of Los Angeles, for appellant. Bernard Potter, of Los Angeles, for respondents.

JAMES, J. Defendants W. J. Davis and Ida R. Davis on March 25, 1904, executed their promissory note payable to J. R. Thacker for the sum of \$1,000 one year after date, and contemporaneously therewith gave a mortgage upon two certain lots of land at Santa Monica to secure the payment of said promissory note. On the 24th day of March, 1905, the mortgagee assigned the note and mortgage to plaintiff, who thereafter remained the owner of same. On the 30th day of June, 1910, the mortgagors entered into

an agreement which was thereafter consummated, by the terms of which they exchanged the property, so mortgaged with appellant Lula H. Plowman, the agreement of exchange containing this clause relative to the mortgage indebtedness referred to and existing against the property of defendants W. J. and Ida R. Davis: "Above property subject to a mortgage of one thousand dollars to be assumed by owners of first piece." The Davises on their part assumed an incumbrance of \$1,500 then existing against the property of Lula H. Plowman which they received in exchange for their own lots. This action was brought on September 22, 1910, to foreclose the mortgage given by the Davises to secure the payment of the \$1,000 note; Lula H. Plowman and her husband, A. J. Plowman, being made defendants, and it being alleged in the complaint that on the 30th day of June, 1910, the date of the making of the agreement of exchange between the Davises and Lula H. Plowman, "the said defendants W. J. Davis, Ida R. Davis, Lula H. Plowman, and A. J. Plowman, in writing, acknowledged said note and mortgage and indebtedness, and assumed and agreed to pay the same." Defendants Davis made no appearance in the action, and their default was therefore regularly entered. Defendants Plowman appeared, and among other defenses, set up the plea that the note and mortgage debt was barred by the provisions of section 337 of the Code of Civil Procedure. The trial court made its findings generally in favor of plaintiff, and found that the agreement of exchange with the conditions hereinbefore mentioned had been duly made between the parties, but found in favor of defendants Plowman on the plea of the statute of limitations.

[1] It will be noticed from the foregoing statement of facts that at the time the agreement of exchange was made between the Plowmans and Davises the statute of limitations had already run against the mortgage debt of \$1,000 owing by the Davises to Thomas Davis, the assignee of their mortgage, and hence also the statute had completely run at the time this action was commenced. The case presents mainly the one question as to whether the Plowmans, having expressly assumed the mortgage indebtedness theretofore existing against the property which they received in exchange for their own, could in an action brought to foreclose the mortgage be allowed to defend on the ground that the statute of limitations had run against the debt. It very clearly appears that the assumption of the \$1,000 mortgage debt by the Plowmans was a part of the consideration moving from them to the Davises in the exchange of properties; in other words, as a part of the purchase price, instead of paying \$1,000 to the Davises in addition to the transfer of their real estate, they agreed to pay the debt then admitted to be owing by the Davises to the plaintiff.



The agreement in this respect was one which the parties had the right to make and one which they did voluntarily and expressly enter into. In the case of *Washer v. Independent M. and D. Co.*, 142 Cal. 708, 76 Pac. 656, our Supreme Court, referring to contracts of a similar nature, has said: "It was nothing to defendant as to whom the purchase money should be paid. If its grantors requested the payment of \$4,500 to plaintiff, and defendant agreed to pay said sum, it will not now be allowed to defend this action upon the ground that its grantors did not owe plaintiff. It is not the business of the defendant to go upon a tour of investigation as to the merits of plaintiff's claim against its grantors after agreeing to pay it. If its grantors were satisfied that they owed plaintiff, defendant cannot, after agreeing to pay the indebtedness, claim that nothing was due. It was said by the Supreme Court of Pennsylvania in *Merriman v. Moore*, 90 Pa. 81: 'A vendor may direct how the purchase money shall be paid. He may reserve it to himself, donate it to a public charity, or may make such other disposition of it as may best meet his views, and if his vendee agrees to pay it, according to such directions, he cannot set up a defense that his vendor was under no duty to apply it in such manner.'" See, also, *Hopkins v. Warner*, 109 Cal. 133, 41 Pac. 868. We quote again from the case of *Williams v. Naftzger*, 103 Cal. 440, 37 Pac. 411, on the same subject: "An agreement on the part of a grantee to pay and discharge a mortgage debt upon the granted premises for which his grantor is liable renders the grantee liable therefor to the mortgagee, and in an action for the foreclosure of the mortgage, if the mortgaged premises are insufficient to satisfy the mortgage debt, judgment may be rendered against him as well as against the mortgagor for the amount of such deficiency. This liability results from the familiar doctrine in equity that a creditor is entitled to the benefit of all securities or collateral obligations that his principal debtor may have given to the surety for the payment of the debt. By the conveyance of the mortgaged premises and the assumption of the mortgage debt by the grantee, the latter, as between him and his grantor, becomes primarily liable to the mortgagee, and his vendor becomes his surety. *Halsey v. Reed*, 9 Paige [N. Y.] 452; *Crowell v. Currier*, 27 N. J. Eq. 154; *Crawford v. Edwards*, 33 Mich. 354; *Keller v. Ashford*, 133 U. S. 622 [10 Sup. Ct. 494, 33 L. Ed. 667]; *Biddel v. Brizolara*, 64 Cal. 354 [30 Pac. 609]; *Jones on Mortgages*, 741, 752."

[2] The argument of these cases is that a party who expressly agrees to pay a particular debt which the person contracting with him admits that he owes to a third party cannot thereafter be heard to say that the debt is not owing, and much less, to our minds, should he be permitted to urge that,

while the debt was once due from the person with whom he has contracted, the statute of limitations has intervened to prevent its collection. The Plowmans by their contract made with the Davises expressly admitted that the premises which they received were subject to the lien of the mortgage incumbrance, and the Davises chose to consider that debt as being a live and existing obligation required to be performed by them on their part. It follows that, if the Plowmans were permitted to maintain this defense, the result would be that they would not pay for the property all that they had agreed to pay. In line with what we have said, the Supreme Court of Michigan has decided that, where a vendee assumes the payment of a mortgage indebtedness he waives all defenses thereto except payment. *Terry v. Durand Land Co.*, 112 Mich. 665, 71 N. W. 525.

We think that the complaint was properly framed in the form it was presented, plaintiff seeking to foreclose his mortgage and alleging the assumption of the mortgage debt by the Plowmans in the manner stated. For the reasons we have given, we think the trial court erred in concluding that the indebtedness was barred as to respondents.

The appeal is taken by plaintiff from the judgment and also from an order denying a new trial, which judgment and order are reversed.

We concur: ALLEN, P. J.; SHAW, J.

20 Cal. App. 26

PEOPLE v. QUONG SING et al. (Civ. 903.)  
(District Court of Appeal, Third District,  
California. Sept. 30, 1912.)

1. HIGHWAYS (§ 6\*)—HIGHWAYS ON PUBLIC LANDS—ESTABLISHMENT—STATUTORY PROVISIONS—DEDICATION.

Under Rev. St. § 2477 (U. S. Comp. St. 1901, p. 1567), passed in 1866, granting right of way over public lands for highways, and the statute (Pol. Code, § 2619), in effect January 1, 1873, providing that roads laid out and recorded as highways by the order of the board of supervisors, and all roads used as such for five years, are highways, land continuously used for a highway from 1863 over public land passing to a railroad company in 1875 by patent, and recognized in 1872 by the county board of supervisors as a highway in accordance with St. 1871-72, p. 142, authorizing orders describing highways and roads dedicated as highways, is a highway by dedication.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 8, 9; Dec. Dig. § 6\*]

2. HIGHWAYS (§ 6\*)—ESTABLISHMENT—STATUTORY PROVISIONS.

The statute (Pol. Code, § 2619), in effect January 1, 1873, providing that roads laid out and recorded as highways by order of the board of supervisors, and roads used as such for five years, are highways, is in the nature of a statute of limitations which gives to the public the right to use a road as a highway in case it has been so used for five years prior to the repeal of the statute.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 8, 9; Dec. Dig. § 6\*]

**3. HIGHWAYS (§ 5\*)—ESTABLISHMENT BY USER—EVIDENCE.**

Where there was evidence that a traveled track was not confined to the center of a strip, but was sometimes on one side and sometimes on the other, but the width of the space passed over was at least 40 feet, a finding of a highway 40 feet wide by user was authorized.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 6, 7; Dec. Dig. § 5.\*]

**4. HIGHWAYS (§ 158\*)—OBSTRUCTIONS—ACTIONS FOR REMOVAL—FINDINGS—SUFFICIENCY—"DEDICATION."**

Where the complaint in a suit to abate a nuisance on a highway alleged that the strip of land was duly laid out as a highway, and both parties introduced, without objection, evidence of the laying out or establishing of the highway, its user and dedication, a judgment granting relief would not be disturbed merely because the court found that the strip had been used as a highway since a designated date, and that since such date it had been a duly dedicated highway; the term "dedication" being used to define the right arising from the user shown and found.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 430, 431, 435; Dec. Dig. § 158.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1908-1918; vol. 8, pp. 7629-7630.]

**5. APPEAL AND ERROR (§§ 533, 717\*)—QUESTIONS REVIEWABLE—RECORD—OPINION OF TRIAL COURT.**

The opinion of the trial court appended to respondent's brief is no part of the record, and may not be used to supply findings or to support the findings or judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2339, 2400, 2967; Dec. Dig. §§ 533, 717.\*]

**6. APPEAL AND ERROR (§ 934\*)—FINDINGS—CONSTRUCTION—REVIEW.**

The court on appeal must give the trial court's findings such a construction as will support the judgment, provided that can reasonably be done without violating the plain import of the language used; and a finding that a road "is now, and ever since" a designated past date has been, used as a highway does not apply to any period prior to the designated date.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781; Dec. Dig. § 934.\*]

**7. HIGHWAYS (§ 158\*)—ESTABLISHMENT—EVIDENCE—SUFFICIENCY.**

A deed conveying for road purposes a strip 20 feet wide does not justify a finding of a way 40 feet wide.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 430, 431, 435; Dec. Dig. § 158.\*]

**8. EVIDENCE (§ 67\*)—PRESUMPTIONS—EXISTENCE OF FACTS.**

The maxim in Code Civ. Proc. § 1963, subd. 32, that a thing once proved to exist continues as long as is usual with things of that nature does not work backwards.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 87, 88, 103; Dec. Dig. § 67.\*]

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by the People of the State of California against Quong Sing and another. From a judgment for plaintiff, defendants appeal. Reversed, and new trial ordered.

Meredith & Landis, of Sacramento, for appellants. Chas. A. Tuttle and Ben. P. Tabor, both of Auburn, for respondent.

**CHIPMAN, P. J.** This is an action for the abatement of a nuisance alleged to consist of obstructions placed and now being maintained by defendants on a public highway. Plaintiff had judgment, from which defendants appeal.

The charging part of the amended complaint reads as follows: "(1) That a certain road and highway in the town of Newcastle, county of Placer, state of California, described as commencing at the northeast corner of the Rice tract, according to the plat of the Rice tract now on file in the office of the recorder of the county of Placer, running thence in a southeasterly direction to a point opposite a house known as the C. M. Silva house in the said town of Newcastle, said road and highway being 40 feet in width along the east line of the said Rice tract, is now, and at all the times herein-after mentioned was, a duly laid out public highway of the county of Placer, state of California. (2) That defendants, during the month of December, 1910, built and constructed a fence and barn on said highway at a place known as Newcastle Chinatown, and are now maintaining said fence and barn on said highway at said place."

A general demurrer was overruled, and defendants answered, denying the existence of the alleged highway, in the following terms:

"(1) Deny that a certain or any road or highway in the town of Newcastle, county of Placer, state of California, described as commencing at the northeast corner of the Rice tract, according to the plat of said Rice tract on file, at the time of the commencement of the foregoing entitled action, or now, in the office of the recorder of the said county of Placer, state of California, and running thence in a southeasterly direction to a point opposite a house known as the C. M. Silva house in said town of Newcastle, is now, or was at the time of the commencement of the foregoing entitled action, or was at any of the times referred to in said amended complaint, a duly, or otherwise, or at all, laid out public, or otherwise, highway, either of the said county of Placer, state of California, or otherwise, or at all; deny that said alleged road or highway is, or was at the time of the commencement of the foregoing entitled action, or was at any of the times mentioned in said amended complaint, of the width of 40 feet, or any number of feet, or any width whatever." Defendants also deny that they or either of them constructed the fence or barn as alleged in the complaint "or at any other place or point"; deny that said fence and barn obstruct said alleged highway; and deny maintaining said or any obstruction.

The court made the following findings: "(1) That a certain road and highway in the town of Newcastle, county of Placer, state of California, described as commencing at the northeast corner of the Rice tract ac-



cording to the plat of the Rice tract now on file in the office of the recorder of the county of Placer, and running thence in a southeasterly direction along the east line of the Rice tract to Cypress street, said road and highway being 40 feet in width, is now, and ever since the 14th day of April, 1902, has been, used by plaintiffs as a highway. (2) That defendants, during the year 1910, built and constructed a fence and barn on the road and highway hereinbefore described in finding 1, and are now maintaining said fence and barn on said road and highway. (3) That the said fence and barn, built, constructed, and maintained on said road and highway by defendants, are an obstruction on said road and highway, and interfere with the free and comfortable use and enjoyment of said road and highway by plaintiffs."

As conclusions of law the court found: "That the said road and highway described herein in finding 1 is now, and ever since the 14th day of April, 1902, has been, a duly dedicated highway of the county of Placer. (2) That the fence and barn, built and constructed by defendants on said highway, constitute a nuisance." There is a separate appeal from the order denying motion for a new trial, No. 857, which, by stipulation, is to be heard with the appeal from the judgment.

The finding is that said parcel of land "is now, and ever since the 14th day of April, 1902, has been, used by plaintiff as a highway." The judgment employs the terms, used in the conclusion of law, that said parcel of land is "now, and ever since the 14th day of April, 1902, has been, a duly dedicated public highway." The averment of the complaint is that said strip of land "is now, and at all the times hereinafter mentioned was, a duly laid out public highway." Defendants state in their brief that there is but one question to be determined, namely, "Is the strip of land described in the complaint a public highway or a private right of way?"

[1] The record is voluminous, comprising the testimony of many witnesses, and, as to the existence and location of the highway, is sharply conflicting. Without confining themselves to the issues presented by the pleadings, both sides submitted evidence, without objection, as to the existence of a public road along the land described in the complaint, when it was first used as such, how it was used by the public and became a public way, and tracing the title to the land from the general government to the present owners. There was evidence tending to show that a roadway was used by the public along the strip of land in controversy, leading to and from the town of Newcastle, as early as in the year 1863, and that this use had been continuous. The proceedings of the board of supervisors of Placer county were introduced, which showed that in May,

1872, a roadway therein described was recognized as then in use as a highway, and it was shown that this roadway was substantially along the strip of land in question. This declaration of the board of supervisors was made under the act of February 24, 1872 (Stats. 1871-72, p. 142), which provided that all public roads and trails in Placer county, "located in accordance with the provisions of this act, are hereby declared public highways." Section 6 of the act provided that the board should, in the month of May, 1872, "inspect the records of the roadmasters and, by order entered in the Record Book of Roads, shall determine and declare what roads and trails heretofore used as public highways shall be highways, which order shall distinctly state the beginning, general course and terminus of such roads and trails, and that from thenceforth that such roads and trails shall be declared and dedicated as public highways." The act of March 30, 1874 (Stats. 1873-74, p. 833), declared that all public roads in the county of Placer, located and established "in accordance with the present road law, and recorded in the Record Book of Roads and Highways of said county or which may hereafter be so located, are hereby declared public highways." In 1872 the title to this land was in the United States, and passed to the Central Pacific Railroad Company in 1875 by patent. In 1866, prior to the date of the grant to the railroad company, Congress granted the right of way over public lands for roads, highways, ditches, etc. (U. S. Rev. Stats. § 2477 [U. S. Comp. St. 1901, p. 1567]); and the Supreme Court has held that proof of user by the public for the statutory period, under the act of 1873, constitutes the dedication of the land as a highway. S. P. R. R. Co. v. City of Pomona, 144 Cal. 339, 345, 77 Pac. 929, and cases there cited.

[2] There was no evidence that this road was ever abandoned as a highway. Section 2619, in effect January 1, 1873, provided that: "Roads laid out and recorded as highways by order of the board of supervisors, and all roads used as such for a period of five years are highways." There was evidence that the parcel of land involved was used as a highway for more than five years prior to 1873. This act was repealed in 1874 (Stats. 1873-74, p. 116), but it has been held that the act of 1873 was "in the nature of a statute of limitations, which gives to the public the right to use the road as a highway in case it has been so used." Bolger v. Foss, 65 Cal. 250, 3 Pac. 871, and cases noted in S. P. R. R. Co. v. City of Pomona, supra. There was evidence tending to show that in 1879 one Haight, the then owner, conveyed to Quong Yet Lung certain land lying mostly north of this strip but embracing a portion of it at its northerly end and south of the railroad right of way; also certain land to Quong Sing lying along the north boundary of this

strip. Haight conveyed to Quong Sing a strip of land containing one-twentieth of an acre, which occupies a part of said road southerly from the land of Quong Yet Lung to Cypress street. The deed contains the following clause: "Conditioned that said strip of twenty feet shall be dedicated to and exclusively used for road purposes, for the benefit of property east of same, deeded to Quong Sing, and on the north deeded to Quong Yet Lung." It was by right of this deed, as we gather from the evidence, that the obstructions complained of were placed in the highway. The fence was erected along the highway, but did not connect with any other fence, and performed no office except to prevent the occupants of the land on the west side of the road from reaching it. There was evidence that this roadway was traveled from the year 1863, without its being interfered with, until the Central Pacific Railroad crossed it with trestle work under which the highway was traveled; that about 1876 an earth fill was substituted for this trestle work, thus shutting off the travel by that road past Chinatown, but travel to the inhabitants of Chinatown continued over this road to the railroad embankment without interference until obstructed as now complained of.

[3] As to the width actually traveled, witnesses varied in their testimony, but there was evidence that, after Chinatown was established, the buildings on the east of the road were treated as the eastern boundary, and the buildings and inclosures on the west as the western boundary. There was evidence that the traveled track was not confined to the center of this strip, but was sometimes on one side and sometimes on the other, as well as at points in the middle, but that the width of the space thus passed over was at least 40 feet. It was held in *S. P. R. R. v. City of Pomona*, supra, that, where the evidence tends to show the user of a street to the width found by the court, the fact that the main travel was confined to narrower limits is not conclusive of the width. The record of the proceedings of the board of supervisors of 1872 does not mention the width of the road then declared to be a highway, but it is fair to assume that the board contemplated a width at least equal to that in use. That there was a roadway used by the public continuously from about the year 1863 over this strip of land is abundantly shown by the testimony, and upon this point there is no serious conflict. The conflicting testimony was chiefly as to its precise location. We think, however, there was sufficient evidence that the location was substantially as claimed in the complaint and shown in the findings. We think, too, that, regardless of any claim of a highway by virtue of the proceedings of the board of supervisors in 1872, and regardless of any view that may be taken of the reservation in the Haight deed of April 14, 1902, there was sufficient

evidence to show, by user for 10 years prior to 1873, that the land in question became a highway by virtue of the act of 1873.

[4] In this condition of the record we are asked for a reversal of the judgment and order for the reason that finding 1 is not responsive to the issue presented by the pleadings, and this because the complaint alleges that this strip of land was "*duly laid out*" as a highway, while the finding is that it "*has been used*" as a highway since April 14, 1902, and the conclusion of law was, as is also the judgment, that the land, "ever since the 14th day of April, 1902, has been *a duly dedicated highway*." (Italics as used by appellants.) The argument runs thus: The complaint avers that this strip of land was "duly laid out," and it cannot be said that a finding that it "has been used" as a highway is in any sense responsive to the issue, and there is no finding that the strip was "duly laid out" as a highway. Furthermore it is contended that a finding that a strip of land "has been used as a highway" cannot sustain a conclusion of law and judgment that said strip of land is and has been "a duly dedicated public highway"; that the judgment decrees more than is asked in the complaint, and the finding of a user is in excess of the averment of the complaint. These points are followed up by authorities showing the distinction in law between these various forms of expression and that they are not legal equivalents. Had these points been raised in the course of the trial, and the court had been asked to limit the evidence strictly to the averments of the complaint, a different question would be before us, had the rulings been such as to raise it. But both sides invited the greatest latitude, and evidence, without objection, was addressed to the laying out or establishing of the road to its user and to its dedication. We think the court was justified in dealing with the case as counsel dealt with it, and was not confined strictly to the paper-made issues, for counsel seem not to have observed them. The question both sides were seeking to solve was the question as appellants stated it in their opening brief—Is the strip of land in controversy a public highway or a private right of way? The question as to how it became the one or the other, if either, was opened up and free hand given for its exploitation. It may safely be assumed that terms used by the learned trial judge were not used in their strictest legal sense, and that, in the sense intended, the "dedication" adjudged might arise from the user shown and found. Proof of user under the act of 1873 for the statutory period was said, in the *Pomona Case*, supra, to constitute a dedication.

[5-8] The question of more difficulty arises out of the finding and conclusion of law that the said road "is now, and ever since the 14th day of April, 1902, has been, used



by plaintiffs as a highway" (finding) "a duly dedicated highway" (conclusion of law and judgment). It is contended that the "findings and conclusions of the court show an election on the part of the court to stand upon the deed from Haight to the defendants hereinbefore set forth, and to eliminate from consideration entirely the testimony addressed to the period anterior to February 14, 1902." It is further contended that, even if this deed may be construed to constitute a dedication of the strip of land to the public, the court erred in doubling the width so dedicated. The court rendered a written opinion which is appended to respondent's brief. This, however, forms no part of the record, and cannot be used to supply findings or to support either findings or judgment. This opinion shows that the court had in view all the evidence as well as the condition in the Haight deed in reaching its conclusion that a highway "is now, and ever since the 14th day of April, 1902, has been, used by plaintiffs as a highway." It is our duty to give the findings and conclusions of law a construction in support of the judgment, if it can reasonably be done without violating the plain import of the language used. We find ourselves unable to give the language used a reasonable construction which would justify our holding that the terms "ever since the 14th day of April, 1902," meant any period prior thereto. If the court had intended to place its finding in part on proof of user or dedication prior to that date, it would have been a very simple matter to accomplish it by framing a finding accordingly. The correspondence of the date with that of the Haight deed is more than a coincidence; and, if we were to consult the written opinion of the court, it would plainly appear that the date, and the earliest date at which the court fixed the existence of a highway, was a date founded on the Haight deed, which the court regarded as evidence of dedication to the public. But the finding is not thus supported, for this deed conveyed a strip 20 feet wide, whereas the court found the strip to be 40 feet wide. If a court should find that on April 14, 1902, A. was, and ever since has been, a trespasser on certain land, we do not think such a finding could be reasonably construed to mean that A. was a trespasser years before that date. If an issue had been tendered by the pleadings or by the evidence, in the case supposed, of trespass at some prior date, the findings should respond to such issue. Counsel for respondents say that April 14, 1902, "was selected, not because the right to use as a highway, in the opinion of the court, dated from that day, but as a convenient date from which to reckon." The language bears out no such explanation. We have a Code maxim "that a thing once proved to exist continues as long as is usual

with things of that nature (Code Civ. Proc. § 1963, subd. 32); but this maxim does not work backwards. The evidence, other than the Haight deed and user after April 14, 1902, was not of itself sufficient to support the finding.

The judgment is reversed, and a new trial ordered upon the evidence submitted at the former trial and such additional evidence as may be offered by either or both of the parties.

We concur: BURNETT, J.; HART, J.

20 Cal. App. 806

PEOPLE v. QUONG SING et al. (Civ. 957.)  
(District Court of Appeal, Third District, California. Sept. 30, 1912.)

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by the People of the State of California against Quong Sing and another. From an order denying a new trial, defendants appeal. Reversed.

Meredith & Landis, of Sacramento, and John M. Fulweiler, of Auburn, for appellants. Chas. A. Tuttle and Ben. F. Tabor, both of Auburn, for respondent.

CHIPMAN, P. J. Agreeably to stipulation of the parties, the appeal in this cause, from the order denying defendants' motion for a new trial, was submitted to be heard and determined in the appeal from the judgment in the same cause, No. 903 (127 Pac. 1052).

For the same reasons stated in the opinion this day filed in No. 903, the order is reversed.

We concur: BURNETT, J.; HART, J.

(20 Cal. App. 40)

PEOPLE v. WILSON. (Cr. 400.)  
(District Court of Appeal, First District, California. Oct. 2, 1912.)

CRIMINAL LAW (§ 1087\*)—DENIAL OF NEW TRIAL—REVIEW—REPORTER'S TRANSCRIPT.

An appeal from an order denying a new trial cannot be considered where there is no reporter's transcript in the record, and the time for filing the same, under Pen. Code, § 1247, or any extension grantable under section 1247d, has elapsed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2770-2781, 2794; Dec. Dig. § 1087.\*]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Edward Wilson was convicted of robbery, and he appeals. Affirmed.

Edward O'Dea and John F. Brady, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., for the People.

KERRIGAN, J. The defendant was convicted of the crime of robbery, and sentenced to imprisonment in the state prison for a term of 12 years. The appeal is from the judgment and an order denying a motion for a new trial.

The cause was on our last calendar for argument, and, when called, counsel for defendant failed to argue it, but obtained time within which to file a brief. No brief having been filed, and the time allowed therefor having expired, the court this day ordered the matter to be submitted for decision.

On examination of the record, we find that no reporter's transcript has been filed, and the time for such filing, under section 1247 of the Penal Code, or any extension thereof which could be granted under section 1247d of said Code, has long since elapsed. The appeal from the order denying the motion for a new trial cannot, therefore, be considered.

So far as the appeal from the judgment is concerned, we have examined the judgment roll, and find nothing therein which lends any support to the defendant in such appeal.

The judgment and order are accordingly affirmed.

We concur: LENNON, P. J.; HALL, J.

20 Cal. App. 61

SCHUMACHER v. LANGFORD, Sheriff.  
(Civ. 1,027.)

(District Court of Appeal, First District, California. Oct. 7, 1912.)

**1. EXECUTION (§ 293\*)—REDEMPTION—MORTGAGEE.**

A mortgagee, when redeeming from an execution sale under Code Civ. Proc. § 705, relating to mortgagees, is acting in his own interest to protect his lien already existing.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 835-844; Dec. Dig. § 293.\*]

**2. EXECUTION (§ 298\*)—MORTGAGES (§ 32\*)—SALE—REDEMPTION.**

Where a deed is given as security for a loan, it does not become a mortgage until the actual advance of the money, and till then one holding by such a deed is a trustee for the grantor, and if he redeems the land from a prior execution sale he does so as the successor in interest of the grantor and not required by Code Civ. Proc. § 705, to produce a note of the record of his mortgage nor an affidavit as to the amount due.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 865-873; Dec. Dig. § 298;\* Mortgages, Cent. Dig. §§ 60-66, 84-94; Dec. Dig. § 32.\*]

**3. EXECUTION (§ 298\*)—SALE—REDEMPTION.**

Where one whose land had been sold under execution borrowed money to redeem and added to it money of her own and gave the lender a deed as security and had the property redeemed in the name of the lender with such money, it will be held to have been redeemed by her and not by the lender, and there would be no need to comply with Code Civ. Proc. § 705, relating to redemption by mortgagees.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 865-873; Dec. Dig. § 298.\*]

**4. EXECUTION (§ 298\*)—TRUSTS (§ 80\*)—SALES—REDEMPTION.**

Where one redeemed property of another sold under execution sale and took title in himself by means of a deed executed to him by such other, he held the property both as a

mortgagee and as a trustee, and he did not have to comply with Code Civ. Proc. § 705, requiring mortgagees to produce a note of the record of their mortgages and affidavits as to the amount due, since redemption by trustee is in effect a redemption by the cestui qui trust.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 865-873; Dec. Dig. § 298;\* Trusts, Cent. Dig. §§ 113, 114; Dec. Dig. § 80.\*]

**5. EXECUTION (§ 293\*)—CONVEYANCES—REDEMPTION.**

A judgment debtor may convey property to another for the purpose of redemption.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 835-844; Dec. Dig. § 293.\*]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by F. Schumacher against Arthur B. Langford, as Sheriff. Judgment for plaintiff, and defendant appeals. Reversed.

Thomas E. Haven, of San Francisco, and H. E. Wilcox and D. M. Burnett, both of San Jose, for appellant. S. G. Tompkins, of San Jose, for respondent.

KERRIGAN, J. This action was brought for the purpose of obtaining a writ of mandate, commanding the defendant, as sheriff of the county of Santa Clara, to execute and deliver to plaintiff a deed of conveyance of certain real estate theretofore sold by him under execution. Judgment was entered as prayed, and this appeal is from such judgment and from an order denying defendant's motion for a new trial.

The facts of the case are that on December 21, 1906, a judgment was duly rendered against Ada B. Moody for a certain sum of money. On July 10, 1907, the judgment being still in full force, a writ of execution was duly issued thereon, to satisfy which the defendant, as sheriff of said county of Santa Clara, on the 8th day of August, 1907, regularly sold to the plaintiff the property described in the complaint belonging to the judgment debtor, Mrs. Ada B. Moody. On the 7th day of August, 1908, Mrs. Moody called at the office of Herman Murphy, a loan broker doing business in San Francisco, and informed him that the following day would be the last on which he could redeem such property, and requested him to obtain for her the sum of \$2,300 to assist her in effecting a redemption thereof. She already had the sum of \$916.54, and she turned it over to Murphy to be used with the \$2,300 to make up the sum necessary to make the redemption. Murphy arranged to have Henry S. Bridge, a client of his, advance the \$2,300. For this sum a promissory note was executed by Mrs. Moody, secured by an assignment of her interest in the estate of her deceased husband; and assignment of a note and mortgage owned and held by her brother, one Guy Hinton, and a promissory note of her mother to Bridge for the sum of \$2,300, secured by



a deed of trust covering real estate in San Francisco. "Nothing," says the statement on appeal, "was said or done at that time or thought of with regard to a deed of the property in question in this suit from Mrs. Moody to Bridge." On the 8th day of August (the following day) Murphy, accompanied by Mrs. Moody, went to the sheriff's office at San Jose, and having made a proper tender of the amount of money necessary to effect a redemption, demanded a sheriff's deed to the property and requested that it be made to Bridge. The sheriff informed Murphy and Mrs. Moody that in order to obtain such deed to Bridge it would be necessary to have an assignment by the purchaser of the certificate of sale. Being unable to procure such assignment, the parties were referred to the sheriff's attorney, who instructed them that in order to carry out their desire it would be necessary for Mrs. Moody to make a deed to the property to Bridge. This was done. Murphy exhibited the deed to the sheriff, and demanded a certificate of redemption in the name of Bridge, which, upon payment of the amount due, was issued as requested. The statement on appeal shows that no arrangements had been made with regard to a deed, nor had any been thought of between the parties until it was mentioned by the sheriff's attorney, and the purpose of the deed was solely to enable Bridge to redeem in his own name. It also appears that at the time of the transaction nothing was said by either Mrs. Moody or Murphy or anybody as to reconveying the property in case of repayment of the \$2,300, and that the first mention of it was about 25 days afterwards, when Murphy wrote a letter to Mrs. Moody stating that Bridge would reconvey the property to Mrs. Moody upon the repayment of the loan.

Upon these facts the court found that the redemption thus effected was made by Bridge as a redemptioner (mortgagee) and not as successor in interest of Mrs. Moody, and was void for the reason that Bridge, being a redemptioner under section 701, Code of Civil Procedure (subd. 2), had not produced to the sheriff, or served with his notice to that officer, a note of the record of his mortgage certified by the recorder, nor an affidavit showing the amount then due upon his lien, as required by section 705 of the same Code.

In this we think the court erred.

[1] A mortgagee, when redeeming from an execution sale under the provisions of section 705, Code of Civil Procedure, is acting in his own interest to protect his lien already existing, and upon the completion of the redemption becomes, (in default of subsequent redemption by the judgment debtor or other lienholders) the owner of the property freed from the interest of the judgment debtor. The circumstances of the redemption in this case were entirely different.

It is strongly urged by the appellant that Murphy, in making the redemption, was acting in behalf of Mrs. Moody, and that there had been no agreement between them that the property when redeemed should be held by Bridge as further security for his loan; that Mrs. Moody, being unversed in legal matters and without any independent legal advisor, made the deed to Bridge, which enabled him to obtain from the sheriff the certificate of redemption, without intending anything more than a redemption in her own interest. There is strong support in the record for this contention, but in the view we take of this case it may be freely admitted that the making of the deed from the judgment debtor to Bridge, followed by the redemption in his name with the consent of the judgment debtor, was for the purpose of affording additional security for the loan of the \$2,300; and that the deed will, therefore, in equity be regarded as a mortgage. But it will not be so regarded until the advance, for which the deed is given as security, is actually made.

[2] If a deed should be made and delivered as security for a loan, and the loan never in fact made, it will hardly be contended that the grantee is in the position of a mortgagee. He would hold the mere naked legal title as trustee for the grantor. So, in the present case, when Murphy presented himself to the sheriff, produced the deed to Bridge from the judgment debtor, and demanded a certificate of redemption in the name of Bridge, it matters little whether he was acting for the judgment debtor or for Bridge, for the latter, not yet having made any loan to Mrs. Moody, being still in possession of his money, could only redeem as her successor in interest; and the deed from her to him only assumed the character of a mortgage upon the actual advance of the redemption money. It was at that precise moment that the loan to the judgment debtor was made; and until that moment Bridge held but the naked legal title. He was therefore not required, under the provisions of section 705, Code of Civil Procedure, to produce a note of the record of his mortgage nor an affidavit as to the amount due.

[3] If it should be contended that the \$2,300 in the hands of Murphy at the time of the redemption was in his hands as the agent of Mrs. Moody and not of Bridge, then the redemption was made entirely with Mrs. Moody's money; and as Mrs. Moody had obtained the loan for the express purpose of enabling her to redeem, had added to it nearly \$1,000 of her own money, and had gone to the sheriff's office accompanied by Murphy for the purpose of making the redemption, it must be held that the redemption was made by her and not by Bridge.

[4] Again, regarding the redemption as having been made by Bridge, it was only incidentally for his own benefit; for Mrs.

Moody, in making her deed to him and in supplying him with part of the money needed for the redemption, did so principally in order that the property might be redeemed for her; and in this view of the case, when the redemption was effected Bridge held the property in a twofold capacity. He was the trustee of the legal title and a mortgagee for the money advanced by him. It is a well-established rule that, where the purchase money is paid by one person and the conveyance is made to another, "a resulting trust immediately arises against the person to whom the land is conveyed in favor of the one by whom the purchase money is paid."

\* \* \* The same rule prevails if the money paid by the party taking the title is advanced by him as a loan to the other, and conveyance is made to the lender for the purpose of securing the loan. \* \* \* In such case the grantee holds the double relation to the real purchaser; he is trustee of the legal title to the land, and is mortgagee for the money advanced for its purchase." *Campbell v. Freeman*, 99 Cal. 546, 34 Pac. 113; *Gerety v. O'Sheehan*, 9 Cal. App. 447, 99 Pac. 545. So in the present case, when the transaction is looked into, it is seen that Bridge advanced money for the purpose of redeeming the property for Mrs. Moody, taking the title in his own name, being enabled to do this through Mrs. Moody's deed to him. He was thus her successor in interest, and entitled to receive from the sheriff a certificate of redemption without complying with the provisions of section 705, Code of Civil Procedure, relating to a mortgagee. Having been redeemed by her trustee, the property was in effect redeemed by her. *Kofoed v. Gordon*, 122 Cal. 314, 325, 54 Pac. 1115.

[5] A judgment debtor may convey property to another for the purpose of redemption. *Southern Cal. L. Co. v. McDowell*, 105 Cal. 99, 38 Pac. 627; 3 *Freeman on Execution*, § 317, p. 1864; 17 *Cyc.* 329.

In applying these equitable principles each party gets his due. The plaintiff, the purchaser at the execution sale, receives back the money expended by him, plus the interest to which he is legally entitled; Bridge gets security for his advance; and the judgment debtor recovers her property, incumbered, however, with a lien in favor of Bridge.

The judgment and order are reversed.

We concur: LENNON, P. J.; HALL, J.

29 Cal. App. 67

PEOPLE v. OVERACKER. (Cr. 229.)

(District Court of Appeal, Second District, California, Oct. 8, 1912.)

# 1. CRIMINAL LAW (§ 1158\*)—APPEAL—REVIEW—QUALIFICATION OF JURORS.

The holding of jurors to be qualified cannot be disturbed, the evidence justifying the conclusions that their opinions were based on

some of the matters mentioned in Pen. Code, § 1076, as being insufficient to disqualify a juror if it appeared he could lay aside such opinions, and act fairly and impartially, and that they could so do.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066, 3070, 3071, 3074; Dec. Dig. § 1158.\*]

## 2. CRIMINAL LAW (§ 822\*)—APPEAL—REVIEW—INSTRUCTIONS.

On review of instructions, the charge is to be taken as a whole, and if, so considered, they make a fair statement of the law, they will be held sufficient and without error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.\*]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

S. H. Overacker was convicted of manslaughter, denied a new trial, and appeals. Affirmed.

Davis & Rush, of Los Angeles, and B. E. Tarver, of Santa Ana, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was charged with having committed the crime of murder by killing one Gustavus A. Winn. Upon trial under that charge he was found guilty by a jury of the crime of manslaughter. An appeal has been taken from the judgment of imprisonment entered against him and from an order made denying a motion for a new trial. Upon a former trial the same defendant was convicted of murder in the first degree, and this court upon appeal reversed the judgment and order denying a new trial. See *People v. Overacker*, 15 Cal. App. 620, 115 Pac. 756. In the decision just cited is contained a general statement of facts from which the evidence heard at the second trial made no substantial variance. It will therefore not be necessary to reiterate here that narrative.

[1] Among the errors assigned, it is claimed on behalf of defendant that the trial court decided wrongly in its rulings on challenges for cause interposed as to a number of the jurors. Only two of such jurors so objected to remained upon the jury, however, as the defendant, exercising his right to peremptorily challenge the persons offered, excused all of them except L. C. Shadel and William Boyer. When the jury was finally completed and sworn, defendant had exhausted all of his peremptory challenges. It is therefore shown that the defendant, by reason of not having the right to exercise further peremptory challenges, was compelled to accept two men who were not satisfactory to him. All of the jurors challenged on the ground that they entertained an actual bias as to the defendant's guilt or innocence disclosed upon their examination that they had formed opinions upon the matter at issue, and nearly all of them stated that it would require evidence to remove



such opinion. They were therefore disqualified to act, unless it was made to appear, under the exceptional cases provided for by section 1076 of the Penal Code, that their opinions were founded upon public rumor, statements in public journals, or common notoriety, and that they could, notwithstanding such opinions, act impartially and fairly upon the matters to be submitted to them. A trial judge, in determining the competency of a juror, and in deciding whether such juror can lay aside any preconceived opinion which he may have and act fairly and impartially, is called upon to determine questions of fact, and an appellate court in reviewing such rulings will find no question of law presented unless the evidence taken upon the examination of the juror is entirely uncontradictory. In other words, if the evidence as presented to the trial judge is such as might justify a conclusion to be made thereon, either in the affirmative or negative, of the question of competency, the determination of the trial court upon that question is final and conclusive. In the case of *People v. Ryan*, 152 Cal. 364, 92 Pac. 853, the Supreme Court has stated the rule in the following language: "The trial court must decide which of the answers most truly shows the juror's mind. It should, of course, be liberal in giving the defendant and the people the benefit of any doubts that may arise as to the fairness of the juror and his ability to lay aside any preconceived impressions and should excuse the juror if such doubt is created. But where there are such contradictions its decision is binding upon this court." To the same point may also be cited the following cases: *People v. Fredericks*, 106 Cal. 554, 39 Pac. 944; *People v. Loper*, 159 Cal. 6, 112 Pac. 720, Ann. Cas. 1912B, 1193; *People v. Edwards*, 127 Pac. 58. We have made a close and careful examination of the record of the proceedings had upon the impanelment of the jury and are of the opinion that the evidence given as to the state of mind of each of the jurors objected to by the defendant is sufficient to sustain the conclusions of the trial judge and his rulings made upon challenges for cause. In the case of none of the jurors objected to on the ground of actual bias can it be said that the evidence did not show that their opinions were based upon some of the matters mentioned in section 1076 of the Penal Code as being insufficient to disqualify a juror, provided it appeared that he could lay aside such opinion and act fairly and impartially. Neither can it be said from the evidence that it did not appear to the trial court that such jurors could lay aside such opinions and act in the trial without bias.

[2] It is the earnest contention of counsel for defendant that the court by its instructions misdirected the jury. The claim is

made that under the instructions as given the jury could have reasonably understood the court to say that, if they believed the defendant to have been insane at the time he killed the deceased, they should, nevertheless, find him guilty of manslaughter, and that the plea of self-defense under such facts would be of no avail. To us the plain effect and meaning of the instructions do not support the construction given them by the defendant. The charge was lengthy, and, as is usually the case, many instructions were offered on the part of the prosecution, and perhaps more submitted on behalf of the defendant. As ordinarily happens, the instructions on behalf of the prosecution were framed to support particularly the side of the people, and those for the defendant were designed to give great prominence to all features of the law favorable to the defense. The rule of analysis is, where instructions of the trial court are presented for examination, to take into view not an isolated portion thereof, but to consider the charge as a whole. If, when so considered, the instructions may be said to make a fair statement of the law, then they will be held to be sufficient and without error. This rule has been so often laid down in the decisions of our Supreme Court as to make unnecessary the citation here of particular decisions. Measured by this standard, we are of the opinion that the instructions as given in this case by the trial judge were not such as to mislead the jury, but that they sufficiently defined the law as applicable to the facts shown by the evidence. Nor do we find any error of a substantial nature in any of the rulings of the court upon the admission or rejection of testimony, or because of remarks made by the judge during the course of the trial. The evidence was entirely sufficient to support the verdict of the jury, for in no instance where a contention is made in behalf of defendant that there is a failure of proof can it be said that there was not some testimony on both sides of the question. We have scrutinized the record very closely and are impressed with the conviction that in the trial of this defendant all of his substantial rights were fairly guarded, and that by his conviction of the crime of manslaughter there is not shown to have been a miscarriage of justice.

The judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

20 Cal. App. 35

PEOPLE v. ARNOLD. (Cr. 390.)

(District Court of Appeal, First District, California. Oct. 2, 1912. Rehearing Denied Nov. 1, 1912.)

1. LARCENY (§ 40\*)—INDICTMENT—VARIANCE. There is no variance between an indictment for the larceny of money and proof of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the cashing of a check obtained by fraud, with intent to convert the proceeds to the defendant's use.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 102-126; Dec. Dig. § 40.\*]

**2. LARCENY (§ 27\*)—PERSONS LIABLE—CONSPIRATORS.**

Where a party indorsed and secured the money on a fraudulently obtained check, with intent to steal the money, and defendant and such indorser were jointly engaged in the transaction, they were both guilty of larceny of the money.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 55-57; Dec. Dig. § 27.\*]

**3. LARCENY (§ 14\*)—DEFENSES—EVIDENCE.**

In a prosecution for the theft of money obtained on a check, procured from the prosecutrix by leading her to believe, through fraudulent spiritual manifestations, that the proceeds would be invested in a profitable enterprise on her behalf, it was no defense that defendant was advised and believed the investment to be a good one.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 34-38; Dec. Dig. § 14.\*]

**4. CRIMINAL LAW (§ 829\*)—INSTRUCTION—REQUESTS.**

In a trial for the theft of money obtained on a check fraudulently procured from prosecutrix under pretense of buying stock for her, an instruction to acquit if the prosecutrix intended to buy stock at the time she gave her check was sufficiently covered by an instruction to acquit if the jury had a reasonable doubt whether the prosecutrix intended to buy the stock, and was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

**5. CRIMINAL LAW (§ 814\*)—INSTRUCTIONS—ISSUES AND EVIDENCE.**

Where the only property described in an indictment for larceny was \$1,000 in lawful money secured on a fraudulently obtained check, and the evidence showed that, if defendant stole the check, he necessarily stole the money, it was not error to refuse an instruction that the charge against defendant could not be sustained by proof of the larceny of the check.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.\*]

**6. CRIMINAL LAW (§ 809\*)—INSTRUCTIONS—ABSTRACT PROPOSITION.**

An instruction in a larceny case, though abstractly correct, was properly refused, where, under the evidence, it would have confused the jury, and could have been properly given only with explanatory matter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1961-1967; Dec. Dig. § 809.\*]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Oscar Arnold was convicted of grand larceny, and he appeals. Affirmed.

Nathan C. Coghlan, of San Francisco, for appellant. U. S. Webb, Atty. Gen., for the People.

HALL, J. The defendant is the husband of Dessie Arnold, whose conviction of the crime of grand larceny, under an indictment in which she was jointly charged with

this defendant, one Emma Smith and one E. C. Miles, has heretofore been sustained by this court. See *People v. Arnold*, 17 Cal. App. 68, 118 Pac. 729. The appeal now before this court, however, is from a conviction of the crime of grand larceny, under an indictment in which all of the same parties are jointly charged, but is for a different larceny than that of which Dessie Arnold was convicted, though perpetrated by similar methods.

Appellant in this case was convicted of the same larceny, and under the same indictment, as that under which Miles was convicted, and whose conviction was sustained by this court in an opinion (*People v. Miles*, 125 Pac. 250), filed June 1, 1912.

It is now contended, as it was contended in the Miles Case, that the evidence does not show any criminal connection of this appellant with the crime of which he was convicted. The evidence in the present case does not materially differ from the evidence presented upon the trial of Miles, and is ample to prove defendant's criminal connection with whatever crime was committed in getting the money (\$1,000) from the prosecutrix. And for the same reasons that we assigned in the Miles Case we think the evidence sufficient to support the conclusion that the prosecutrix did not intend to part with the title to the money when she gave her check or when the money was drawn on the check and taken into the possession of Miles, appellant's codefendant and fellow conspirator. We have not, and shall not repeat, a summary of the evidence as it is quite sufficiently stated in the opinion rendered in the Miles Case, to which reference may be made for a full statement of the facts.

[1, 2] It is now urged that there is a variance between the indictment and the proof, in that the proof shows a larceny of a check rather than of money. It may be conceded that, if the proof had stopped with the giving of the check, the charge of larceny of the money would not have been sustained. But the proof showed that the check was indorsed by Miles and promptly cashed by the bank on which it was drawn, at San Francisco where the check was drawn. Miles thus obtained possession of the money with intent to steal it. As Miles and appellant were fellow conspirators, jointly engaged in the same criminal enterprise, both were guilty of the larceny of the money thus obtained by means of the check. The check having been cashed and the money obtained thereon, the case is within the rule followed in *People v. Whalen*, 154 Cal. 472, 98 Pac. 194. The evidence therefore, sufficiently proves a larceny of money.

[3] It is next urged that the court erred in sustaining an objection made by the district attorney to a question put to the defendant while a witness as to whether or not he had, before the giving of the check by the pros-



ecutrix to Miles, upon which the money was obtained, made inquiry as to the marketability and the probable value of the "fountain tooth brush." This evidence, it is claimed, would have tended to show the good faith of defendant in urging and advising the prosecutrix to turn over her money to Miles for investment in the company that it is claimed was to be formed to manufacture and market the "fountain tooth brush" when it should be patented. The theory of the prosecution was that defendant and his fellow conspirators by trick and device falsely and fraudulently caused the prosecutrix to believe that certain voices that she heard at a series of seances conducted by Mrs. Arnold were the voices of spirits from the other world. These voices urged and advised her to invest in this Fountain Tooth Brush Company. The theory of the prosecution is amply sustained by the evidence, which shows a bald and cruel scheme to mulct the prosecutrix out of her savings by causing her to believe that she was being advised by spirits to invest her money in the alleged Fountain Tooth Brush Company. From the abundant evidence in the record, clearly and beyond peradventure showing the bald fraud practiced by defendant and his codefendants upon the prosecutrix, it is unbelievable that the proffered evidence could have had any result upon the verdict if it had been admitted. But, in addition, it is clear that it had but a very remote, if any, bearing upon the real question at issue. It would have been no defense to the charge as proven. If the defendant obtained the possession of the money of the prosecutrix by false and fraudulent spiritual manifestations, with intent to convert the money to his own use, it is no defense to the charge of larceny, that he had been informed by others that in their opinion the fountain tooth brush would be a valuable article. This would be but a matter of opinion. The trick and device by which the money was obtained was in representations by words and acts that departed spirits were talking to the prosecutrix, and advising her to invest in the enterprise. If these representations were false and made to deceive the prosecutrix—and the evidence beyond question so proves—and defendant and his fellow conspirators by such means obtained possession of the money of the prosecutrix, with intent to convert it to their own use, it would be no defense to say that they believed that the investment that they were advising would be a good one. We do not think that a new trial should be granted because of the ruling complained of.

Complaint is made as to some modifications which the court made to certain instructions requested by defendant. These we have examined, and find no error therein.

[4] The court did not err in refusing the

instruction to the effect that, if the prosecutrix intended to buy the shares of stock referred to in the evidence at the time when she gave her check, the jury should acquit the defendant, for the reason that the same matter was fully covered by the instruction given by the court as follows: "You are instructed that, if you have a reasonable doubt as to whether the said complaining witness intended to buy the said shares of stock, you must resolve that doubt favorably to the defendant and acquit him."

[5] So also the court did not err in refusing an instruction to the effect that the charge against defendant could not be sustained by proof of the larceny of a check. The same matter was clearly covered by an instruction which the court gave to the effect, and, if the jury had any reasonable doubt as to whether or not the defendant actually intended by trick, device, or fraud to procure the property of the prosecutrix described in the indictment, they should resolve such doubt favorably to the defendant and acquit him. The only property described in the indictment was \$1,000 in lawful money of the United States of America.

[6] The refused instruction, although correct as an abstract proposition of law, would, we think, in view of the condition of the evidence, have probably been confusing to the jury, and could only have properly been given in connection with explanatory matter. In this behalf it must be noted that, although the evidence shows that the prosecutrix gave her check to the codefendant of appellant, it also shows without contradiction that such check was promptly cashed, and the money (\$1,000) obtained thereon without resort to any other trick, device, or fraud than such as had resulted in procuring the check, which was but a step towards procuring the money. Under such circumstances, defendant might be guilty of larceny of both the check and the money. If the check was obtained by larceny thereof, no right or title to the money was acquired thereby. In this case, under the evidence in the record, if the defendant was guilty of a larceny of the check, he was necessarily also guilty of a larceny of the money obtained thereby, and for that reason the court was justified in refusing the requested instruction.

This disposes of all the points urged for a reversal.

In conclusion we may say that after a careful examination of the entire record, including the evidence, we are satisfied that no miscarriage of justice has resulted from any ruling of the trial court.

The judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.







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## PEOPLE v. CARROLL. (Cr. 191.)

(District Court of Appeal, Third District, California. Oct. 2, 1912.)

1. CRIMINAL LAW (§ 1172\*)—INSTRUCTIONS—  
PETIT LARCENY.

If there is evidence from which a reasonable inference that the crime was petit instead of grand larceny can be drawn, it is prejudicial error to submit only grand larceny.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154–3157, 3159–3163, 3169; Dec. Dig. § 1172.\*]

## 2. LARCENY (§ 12\*)—"TAKING FROM PERSON."

If accused and others caused another's purse to be dropped upon the ground by jostling him, etc., in their effort to commit the larceny, their taking it from the floor was a "taking from the person."

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 22–29; Dec. Dig. § 12.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 6860–6864.]

## 3. CRIMINAL LAW (§ 814\*)—INSTRUCTIONS.

Requests for instructions inapplicable to the facts are properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979–1985, 1987; Dec. Dig. § 814.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

#### 4. LARCENY (§ 62\*)—SUFFICIENCY OF EVIDENCE.

Evidence held not to show that accused picked up the purse, alleged to have been stolen, from the ground, or that it came out of the owner's pocket otherwise than through accused's agency.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 153, 162; Dec. Dig. § 62.\*]

#### 5. CRIMINAL LAW (§ 787\*)—INSTRUCTIONS—WEIGHING EVIDENCE.

The court instructed that evidence is to be estimated according to the evidence which it is within the power of one side to produce and the other to contradict; and therefore, if weaker evidence is offered when stronger evidence was within the power of the party, the evidence offered should be viewed with distrust. The court further instructed that it was accused's constitutional right not to testify; and his neglect to do so could not prejudice him in any manner. Accused offered no evidence. Held, that the first instruction was erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1902, 1903; Dec. Dig. § 787.\*]

#### 6. CRIMINAL LAW (§ 1186\*)—APPEAL—HARMLESS ERROR—INSTRUCTION.

The error in the instruction was not reversible, in view of Const. art. 6, § 4½, adopted October 10, 1911, providing that no new trial shall be granted in a criminal case for the misdirection of the jury, unless the error resulted in a miscarriage of justice; the evidence showing convincingly that the crime was committed, and not showing a miscarriage of justice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. § 1186.\*]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

John C. Carroll was convicted of grand larceny, and appeals from the judgment of conviction and the order denying his motion for a new trial. Affirmed.

Geo. F. McNoble, of Stockton, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, of Sacramento, for the People.

CHIPMAN, P. J. The defendant was convicted of the crime of grand larceny on an information jointly charging defendant and Walter Flavin and George Armstrong with its commission. He appeals from the judgment of conviction, and from the order denying his motion for a new trial. The prosecuting witness was one F. M. Katsura, a Japanese who resided at the city of Fresno.

The Attorney General makes the point that "the appellate record has not been properly perfected, and the appeal should be dismissed." The objections having been removed, it is not necessary to notice them.

Katsura testified: That he came to Lathrop on February 23, 1912, on his way to Sacramento: his train arriving at Lathrop at about 1 o'clock p. m. That he left his car to take the Sacramento train, which was to leave in a few minutes. He hastened to the front of the first car; but there was a crowd of people getting on, and, to avoid them, he

went back to get in the rear car. That he had a grip or hand bag in the right hand, and his left hand in his pocket, where his purse was. That, as he neared the platform of the car, and was about to step on the platform, he took his left hand out of his pocket and used it to hold on his hat, as a gust of wind threatened to blow it off. He testified that his purse was in his pocket at that time. As he approached the platform, Flavin, one of the three men charged with the crime, stepped up ahead of him and halted, obstructing Katsura's passage. Another of the three, Armstrong, stepped to the right side of Katsura and commenced pushing him, crying, "Hurry up, hurry up," while the third, Carroll, the defendant, stood at the left side of Katsura. At this time, and while Katsura was holding on his hat and was about to step on the platform, he heard the man standing at the left say, "I have got it, I have got it," and at once he realized he had been robbed. He put his left hand to his pocket and found it pulled out and his purse gone, in which there was \$23.50 and 3 pennies. These three men immediately withdrew and went forward towards the front end of the train and disappeared. Their subsequent movements in the town of Lathrop, up to the time of their arrest on the same day, are partly accounted for, and tended to confirm the testimony of Katsura that they were engaged in a conspiracy to rob him. It appeared that they had no tickets for that train; that two of them purchased tickets for Merced not long after the theft. The evidence was quite sufficient to show that the "job" was "pulled off" in a way common among this class of pickpockets, and it is not now urged that the evidence was insufficient to establish larceny.

A reversal of the judgment of conviction is urged on two grounds: First, because the court refused to give the following instruction requested by defendant: "If the jury are satisfied from the evidence, beyond a reasonable doubt and to a moral certainty, that the defendant John C. Carroll, did, on or about the 23d day of February, 1912, at and in the county of San Joaquin, state of California, steal, take, and carry away the sum of \$23.53, the personal property of F. M. Katsura; but if at said time and place said sum of \$23.53 was not in the possession of and not upon the person of one F. M. Katsura, then they cannot convict said defendant of grand larceny, but may bring in a verdict of guilty of petit larceny;" and, second, because the court gave the following instruction: "Evidence is to be estimated, not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and the other to contradict; and therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within

the power of the party, the evidence offered should be viewed with distrust."

Counsel, in his cross-examination, endeavored to show by the witness that his pocketbook might have fallen out of his pocket while he was in the act of removing his hand from it, and that the defendant might have picked it up from the ground. The following questions and answers will illustrate the point: "Q. You had never seen Mr. Carroll before that day; that is the first time you ever saw him, was it? A. Yes; first time. Q. Do you know who took the purse out of your pocket? A. Well, I have not seen take off. At same time he say, 'I have got it.' Q. You don't know who took the purse out of your pocket? A. No. Q. You don't know whether, when you pulled your hand out, you may have dropped the purse, do you? A. No. Q. You don't know? A. I don't know. Q. You don't know but what you may have dropped the purse out of your pocket—might have fallen out of your pocket when you pulled your hand out—do you? A. I don't understand. (Question read.) A. Pretty hard to understand. The Court: You understand the question? A. Pretty hard to understand that question. Mr. McNoble: Q. Did you see Mr. Carroll, the defendant, take your pocketbook out of your pocket? A. I don't see him take it. Q. You didn't see him take it out? A. No. Q. What? A. No. Q. Do you know whether somebody took him out, or whether it fall out, for sure? A. I can't tell. Q. You can't tell. It may have fallen out then—out of your pocket? A. I can't tell. Q. You can't tell whether it fell out, or somebody take it? A. No. Q. Is that right? A. Yes; that is right. Q. Then it may have fallen out of your pocket on the ground when you went to get up in the car. Is that right? A. But I know sure I had the pocketbook on the ground before I get on the car. Q. You say you are pretty sure you had it when you were on the ground? A. Yes; sure. I sure I got on the ground, because I have hold of it. Q. But you don't know how it got out of your pocket. That right? A. Pretty hard to understand your question. Q. I say you don't know how your pocketbook got out of your pocket? It might have fallen out, or may have been taken out. Is that it? A. I don't know that. Q. You don't know that. You wouldn't say for sure then—you wouldn't say that for sure then? A. What do you mean? Q. Do you know for sure? Do you know for sure how your pocketbook got out of your pocket? A. I don't know sure. Q. You don't know for sure? A. No. Q. Somebody might have taken it out, or it might have fallen out, or you might have dropped it. That right? A. Yes." Following this cross-examination, the witness testified: "Q. State whether or not you dropped your purse on the ground outside of the car. A. I don't understand now. Q. You know before you step up on the car? A. Yes. Q.

You take your hand out of your pocket, you say? A. Yes. Q. Grab your hat? A. Yes. Q. Now, when you take your hand out, you pull your purse out and drop him that way? (Shows.) A. No. Of course, my hand was on pocketbook. Q. You look out for— A. Yes. I look out for pocketbook." Recross: "Mr. McNoble: Q. I understand you to say, however, you don't know how that pocketbook get out of your pocket? The Court: I think it has been answered. He said before that he didn't know. Mr. McNoble: Very well."

[1] Appellant cites the following cases in support of his contention: *People v. Stofor*, 3 Cal. App. 417, 421, 86 Pac. 734; *People v. Comyns*, 114 Cal. 107, 112, 45 Pac. 1034. It is undoubtedly the rule that, where there is any evidence from which a reasonable inference may be drawn that the crime of which the defendant was convicted was of a lesser degree—in this case, petit larceny, as is claimed—it is prejudicial error to withdraw from the jury the consideration of such evidence and confine the instructions to the crime of grand larceny. In the *Stofor* Case, *supra*, there was considerable evidence tending to show that the money taken by the defendant could have been abstracted from his victim's purse while it was in defendant's possession, with the consent of the owner, and also that it might have been taken when the purse was on the table and out of the owner's possession. In the *Comyns* Case, *supra*, the question related to the value of the articles found in defendant's possession, which was taken from the jury.

[2] In the case here the evidence leaves no rational inference that defendant picked up the purse from the ground, and, even if he did so, the evidence shows that it could not have dropped to the ground but for the maneuvers of these men, who were on the spot with the design to rob him. If the purse dropped, which is a mere surmise or possibility unsupported by any evidence, and it was caused to drop by these men in their effort to commit the larceny, it was, in point of law and common sense, a taking from the person. If these men had caused Katsura to fall down, and his purse had slipped from his pocket in falling, and defendant had picked it up, and the three men had then departed with the money, the law would have regarded it as taking from the person's possession. These three men had Katsura surrounded—one obstructing his entry to the car, another jostling him and attracting his attention by crying "Hurry up," when he could not enter the car for the obstruction they offered, and the third stood at his left side, and, while these proceedings were going on, and at the same time Katsura was told to hurry up, the defendant said, "I have got it, I have got it," and the three immediately left the car. The condition of Katsura's pocket when he put his hand down to



it showed that it had been pulled out, which must have been done by the defendant. Katsura's testimony was that the defendant stood at his side and back of him when he said to his confederates, "I have got it."

[3] Instructions must be applicable to the facts; and it is not error to refuse instructions inapplicable to the facts. *People v. Turley*, 50 Cal. 469; *People v. Chaves*, 103 Cal. 408, 37 Pac. 389; *People v. Chaves*, 122 Cal. 140, 54 Pac. 596.

[4] We do not think the evidence showed that there was a reasonable probability or a reasonable possibility that the defendant picked up the purse from the ground, or that it came out of Katsura's pocket otherwise than through defendant's agency.

[5] The second of the above instructions was given in connection with several other general instructions usually given in criminal cases. The court also instructed the jury as follows: "The jury are instructed that it is the constitutional right of the defendant to stand mute in a criminal action; and his neglect or refusal to be a witness cannot in any manner prejudice him, nor be used against him in the trial or proceeding. The jury are instructed that if the defendant has neglected or refused to become a witness in his own behalf such fact or circumstance cannot in any manner prejudice him in this trial; and you are not to consider such fact or circumstance as any evidence against him in this trial."

Appellant cites *People v. Cuff*, 122 Cal. 589, 55 Pac. 407, and *People v. Charles*, 9 Cal. App. 338, 99 Pac. 383, in which latter case the Cuff Case was commented upon, and in which case, also, a petition for hearing in the Supreme Court was denied January 12, 1909. In the Cuff Case the instruction complained of was given, and also a similar instruction to the one last above quoted, wherein the court said to the jury that "no inference of guilt can be drawn against him [defendant] for a failure to testify in his own behalf." After the admonition given by the Supreme Court in the Cuff Case, that "in criminal cases the proper occasions are so few, and the improper occasions are so many, that it were best they should be given rarely, if at all," we must infer that the instruction found its way to the jury through inadvertence. But this fact cannot lessen the prejudicial effect it may have had upon the jury.

[6] We think, however, that the rule established by the amendment to our Constitution (article 6, § 4½) was designed to meet just such a case as this, and should be applied at this time. It reads: "No judgment shall be set aside, or new trial granted in any criminal case on the ground of misdirection of the jury or the improper admission of or rejection of evidence, or for error as to any matter of pleading or procedure,

unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Adopted October 10, 1911.

The instruction under consideration did not go to the degree of the crime, as did the other one, which latter admitted the crime of larceny, but gave the jury the right to pass upon the degree—whether grand or petit larceny—and this was a fact in the case as to which the defendant had the right to the verdict of the jury, had there been evidence applicable. It may be that the constitutional amendment was not designed to take away such right, where there is evidence reasonably tending to establish a different crime, or a crime of less degree, than that of which the defendant was convicted. There is a difference between misdirecting the jury and in refusing to direct them correctly in matters as to which defendant is entitled by right to have the jury instructed. In the instance before us, the jury were misdirected, from which it is urged that the jury were prejudiced by the fact that the defendant offered no evidence; whereas he might have himself testified, or have called his confederates. There were, in fact, no other witnesses of the transaction whom he could have called. The evidence was convincing that the crime charged was committed. Defendant does not challenge the evidence, except to claim that he should have had an instruction as to what constitutes petit larceny. After an examination of the entire cause, including the evidence, we cannot say that the error complained of resulted in a miscarriage of justice.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

20 Cal. App. 56

SEBRING v. HARRIS. (Civ. 980.)

(District Court of Appeal, First District, California. Oct. 4, 1912.)

# 1. TRIAL (§ 164\*)—NONSUIT—MOTION.

Defendant moved for a nonsuit in an action for false imprisonment on the ground that plaintiff had not "established any cause of action at all; \* \* \* also they must show that there was a want of probable cause on the ground that the testimony, so far as introduced by the plaintiff, does not substantiate anything at all connecting the defendant with the matter." *Held*, that the motion did not raise the point that there was a fatal variance between the proof and allegations.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 372; Dec. Dig. § 164.\*]

# 2. FALSE IMPRISONMENT (§ 22\*)—PROBABLE CAUSE—BURDEN OF PROOF.

Upon showing a wrongful arrest, the burden of proving probable cause was on defendant.

[Ed. Note.—For other cases, see *False Imprisonment*, Cent. Dig. §§ 98, 99; Dec. Dig. § 22.\*]

### 3. TRIAL (§ 163\*)—NONSUIT.

The ground relied upon for a nonsuit should be stated to the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 371; Dec. Dig. § 163.\*]

### 4. FALSE IMPRISONMENT (§ 20\*)—PLEADING—VARIANCE.

Where, in an action for false imprisonment, the answer denied that defendant caused plaintiff's arrest upon the pretended charge of larceny, as alleged in the complaint or "upon any other charge," proof that plaintiff was arrested for disturbing the peace was not a material variance under Code Civ. Proc. § 469, providing that no variance is deemed material unless it actually misleads the adverse party, to his prejudice on the merits.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 86-97; Dec. Dig. § 20.\*]

### 5. FALSE IMPRISONMENT (§ 34\*)—DAMAGES—MENTAL ANGUISH.

The evidence in an action for false arrest showed that defendant directed two police officers to arrest plaintiff, and took her to a fire engine house through a crowd of several hundred, and detained her there for an hour, awaiting the arrival of the patrol wagon, but, on her protest, she was not taken to the police station in the wagon, but was allowed to walk, escorted by a fireman and two police officers, and was detained for a time at the police station. *Held*, that the jury were properly authorized to consider the question of humiliation and mental anguish in awarding damages.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 111; Dec. Dig. § 34.\*]

### 6. NEW TRIAL (§ 123\*)—GROUNDS—LIMITATION BY NOTICE OF INTENTION—EXCESSIVE DAMAGES.

A ground that the damages were excessive, not stated in the notice of intention to move for a new trial, could not be considered upon the hearing of the motion under Code Civ. Proc. § 659, requiring the grounds of the motion to be stated in the notice.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 278-281; Dec. Dig. § 123.\*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Emma Sebring against L. Harris. From an order denying defendant's motion for new trial, he appeals. Affirmed.

Henry Ach and H. E. Michael, both of San Francisco (Wm. Hoff Cook, of San Francisco, of counsel), for appellant. William M. Cannon, of San Francisco, for respondent.

HALL, J. This is an appeal from an order denying defendant's motion for a new trial. The action was brought to recover damages for the wrongful and false arrest and imprisonment of plaintiff caused and procured by defendant.

Among other things it is alleged in the complaint "that on the 22d day of June, 1907, at the city and county of San Francisco, state of California, the defendant caused the plaintiff to be arrested upon a pretended charge of larceny." Defendant in his answer denied that he "caused the plaintiff to be arrested upon a pretended charge of larceny, or upon any other charge." At the close of plaintiff's case, defendant moved the court for a nonsuit, which motion was by

the court denied. This ruling of the court is the first matter urged by appellant as ground for the reversal of the order denying his motion for a new trial.

The only contention of appellant upon this point is that the evidence tends to show that the defendant caused plaintiff's arrest upon a charge of disturbing the peace, instead of upon a charge of larceny, and which appellant contends presented a case of fatal variance between the proof and allegations of the complaint. As will appear later on in this opinion, we do not think the variance at all material.

[1] But it is a sufficient answer to appellant's contention to say that the motion for a nonsuit was not made upon any such ground. The motion as it appears in the record is as follows: "I desire to make the motion for nonsuit on the ground that they have not established any cause of action at all. They have not shown any connection with Mr. Harris. Also, they must show that there was a want of probable cause, and on the ground that the testimony so far introduced by the plaintiff does not substantiate anything at all connecting the defendant with the matter." It is perfectly clear that appellant's motion was directed to a failure to prove that defendant caused the arrest of plaintiff at all, and to a failure to prove want of probable cause for the arrest.

As to the first of these grounds, the evidence in the record establishes beyond question that the defendant did cause the arrest of plaintiff. It is not now contended to the contrary.

[2] As to the second ground, the arrest being shown, the burden of proving probable cause is upon the defendant. *Ah Fong v. Sternes*, 79 Cal. 30, 21 Pac. 381; *People v. McGrew*, 77 Cal. 570, 20 Pac. 92.

[3] The ground relied upon for a nonsuit should be stated to the trial court. *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195; *Loring v. Stuart*, 79 Cal. 200, 21 Pac. 651. Especially does this rule apply where, as in this case, an amendment could have been allowed to the pleadings which would have obviated the objection now made by the appellant, and without possible inconvenience or injustice to the defendant. *Daley v. Russ*, 86 Cal. 114, 24 Pac. 867. The court did not err in denying appellant's motion for a nonsuit. Upon the trial there was some conflict in the evidence as to whether the arrest which the evidence clearly shows defendant caused to be made of plaintiff was upon a charge of larceny or upon a charge of disturbing the peace. There is in the record evidence to support either theory. The court gave instructions addressed to both theories.

[4] Appellant contends that the instruction which the court gave to the effect that a verdict for plaintiff might be rendered if it

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. D.g. Key-No. Series & Rep'r Indexes



plaintiff upon a charge of disturbing the peace was error. It is not contended that the instruction is incorrect in the abstract, but that it was error to give an instruction upon such a theory of the case because of the allegation in the complaint that the arrest was upon a charge of larceny. In other words, it is claimed that the evidence and theory upon which the instruction was predicated presents a case of a material variance between the allegations of the complaint and the proof. We do not think so. It may be true that in some jurisdictions it would be so considered, but we do not think that it should be so considered under the law of this state.

The gist of the action in this case was the wrongful arrest. The charge upon which the arrest was made was but an incidental matter, peculiarly within the knowledge of defendant, and need not have been alleged by plaintiff. A denial that the arrest was made upon a charge of larceny would not have met the gist and substance of the allegation of the complaint. This defendant recognized by denying, as he did, that he caused the plaintiff to be arrested upon a pretended charge of larceny or upon any other charge. By this denial he challenged proof that he had caused the arrest of plaintiff upon any charge whatever. The evidence tending to show an arrest upon a charge of disturbing the peace was addressed to the issue presented by the denials in defendant's answer; and the instruction predicated upon the theory of the case resting upon such evidence was thus pertinent both to the evidence before the jury and court, and the issues presented by the pleadings. "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be amended, upon such terms as may be just." Section 469, Code Civ. Proc. That the defendant was in no respect misled by the variance between the allegation in the complaint and the proof is perfectly clear, for he went to trial upon the issue as to whether or not he had caused the arrest of plaintiff upon any charge at all. It is thus clear that the variance now complained of as a foundation for the attack upon the instruction was not material, and the court was not even required to direct an amendment to the pleading to conform to the proof. Section 470, Code Civ. Proc. The proof was addressed to the issue framed by the pleadings, and the instruction was pertinent both to the issue thus presented and the evidence bearing thereon. The cause of action proved under either theory of the facts was in substance the one alleged. The court

therefore did not err in giving the instruction complained of.

It is next urged that the court erred in an instruction which it gave upon the question of damages. Stress seems to be laid upon that portion of the instruction in which the jury were told that they were entitled to consider whether the plaintiff was subjected to humiliation or suffered great or any mental anguish by reason of such arrest.

[5] Where it is alleged, and the proof is sufficient to support such allegation, that the arrest was malicious, no reason occurs to us why humiliation and mental anguish caused by such arrest are not proper elements to be considered by the jury in fixing damages for such arrest. The evidence shows that defendant directed two police officers to arrest plaintiff. They arrested her accordingly, and took her to a fire engine house through a crowd of several hundred persons. There they detained her for about an hour pending the arrival of the police patrol wagon. Upon its arrival, however, upon her protest she was not taken to the police station in the wagon, but was allowed to walk there, escorted for a part of the way by a fireman, and for the balance of the way by two police officers. She was detained for a time at the police station, but was eventually released without any charge being preferred against her. That humiliation and mental anguish to a woman would be the natural and proximate result of such an arrest goes without saying. The instruction was correct in the abstract, and was justified by the evidence in the record.

[6] The only other point raised by appellant is that the damages awarded by the jury are excessive. This point was first raised at the oral argument. It was not even stated as ground for the motion in the notice of intention to move for a new trial, and therefore could not be considered by the trial court upon the hearing of the motion for a new trial. Section 659, Code Civ. Proc.

The court did not err in denying appellant's motion for a new trial, and the order appealed from is therefore affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(19 Cal. App. 648)

REED ORCHARD CO. et al. v. SUPERIOR COURT IN AND FOR YOLO COUNTY et al. (Civ. 1022.)

(District Court of Appeal, Third District, California. Sept. 7, 1912. Rehearing Denied by Supreme Court Nov. 6, 1912.)

1. APPEAL AND ERROR (§ 479\*)—SUPERSEDEAS—PROCEEDINGS IN TRIAL COURT.

Where the appeal acts as a supersedeas, the appellate court will issue a writ of supersedeas or stay of proceedings when the trial



court is about to attempt to enforce the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2251-2256; Dec. Dig. § 479.\*]

## 2. APPEAL AND ERROR (§ 460\*)—EFFECT—STAY BY APPEAL.

No stay of execution is effected by an appeal unless by virtue of some statutory provision.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2217-2226, 2245-2246; Dec. Dig. § 460.\*]

## 3. EMINENT DOMAIN (§ 167\*) — CONDEMNATION—STAY PENDING APPEAL—CONSTITUTIONALITY OF STATUTE.

Code Civ. Proc. § 1254, providing that at any time after trial and judgment in condemnation proceedings or pending an appeal to the Supreme Court, when the plaintiff pays into court for the defendant the full amount of the judgment, etc., the superior court in which the proceeding was tried may upon certain notice, authorize the plaintiff if in possession, to continue therein, and if not to take possession during the pendency of the litigation, and may, if necessary, stay all proceedings against the plaintiff on account thereof, is constitutional.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 451-456; Dec. Dig. § 167.\*]

## 4. EMINENT DOMAIN (§ 167\*)—CONDEMNATION—STAY PENDING APPEAL—REPEAL OF STATUTES.

Code Civ. Proc. § 1254, authorizing the superior court in certain cases to stay further proceedings pending appeal from the judgment in condemnation proceedings, is not repealed by Code Civ. Proc. § 949, specifying cases where the appeal does not stay execution and not including condemnation proceedings; the law not favoring repeals by implication, especially not the repeal of special by general statutes, and any conflict in these two sections being controlled by Pol. Code, § 4481, providing that, if the provisions of any title conflict with the provisions of any other title, the provision of each title must prevail as to all matters and questions arising out of the subject-matter of such title.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 451-456; Dec. Dig. § 167.\*]

## 5. STATUTES (§ 230\*)—AMENDMENT—DEFECT. A revised or amended act must be construed as a new and original piece of legislation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 311; Dec. Dig. § 230.\*]

## 6. STATUTES (§ 158\*)—REPEAL BY IMPLICATION.

The law does not favor repeal of statutes by implication.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 228; Dec. Dig. § 158.\*]

## 7. STATUTES (§ 225\*)—REPEAL—REPUGNANT PROVISIONS.

Where there are two or more provisions in a statute relating to the same subject-matter, they must, if possible, be construed so as to maintain the integrity of both.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 302, 303; Dec. Dig. § 225.\*]

## 8. STATUTES (§ 162\*)—REPEAL—GENERAL AND SPECIAL ACTS.

Where two statutes treat of the same subject, the one being special and the other general, unless they are irreconcilably inconsistent, the latter, although latest in date, will not be held to have repealed the former, but the spe-

cial act will prevail in its application to the subject-matter, as far as coming within its particular provisions.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 235-237; Dec. Dig. § 162.\*]

## 9. EMINENT DOMAIN (§ 258\*)—APPEAL—SUPERSEDEAS.

The fact that the railroad company paid into court the amount of the judgment in condemnation proceedings in favor of several claimants without specifying the amount deposited for any particular claimant was not ground for granting a writ of supersedeas to prevent the railroad company from taking possession of the land pending appeal from the judgment of condemnation; the statute merely requiring the plaintiff in condemnation proceedings to deposit the amount of the judgment.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 672; Dec. Dig. § 258.\*]

## 10. APPEAL AND ERROR (§ 458\*) — SUPERSEDEAS.

Nor was it ground for the granting of such writ of supersedeas that the verdict and judgment were informal or erroneous, where there was no jurisdictional defect; mere irregularities not being reviewable on supersedeas.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2223, 2224; Dec. Dig. § 458.\*]

## 11. EMINENT DOMAIN (§ 258\*)—APPEAL—SUPERSEDEAS—PETITION.

Where the petition for a writ of supersedeas to prevent the railroad company from taking possession of the land during the pendency of an appeal from a judgment of condemnation, while alleging as a ground for the writ that the verdict was insufficient because it did not find the amount of the interest of each of the various defendants, alleged that one petitioner, who was a defendant in condemnation proceedings, was the owner of the condemned property, its allegations considered together did not disclose an insufficient verdict; the presumption being in the absence of a contrary showing that the value found in the verdict was the value of such petitioner's interest, and that the interest of the other defendants was merely of normal or of no value.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 672; Dec. Dig. § 258.\*]

## 12. EMINENT DOMAIN (§ 258\*)—APPEAL—SUPERSEDEAS.

Where a party, after having been properly served, fails to appear, and to allege or prove the value of his interest in the property condemned, he cannot thereafter, on an application for a writ of supersedeas to prevent the railroad company from taking possession pending an appeal, object to the finding of the court or jury in the condemnation proceedings.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 672; Dec. Dig. § 258.\*]

## 13. EMINENT DOMAIN (§ 223\*)—VERDICT—VALIDITY—DEFAULT OF DEFENDANT.

The default of defendants in condemnation proceedings does not relieve the jury from their duty to determine the value of the land condemned.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 568-573; Dec. Dig. § 223.\*]

## 14. APPEAL AND ERROR (§ 865\*)—RIGHT OF APPEAL—DEFAULTING DEFENDANT — SCOPE OF APPEAL.

A defaulting defendant has the right of appeal, but his attack must be confined to the consideration of jurisdiction or of the suffi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ciency of the pleadings and he cannot question the disposition of the fund.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3462-3466; Dec. Dig. § 865.\*]

**15. APPEAL AND ERROR (§ 907\*) — SUPERSEDEAS—PETITION.**

Where the petition for a writ of supersedeas to prevent a railroad company from taking possession of the land condemned during the pendency of an appeal fails to state that any objection was made to the form of the verdict rendered in the condemnation proceedings, it will be presumed that no such objection was made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.\*]

**16. EMINENT DOMAIN (§ 262\*) — VERDICT — —TIMELY OBJECTION.**

Where the defendant in condemnation proceedings fails to object to a verdict, which does not comply with Code Civ. Proc. § 1248, and assess the value of each separate interest in the property condemned, he cannot subsequently complain thereof.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 681-686; Dec. Dig. § 262.\*]

**17. EMINENT DOMAIN (§ 223\*)—VERDICT—CORRECTION.**

Under Code Civ. Proc. § 619, providing that an informal or insufficient verdict may be corrected by the jury under the advice of the court or the jury may again be sent out, a verdict, in a condemnation proceeding, which is informal because it does not comply with Code Civ. Proc. § 1248, and assess the value of each separate interest condemned, may be corrected by the jury.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 568-573; Dec. Dig. § 223.\*]

**18. EMINENT DOMAIN (§ 223\*)—VERDICT—CORRECTION BY COURT.**

Under Code Civ. Proc. § 1247, providing that the court may determine all conflicting claims to the property sought to be condemned and to the damages therefor, the court has power to assess the value of each separate interest in the property condemned, where the jury fails to make such assessment as required by Code Civ. Proc. § 1248.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 568-573; Dec. Dig. § 223.\*]

**19. EMINENT DOMAIN (§ 258\*)—APPEAL—SUPERSEDEAS—GROUNDS—LEASE.**

It was not ground for the granting of a writ of supersedeas to prevent the railroad company from taking possession during the pendency of an appeal from a judgment of condemnation, that there was a lease upon the property condemned of which the judgment took no account, where from the pleadings it presumptively appeared that such lease ceased to be operative on condemnation of the land.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 672; Dec. Dig. § 258.\*]

**20. EMINENT DOMAIN (§ 258\*)—APPEAL—SUPERSEDEAS—GROUND—MORTGAGE.**

Nor was it ground for such writ that there was a mortgage upon the land for the payment of which no provision was made in the condemnation proceedings; the mortgagee having a right to resort to the fund in the custody of the court to satisfy the deficiency, if any should remain after resort were had to that part of the incumbered land which was not condemned.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 672; Dec. Dig. § 258.\*]

Condemnation proceedings were instituted by the Vallejo & Northern Railroad Com-

pany against the Reed Orchard Company and others, and, after appeal taken, the Reed Orchard Company and others petitioned for a writ of supersedeas against the superior court in and for the county of Yolo and judge thereof, to prevent the railroad company from taking possession of certain real estate pending the appeal. Demurrer to the petition for a writ of supersedeas sustained, and the order to show cause discharged.

For opinion of Supreme Court denying rehearing, see 128 Pac. 18.

Arthur C. Huston, of Woodland, and White, Miller & McLaughlin, of Sacramento, for petitioners. T. T. C. Gregory, of Fairfield, John S. Partridge, of San Francisco, Elmer W. Armfield, of Woodland, and C. J. Goodell, of San Francisco, for respondents.

**BURNETT, J.** This is an application for a writ of supersedeas to prevent the Vallejo & Northern Railroad Company from taking possession of certain real estate during the pendency of an appeal from a judgment of condemnation. The petition for the writ alleges that the Reed Orchard Company has been and now is the owner in fee of a certain tract of land containing 140 acres, more or less, in Yolo county, known as the Reed orchard; that petitioner, the People's Savings Bank, has been and now is the holder of a deed of trust covering the whole of said property and securing over \$35,000 due from the said Reed Orchard Company to said bank, the said deed of trust being of record in the county recorder's office of said Yolo county; that petitioner Komano has a lease of said premises for the term of five years beginning November 1, 1907, and that he has paid the rental to date including \$3,750 due January 1, 1912 (being one-half of the rental for the year ending November 1, 1912), but that the \$3,750 due July 1, 1912, has not been paid; that on the 5th day of May, 1910, the Vallejo & Northern Railroad Company began an action in the superior court of said Yolo county against petitioners to condemn for railroad purposes 104.1 acres of said tract of land; that the summons in said action was served on the defendants named therein, petitioners herein; that said Reed Orchard Company appeared in said action and answered said complaint; that People's Savings Bank and said Komano did not appear in the action, but that evidence was received at the trial, without objection, "showing that the deed of trust to said People's Savings Bank was in full force and effect and the said lease so owned and held by S. Komano was offered and received without objection, and also testimony showing the net value of the crops grown on said premises and to which said tenant S. Komano would be entitled under



said lease and other evidence was received tending to show the value of his interest and the jury viewed the premises"; that a jury trial was had, and a verdict was rendered on the 22d day of March, 1912, in favor of plaintiff, awarding to it the 104.1 acres sought to be condemned and fixing the value thereof at the sum of \$104,100, but that said verdict did not separately assess or fix the value separately of the several estates and interests of the defendants; that on March 23, 1912, the superior court entered judgment on said verdict awarding the plaintiff the said 104.1 acres, but said court did not, by said judgment or at all, fix, determine, or ascertain the interests or estates or value of the interests or estates of the various defendants in said action or in any manner designate or show the value of each estate or interest therein separately; that within the time required by law petitioners herein appealed from said judgment; "that the said Vallejo & Northern Railroad Company deposited in court the amount of the verdict together with the costs for the defendants generally to be distributed to those entitled thereto without naming the persons to whom the same was to be paid nor the respective amounts to be paid to any person or defendant in said action; that a final order of condemnation was entered by said court from which petitioners have appealed; that a notice has been served on petitioners by said railroad company that it would move said court to enter an order putting said company into possession of said property and authorizing it to use the property during the pendency and until final conclusion of the litigation; and that said superior court and the judge thereof threaten to and will proceed to hear said motion and grant the same." A demurrer on the general ground has been filed herein by respondent, and also an answer and return, in which some of the allegations of the petition are denied and the proceedings in the condemnation suit are more fully set forth than by petitioners. At the hearing it was also stipulated that this court might consider the fact that the lower court "made and entered its order fixing the sum of \$25,000 as a further sum for a fund to pay any further damages and costs that might be recovered in said proceeding, as well as all damages that might be sustained by defendants, if for any cause the property shall not be finally taken for public use, and that then and thereafter the Vallejo & Northern Railroad Company deposited with the clerk of the said superior court of the county of Yolo the said further sum of \$25,000, which said sum is still in the custody of said clerk."

For the two following reasons it is urged that the court should issue the writ: (1) By reason of said appeals, the enforcement of the judgment in said condemnation proceed-

ing has been stayed, and therefore the superior court has no authority to authorize the plaintiff in said action to take possession of or use said property until after the final determination of said appeals; and (2) in consequence of the failure of the jury and of the court to fix the value of the respective interests of the defendants in said action in and to the property condemned none of petitioners can determine or demand from the clerk the amount of his respective interest. The duty of the jury to segregate the damages and to make the respective awards as contended for is claimed to be imposed by section 1254 of the Code of Civil Procedure, and by reason of said omission it is urged that there is really no valid judgment to be executed.

[1] It is virtually conceded that the writ of supersedeas will issue to prevent action on a judgment only where the appeal from the judgment operates as a stay of proceedings; or, as it has been stated: "Where the appeal acts as a supersedeas, the appellate court will issue a writ of supersedeas or stay of proceedings when the trial court is about to issue an execution or other order with the intention of carrying the judgment into effect." *Dulin v. Pacific W. & C. Co.*, 98 Cal. 304, 33 Pac. 123; *Foster v. Superior Court*, 115 Cal. 279, 47 Pac. 58; *Rose v. Mesmer*, 131 Cal. 631, 63 Pac. 1010; *McAneny v. Superior Court*, 150 Cal. 6, 87 Pac. 1020.

[2] The first question to be determined, then, is whether the appeal taken by petitioners operated to stay proceedings upon the judgment of condemnation; and this is to be considered in the light of the principle that no stay of execution is effected by an appeal unless by virtue of some statutory provision. In the *Foster Case*, supra, it is said: "The effect of an appeal from the judgment upon the judgment appealed from is a matter of statutory regulation, and, as this effect is to be determined by a construction of the statutes under which an appeal is taken, the decisions in other states upon statutes differing from our own are not entitled to a controlling consideration." Under the facts admitted herein, it is perfectly clear that certain provisions of the statute authorize the court below to make an order to permit plaintiff, the said railroad company, to take possession of and use the said property during the pendency of the litigation.

[3] Section 1254 of the Code of Civil Procedure provides that "at any time after trial and judgment entered or pending an appeal from the judgment to the Supreme Court whenever the plaintiff shall have paid into court, for the defendant, the full amount of the judgment, and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in said proceeding, as well as



all damages that may be sustained by the defendant, if for any cause the property shall not be finally taken for public use, the superior court in which the proceeding was tried may, upon notice of not less than ten days, authorize the plaintiff, if already in possession, to continue therein, and if not, then to take possession of and use the property during the pendency of and until the final conclusion of the litigation, and may if necessary stay all actions and proceedings against the plaintiff on account thereof." Section 1257, following, is another special provision in reference to condemnation proceedings, and it makes applicable to said proceedings the general provisions of part two of the Code of Civil Procedure, relative to new trials and appeals, except as they are inconsistent with the provisions of the title under which are found said sections 1254 and 1257. From the statement of facts already made it appears that a trial has been had, a judgment entered, an appeal has been taken, the plaintiff has paid into court for the defendants the full amount of the judgment and costs, together with the other sum demanded by said section 1254, and the statutory notice has been given for the hearing of the motion for an order to be let into possession of the property. There has been therefore a full compliance on the part of plaintiff with the requirement of said section 1254, and unless there is some reason for holding said section invalid, or that it has been repealed, petitioners' case as to the effect of the appeals, it would seem, must fail. The validity of the section, it may be said, has been directly adjudicated and it cannot now be questioned. In *San Luis Obispo v. Simas*, 1 Cal. App. 175, 81 Pac. 972, it was held, as stated in the syllabus, that "since the amendment to section 1254 of the Code of Civil Procedure an order for possession after payment of the money into court may be made pending an appeal from the decree of condemnation; and it was not error to refuse to permit proof of the appeal in making the order."

In *Spring Valley W. W. v. Drinkhouse*, 95 Cal. 220, 30 Pac. 218, after judgment and pending an appeal, plaintiff took possession of the property by virtue of said section 1254, and in discussing that provision the Supreme Court said: "The final conclusion of this litigation has not yet been reached, and, if said section of the Code is not in conflict with the Constitution of the state, then this proceeding must fail for the order of the trial court is still in full force and effect. This section is not in violation of any provision of the Constitution, but directly in line with that instrument wherein it treats of such matters. \* \* \* It would seem that the framers of both the Constitution and the statute had in view the delays incident to condemnation proceedings, and the necessity in many cases of allowing property

to be taken and used for a public use during the progress of the litigation provided an adequate fund to fully reimburse the landowner was first paid into court." So in *Heilbron v. Superior Court*, 151 Cal. 275, 90 Pac. 707, in refutation of petitioners' argument that in no conceivable instance can a plaintiff in condemnation have a right of entry upon the condemned property until the end of litigation has come, the Supreme Court declared: "This, of course, is not the meaning of the Constitution, which, from its very reading, as well as from the construction which has been given to its language by this court, contemplates that such right of entry vests in plaintiff after the award by the jury of the amount of damages which the defendant will sustain by the taking of his property, whether that amount in the ultimate outcome of the litigation shall prove to be the true amount, or whether, as the result of appeals and new trials, the amount shall be finally determined to be more or less. The constitutional provision is framed to accomplish this result, and unquestionably section 1254 of the Code of Civil Procedure has been carefully devised and drawn to further and effectuate the constitutional intent." Therein also is found this further statement: "The Constitution merely guarantees that there shall be ascertained and paid into court before plaintiff's right of entry attaches the amount of the judgment, and this, notwithstanding that that judgment may be reversed, and that the defendant may ultimately obtain a verdict for a much larger amount of money. We can see no constitutional objection, and none has been pointed out to us, which would invalidate a statute which confers upon a defendant in condemnation proceedings even greater rights, and even greater security for his recovery, than that which the Constitution itself awards him." This section, it may be remarked, has been variously amended by the Legislature, but we need not trace its history fully. It seems advisable, however, to call attention to some of its vicissitudes. As enacted in 1872 it provided that "at any time after service of summons, the court may authorize the plaintiff" to continue in possession or to take possession upon the terms therein prescribed. Subsequently this was changed so as to read: "At any time after trial by jury and judgment entered upon their verdict or pending an appeal from the judgment to the Supreme Court," etc., substantially as it is now. In 1897 the statute was amended so as to authorize the plaintiff "at any time after the filing of the complaint and the issuance and service of the summons thereon" to take possession and use the property. In this form it was decided to be unconstitutional by the Supreme Court in the case of *Steinhart v. Superior Court*, 137 Cal. 575, 70 Pac. 629, 59 L. R. A. 404, 92 Am. St. Rep. 183, in an opinion filed November 8, 1902. Therein

It was held that, under the terms of the Constitution, the preliminary possession cannot be authorized until the damage resulting therefrom has been judicially determined and the amount has been paid or tendered to the owner; the court saying, through Mr. Justice Temple: "I do not agree to the proposition that compensation is made to the owner by paying into court a sum of money before the damage has been judicially determined and where the property owner cannot take the money. Surely he is not compensated until he may take the money. It is not paid into court for him until he can take it." No doubt it was in view of this decision and to overcome the said constitutional objection that in 1903 the section was again amended to read as it is now.

[4-8] The other consideration to be noticed in this connection grows out of the contention of petitioners that this section has been repealed by implication by virtue of the amendment of section 949 by the Legislature of 1905. St. 1905, p. 22. To state the proposition in the language of petitioners: "Section 949, C. C. P., therefore, being general in terms and upon its face providing for a stay of proceedings in all cases not expressly exempt from its operation, and said section being the latest expression of the will of the Legislature, should control section 1254, C. C. P. Section 949 expressly specifies cases where the appeal does not stay execution. In 1905, as stated, the Legislature enacted this section, but did not include among the exceptions therein specified condemnation proceedings. It is well settled that a revised or amended act must be construed as a new and original piece of legislation. *Donlon v. Jewett*, 88 Cal. 530 [26 Pac. 370]." It is believed, however, that respondent is wholly right in the contention that petitioners have thus furnished a striking example of non sequitur. It is well illustrated by respondent as follows: "At the time of the amendment to 1254, in 1903, section 949 read the same as it reads now, except that in 1905 another exception was added, namely, that relating to a judgment giving a stockholder or director the right to inspect the records of a corporation. In other words, the contention of counsel amounts to this: The title on eminent domain provided that an appeal should not stay proceedings in the court below. The general section upon the effect of appeals was amended by adding another exception having no reference whatever to eminent domain. Ergo, the sections on staying proceedings in eminent domain were repealed." The argument of petitioners seems rather to proceed upon the assumption that the provision in reference to appeals in eminent domain was contained in the exceptions provided in said section 949 as it existed prior to said amendment of 1905. Whereas, the truth is, as we have seen, there was and is a special statute applicable to eminent do-

main, and section 949 contains the general law upon the subject of appeals. This last is found in title 13 of part 2 of the Code of Civil Procedure designated "Appeals in Civil Actions." Sections 1254 and 1257 are in title 7 designated "Eminent Domain" of part 3 headed, "Special proceedings of a civil nature." If any conflict in those sections should seem to exist, therefore, it is proper to invoke section 4481 of the Political Code, reading as follows: "Conflicts between titles, which to prevail. If the provisions of any title conflict with or contravene the provisions of another title, the provisions of each title must prevail, as to all matters and questions arising out of the subject-matter of such title." As to the rule of construction of general and special provisions in a statute the authorities are uniform. It is thus stated in *People v. Pacific Improvement Co.*, 130 Cal. 445, 62 Pac. 740, through Commissioner Cooper: "It is the established rule of construction that the law does not favor a repeal by implication, but that, where there are two or more provisions relating to the same subject-matter, they must, if possible, be construed so as to maintain the integrity of both. It is also the rule that where two statutes treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although latest in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject-matter as far as coming within its particular provisions." Therein is quoted Judge Cooley (*Cooley's Constitutional Limitations* [6th Ed.] 182), wherein he said: "The repugnancy between two statutes should be very clear to warrant a court holding that the one later in time repeals the other, when it does not in terms purport to do so. This rule has peculiar force in the case of laws of special and local application, which are never to be deemed repealed by general legislation except upon the most unequivocal manifestation of intent to that effect." See, also, *Lewis' Sutherland on Statutory Construction* (2d Ed.) § 274, and *Miller v. Engle*, 3 Cal. App. 330, 85 Pac. 159. It is submitted that no intention was actually manifested by the Legislature, in the said amendment of 1905, to repeal section 1254 or 1257, and in the light of the foregoing familiar rule of construction it should be held that no repeal by implication was effected.

We do not understand that the cases cited by petitioners are necessarily inconsistent with this position.

In *Estate of McGee*, 154 Cal. 204, 97 Pac. 299, the two sections of the statute under consideration related to the same special subject—that is, the devolution of the title to the homestead premises in case of the death of one of the spouses—and it would seem that no doubt could exist as to the soundness of the decision that the later en-



actment, being irreconcilable with the earlier, must be recognized as the law upon the subject. The case, however, was decided upon the ground that the question had been settled by the decision in *Weinreich v. Hensley*, 121 Cal. 647, 54 Pac. 254, and *Estate of Fath*, 132 Cal. 609, 64 Pac. 995, the court stating, through Mr. Justice Sloss: "It must be taken to be settled that the two Code sections cannot be harmonized, and that, as between them, effect is to be given to the later enactment." In *Kennedy v. Board of Education*, 32 Cal. 492, 22 Pac. 1045, it was held that the general statute applied to all cities. It would therefore necessarily follow that it controlled special statutes made applicable to particular cities. This case followed *People v. Henshaw*, 76 Cal. 436, 18 Pac. 413, wherein it was held that the act of March 18, 1885 (St. 1885, p. 213) entitled "An act to provide for police courts in cities having thirty thousand and under one hundred thousand inhabitants, and to provide for officers thereof," repealed the act of March 10, 1866, establishing a police court in the city of Oakland, a city of a population between 30,000 and 100,000 inhabitants. The conclusion from the language used by the Legislature was reasonable that the intent was to make the general statute applicable to all cities coming within its terms. It therefore became operative in the city of Oakland, and, while the Supreme Court properly said that "the law does not favor the repeal of statutes by implication, and will in all proper cases, in the absence of an express clause repealing a former act, so construe the new law that both may stand," yet it was compelled to hold that the later statute was repugnant to the earlier, that both could not stand together, and that, therefore, the earlier was repealed.

The case of *City of Los Angeles v. Pomeroy*, 132 Cal. 340, 64 Pac. 477, apparently in line with the contention of petitioners, was decided March 25, 1901, while section 1254 contained the unconstitutional provision permitting plaintiff to take possession "at any time after the filing of the complaint, and the issuance and service of the summons thereon." Attention is called to this fact in the opinion filed in the *Simas Case*, supra, wherein it is said: "Since that decision was made section 1254 of the C. C. P. has been so amended that as now in force it must be taken as creating an addition to the class of cases theretofore constituting exceptions to the general stay of proceedings provided for in section 941 of the Code of Civil Procedure." It may be added that this latter decision, as well as that of the *Heilbron Case*, supra, was rendered subsequent to the enactment of said section 949 as amended in 1905, although it does not appear that the attention of the reviewing court was called to the amendment. We are satisfied, however, that both cases were correctly decided, and that effect should

be given to the said special as well as to the general provision.

[9] As to the contention of petitioners in reference to the segregation of the amount found due the defendants, we think several answers may be made, as suggested by respondent.

In the first place, plaintiff is required by the statute to deposit the amount of the judgment, whatever that may be. Plaintiff is not commanded to make any division of the fund among claimants or to specify how much is deposited for any particular claimant.

[10] Nor is it material that the judgment may be informal or erroneous, as this is a consideration for appeal or motion for a new trial. It is manifest that the asserted infirmity as to the verdict is not a jurisdictional defect which invalidates the judgment, but at most an irregularity to be reviewed in the proper proceeding. If from the record the judgment appeared to be void a different question, of course, would be presented, but that is not the incident case. If there was any failure by the jury to find upon the interest of any particular defendant, and this was error, it can be reviewed hereafter on appeal. The right of the plaintiff to obtain possession of the property is not made dependent upon the impeccability of the verdict. It is well settled that the regularity of the proceedings of the court, if within its jurisdiction, cannot be reviewed on prohibition. *Beaulieu Vineyard v. Superior Court*, 6 Cal. App. 248, 91 Pac. 1015; *Lange v. Superior Court*, 11 Cal. App. 5, 103 Pac. 908; *Clark v. Superior Court*, 55 Cal. 199; *Powelson v. Lockwood*, 82 Cal. 614, 23 Pac. 143; *Bishop v. Superior Court*, 87 Cal. 226, 25 Pac. 435. In this respect the same rule must apply to supersedeas.

[11] Again, since it appears from the petition herein that the Reed Orchard Company was the owner of the condemned property and the value of said property was found by the jury, the presumption would be, in the absence of a contrary showing, that this was the value of the owner's interest, and that the interest of the other defendants was of nominal or of no value. In this connection it is to be observed that the petition herein does not negative this presumption, since there is no allegation that the interest of either of the other defendants was of any value at the time the verdict was rendered. The situation here is analogous to that of *Scheerer v. Hutton*, 7 Cal. App. 527, 94 Pac. 850, wherein it is said: "While it is true that the court did not make a finding as to the ownership of the leasehold, nor of its value, the intendments in favor of such judgment, however, lead to the conclusion that the court found as a question of fact, either that the leasehold possessed no value, or that no leasehold interest was held by petitioner in said premises." But the court goes on to say that: "Whatever may have been the finding of the court in that regard as to the ques-



tions of fact, if not warranted by the evidence, it would have been error only. Or assuming that petitioner was the owner of the leasehold, and that it had some value, the legal conclusion of the court that petitioner was entitled to no part of the compensation would have been at most but an error at law, either of which errors could properly be reviewed upon appeal." See, also, *In re Road in Kingston Township*, 134 Pa. 409, 19 Atl. 750; *Taintor v. Mayor of Cambridge*, 197 Mass. 412, 83 N. E. 1101.

[12] It would also seem clear that the defendants had the burden of alleging and proving their interests and the value thereof, and that only the defendant meeting that burden should be permitted in this proceeding to question the disposition of the fund. The People's Savings Bank and Komano, having been regularly served with summons and having failed to appear and urge any claim to whatever fund might be awarded, should not be indulged now to stay this public improvement on the ground that the jury did not find the value of an interest which was not alleged to have any value and did not award these defendants money which in the lower court they declined to claim. If the owner of a mortgage or of a leasehold interest can lie by in this way until after judgment and successfully interpose such an objection, it is manifest that fraud is likely to be encouraged thereby at the expense of the public welfare.

In the case of *Yellowstone Park Railroad Co. v. Bridger Coal Co.*, 34 Mont. 545, 87 Pac. 963, 115 Am. St. Rep. 546, 9 Ann. Cas. 470, the Supreme Court of Montana discusses the question at length, reviewing the constitutional and statutory provisions, which are apparently similar to ours, and declares that, "construing these provisions together, it is apparent that the defendant is required to appear and make his defense as in ordinary actions. And, if he fails to appear and save default by one of the modes provided, he has no right to be heard in the subsequent proceedings. This is so notwithstanding the provisions of section 2221 which requires the commissioners appointed to assess the damages to hear the allegations and evidence of all persons interested. The latter provision certainly contemplates cases where the parties defendant are not in default, for if they must, notwithstanding their default, be heard by the commissioners, they may appeal (section 2224) and still have a jury trial as to the amount of damages—a situation which, in view of the provisions applicable to ordinary actions, would be absurd." As suggested by respondent, this precise question as to the effect of the default of a defendant in a condemnation proceeding as to his subsequent conduct in the cause has not been determined in this state, yet it has been held that the burden of establishing value is upon the defendant, and that he must allege and prove

his damages. *Monterey County v. Cushing*, 83 Cal. 509, 23 Pac. 700; *Drinkhouse v. Spring Valley W. W.*, 87 Cal. 255, 25 Pac. 420; *San Diego Land Co. v. Neale*, 88 Cal. 55, 25 Pac. 977, 11 L. R. A. 604; *Alameda v. Cohen*, 133 Cal. 5, 65 Pac. 127.

[13, 14] It necessarily follows that if a defendant must allege and prove the value of his property or the amount of his damage, and he declines to claim any amount therefor, he is in no position to complain of any finding of a court or jury, at least in a proceeding like this, as to the value of the property sought to be condemned. The default of said defendants, of course, did not affect the duty of the jury to determine the value of the land which was taken nor would they have been relieved of such duty if the owner had suffered default, since it is a constitutional requirement that property shall not be taken until compensation be made, but, without attempting to prescribe the exact limitations of the principle, it is sufficient to say that the defaulting defendants should not be heard here to question the disposition of said fund. A defaulting defendant undoubtedly has the right of appeal, but even then his attack must be confined to the consideration of jurisdiction or of the sufficiency of the pleadings. *San Gabriel Valley Bank v. Lake View Land Co.*, 4 Cal. App. 630, 89 Pac. 360; *Morenhout v. Higuera*, 32 Cal. 295; *Hutchings v. Ebeler*, 46 Cal. 559. In the *Morenhout Case*, *supra*, referring to the effect of a default, it is said: "To say that the judgment is not conclusive upon them because they neglected to appear and exhibit their interests is preposterous. Such a doctrine would place it in the power of an obstinate tenant to defeat and prevent a partition in all cases by merely staying out of court. They were made parties and had an opportunity to appear and take part in the proceedings. Their default was a confession that they had no interest in the land, and the court had jurisdiction to so adjudge expressly. But had it not done so, and passed them in silence, the result would have been the same, for a judgment that the land belonged to the parties between whom it was divided would have been equally as conclusive against their title; they having been made parties and served with process."

[15] Since there is no allegation to the contrary in the petition, we may assume, also, that no objection was made to the form of verdict rendered by the jury.

[16] It is true that the jury are directed by the statute (section 1248, Code Civ. Proc.) to "ascertain and assess the value of the property sought to be condemned and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein." But in a case where there are such separate interests of value, and the jury returns a verdict informal in this respect, it is manifestly the duty of the ag-

grieved party to point out the defect that it may be corrected. If he fail to do so, it is only just that he should thereafter be precluded from complaining. Of course, the general principle is universally recognized as stated by Hayne on New Trial and Appeal, p. 1555, as follows: "So that no principle or rule of appellate practice is more strongly entrenched, both by reason and by precedent, than that which requires objections or errors to be first brought to the attention of the trial court before the appellate court is asked to review them."

[17] Section 619 of the Code of Civil Procedure provides that "When the verdict is announced, if it is informal or insufficient, in not covering the issues submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out." It is readily admitted that the verdict may be so defective as to be subject to subsequent attack, although no objection be made at the time it is rendered, but the situation here is of a very different nature. Upon this point respondent cites the following cases: *Winans v. Christy*, 4 Cal. 80, 60 Am. Dec. 597; *Algier v. Steamer Maria*, 14 Cal. 170; *Campbell v. Jones*, 41 Cal. 515; *Pacific Coast Railway Co. v. Porter*, 74 Cal. 262, 15 Pac. 774; *Big Lost River Irr. Co. v. Davidson*, 21 Idaho, 160, 121 Pac. 92; *Metropolitan, etc., Ry. Co. v. Eschner*, 232 Ill. 210, 83 N. E. 809; *Golden Gate Mill Co. v. Joshua Hendy Machine Works*, 82 Cal. 184, 23 Pac. 45; *Ryan v. Fitzgerald*, 87 Cal. 347, 25 Pac. 546; *Johnson v. Vishner*, 96 Cal. 314, 31 Pac. 106; *Southern Missouri v. Wyatt*, 223 Mo. 347, 122 S. W. 688.

In the *Davidson* Case, *supra*, decided by the Supreme Court of Idaho, it seems that a reversal was sought because separate awards had not been made for several tracts of land, section 5220 of the Revised Codes of that state being the same as said section 1248 of the California Code of Civil Procedure. After stating that it appeared that the several tracts were necessary for the intended use, and that it would be presumed evidence was received of the value of each parcel, it was declared that, in the absence of the instructions, "it will be presumed that the court correctly instructed the jury and told them that in determining the question of value they should separately assess and determine each different parcel. In returning the verdict, however, the jury seems to have found the aggregate value of the several parcels or tracts of land, and to have included therein the value assessed by them upon each separate parcel. This, of course, is not in accordance with the requirements of the statute, and it would have been better and more in conformity with the statute to have found separately the value of each separate parcel and the aggregate value of the damages for the several parcels. When said verdict was

returned, the appellant made no objections to the form of the verdict, or in any way called the trial court's attention to the fact that the verdict was not in conformity with the form required by the statute, and the insufficiency of the verdict was in no way called to the attention of the trial court. \* \* \* We think, under the authorities and the decisions of this court, that appellant waived any objections to the form of the verdict, and cannot present the matter for the first time in this court."

In the *Johnson* Case, *supra*, the Supreme Court of this state said: "If the defendant was dissatisfied with the form of the verdict, he should have asked at the time it was announced, that it be made formal and certain; otherwise it was the duty of the court to construe it so as to give it the effect intended by the jury, if the intended effect could be ascertained from its language, considered in connection with the pleadings and evidence; provided, however, that the intended effect was not unlawful, and not irrelevant to the pleadings. *Truebody v. Jacobson*, 2 Cal. 270; *People v. McCarty*, 48 Cal. 557; *People v. Perdue*, 49 Cal. 425. And, as a general rule, a party will not be heard to object to a verdict for the first time on appeal from the judgment, if it is susceptible of a construction which may have a lawful and relevant effect (*Douglass v. Kraft*, 9 Cal. 562), and this case does not appear to fall within any exception to the rule."

[18] It may be added that upon the assumption that the defaulting defendants had some interest in the property that was and is of substantial value it is a fair inference that its adjustment is a matter of mere computation, and that the apportionment among the claimants of the entire fund, which represents the full value of the property, will give rise to no unfriendly or troublesome dispute. It there should be any serious controversy as to the extent of these interests, there is ample authority for the settlement of it by the court. In connection with said section 1248 of the Code of Civil Procedure must be read section 1247 which provides that "the court shall have power \* \* \* (2) to hear and determine all adverse or conflicting claims to the property sought to be condemned and to the damages therefor."

[19] Again, as before seen, since there is no allegation that the lease is still in force, we may assume, as alleged in the answer of respondent, that by its terms it ceased to be operative on condemnation of the land, and it may for that reason be ignored as of no value.

[20] As for the deed of trust or mortgage, it may be inferred that the residue of the 140-acre tract is abundant security for the payment of whatever may be due the mortgagee. At any rate, under a long line of authorities, if there should be any necessity for



it, the mortgagee may resort to the fund in the custody of the court to satisfy any deficiency.

In the Matter of Morris Avenue, 118 App. Div. 121, 103 N. Y. Supp. 182, it is said: "The question as to the right to an award as between a mortgagee and the owner of the equity has arisen in several cases and the rule seems to be well established that, where a mortgage has been given upon property prior to the taking of a portion thereof by the city, if upon a foreclosure and sale after the taking by the city the amount realized is insufficient to meet the mortgage debt, the lien of the mortgage would extend to and embrace so much of the damages as awarded as should be needed to make good the deficiency. In the Matter of the City of Rochester, 136 N. Y. 83, 32 N. E. 102, 19 L. R. A. 161, where title to a part of certain mortgaged premises was subsequently foreclosed and the land sold by the original description leaving a deficiency, the court said: 'The balance of the land only could be sold and conveyed on the foreclosure. The referee's deed could convey and did convey only that balance and the right of the mortgagee became merely an equitable lien on the fund in the hands of the court to the extent of any deficiency which the land still should pay. The fund was not sold. It simply remained in the hands of the court for distribution.'" Numerous other decisions bearing upon the subject have been cited, among which are the following: *Kansas City v. North American Trust Co.*, 110 Mo. App. 647, 85 S. W. 682; *Chicago, K. & W. R. Co. v. Sheldon*, 53 Kan. 169, 35 Pac. 1105; *Bright v. Platt*, 32 N. J. Eq. 370; *Union Mutual Life Insurance Co. v. Slee*, 123 Ill. 95, 12 N. E. 543; *Markley v. Langley*, 92 U. S. 152, 23 L. Ed. 701; *Buchanan v. Kansas City*, 208 Mo. 674, 106 S. W. 531, 15 L. R. A. (N. S.) 834; *Wood v. Westborough*, 140 Mass. 410, 5 N. E. 613; *Bates v. Boston Elevated Railway*, 187 Mass. 337, 72 N. E. 1017.

The foregoing considerations, in the main, probably would be more apposite to a motion for a new trial or an appeal from the order denying it or from the judgment, but it is conceived that they are also of importance in the determination of the character of the judgment, a question necessarily involved in the application before us.

Petitioners attach much importance to the case of *Butte County v. Boydston*, 64 Cal. 110, 29 Pac. 511, but it is to be observed that the decision therein was rendered on appeal from the judgment and order refusing a new trial, and no question was raised as to conflicting claimants to the fund. There was a failure to find the several elements of damage as required by the statute, and it was properly held that "the judgment is erroneous and must be reversed."

Some other points are discussed by counsel, but it is believed that sufficient consideration has been devoted to the subject, and that no reasonable doubt exists that under the law respondent can be justified in taking the contemplated action.

The demurrer is therefore sustained, and the order to show cause discharged.

We concur: CHILPMAN, P. J.; HART, J.

19 Cal. App. 648

REED ORCHARD CO. et al. v. SUPERIOR COURT IN AND FOR YOLO COUNTY et al.  
(Sac. 2,057.)

(Supreme Court of California. Nov. 6, 1912.)

APPEAL AND ERROR (§ 477\*)—POWER TO ISSUE.

The power to issue a writ of supersedeas is one of the inherent powers of the Court of Appeals to be exercised in any proper case when it appears necessary so to do to preserve the rights of a litigant until final determination of his appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2247-2249; Dec. Dig. § 477.\*]

In Bank. Petition by the Reed Orchard Company and others against the Superior Court in and for Yolo County and judge thereof for writ of supersedeas. Upon a demurrer to the petition being sustained and order to show cause being discharged by the Court of Appeals (128 Pac. 9), the petitioners seek a hearing in the Supreme Court. Hearing denied.

Arthur C. Huston, of Woodland, and White, Miller & McLaughlin, of Sacramento, for petitioners. T. T. C. Gregory, of Fairfield, and John S. Partridge, of San Francisco, Elmer W. Armfield, of Woodland, and C. J. Goodell, of San Francisco, for respondents.

PER CURIAM. The petition that the application in the above-entitled matter for a supersedeas, originally heard and determined in the Court of Appeals, be given a hearing in this court is denied. This denial, however, is not to be construed as an affirmation of the views expressed by the Court of Appeals as to the scope of the writ of supersedeas and the circumstances under which such a writ will be issued.

The power to issue such a writ is one of the inherent powers of a Court of Appeals, to be exercised in any proper case when it appears necessary so to do to preserve the rights of a litigant until final determination of his appeal. *Rogers v. Superior Court*, 158 Cal. 467, 111 Pac. 357.

Chief Justice BEATTY and Justice SLOSS, deeming themselves disqualified, do not participate in the foregoing.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



164 Cal. 156

## POSTAL TELEGRAPH-CABLE CO. v. CITY OF LOS ANGELES. (L. A. 2,972.)

(Supreme Court of California. Nov. 14, 1912. Rehearing Denied Dec. 13, 1912.)

## 1. TAXATION (§ 319\*)—ASSESSMENT—FRANCHISE—DESCRIPTION.

If a telegraph company owned a state franchise in the streets of a city, the description in the assessment as the "franchise of the P. Telegraph Company in the city of Los Angeles" will be deemed to refer to the state franchise alone, and not to the federal, nontaxable franchise.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 514, 527-529, 532-534; Dec. Dig. § 319.\*]

## 2. TAXATION (§ 425\*) — ASSESSMENT — FRANCHISES—DESCRIPTION.

A description of a franchise of a telegraph company as the "franchise of the Postal Telegraph-Cable Company in the city of Los Angeles" sufficiently described it as a state franchise.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 713, 714; Dec. Dig. § 425.\*]

## 3. TAXATION (§ 117\*)—"FRANCHISE"—USE OF STREETS.

A right to occupy the streets is a franchise for purposes of taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 214; Dec. Dig. § 117.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2929-2942; vol. 8, p. 7666.]

## 4. TAXATION (§ 155\*)—FRANCHISE.

The franchise granted by the act of Congress to the Postal Telegraph-Cable Company only authorizes it to use the highways of the state subject to charges imposed by the state, and the right to use a highway without compensation is a privilege which is taxable as a franchise in each city and county in which the highways are located.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 275; Dec. Dig. § 155.\*]

## 5. TAXATION (§ 155\*)—FRANCHISES—USE OF HIGHWAYS.

Civ. Code, § 536, permitting telegraph corporations to construct lines upon any public highway, is a continuing offer by the state to permit telegraph companies to use streets and highways without compensation for telegraph purposes, and the acceptance of such privilege gives to the company a right which is taxable as a state franchise, distinct from its federal franchise.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 275; Dec. Dig. § 155.\*]

## 6. PLEADING (§ 8\*)—CONCLUSIONS.

In an action by a telegraph company to recover a sum claimed to have been illegally paid to the state as a franchise tax, the complaint described its federal franchise and alleged that, under such franchise and not otherwise, plaintiff had for years maintained lines through the highways of the state, and that such lines were declared post roads by act of Congress, and plaintiff had never had any franchise from the state or any municipal corporation. Held, that the allegations that plaintiff used the streets solely under its federal franchise, and had none from the state, were but conclusions; the essential allegation of fact being that of use of the streets.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.\*]

## 7. TRIAL (§ 404\*)—FINDINGS—CONSTRUCTION.

A finding that the allegations of fact in a complaint are true is not a finding that any

conclusions of law contained therein are likewise true.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957-962; Dec. Dig. § 404.\*]

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by the Postal Telegraph-Cable Company against the City of Los Angeles. From a judgment for plaintiff, defendant appeals. Reversed.

John W. Shenk, City Atty., E. R. Young, Asst. City Atty., and Myron Westover, Deputy City Atty., all of Los Angeles, for appellant. Hunsaker, Britt & Fleming, of Los Angeles, for respondent.

SHAW, J. The object of this action was to recover the sum of \$625 paid by plaintiff, under duress, in discharge of city taxes of 1907, alleged to have been illegally assessed against the plaintiff upon certain of its property which, it is claimed, was not subject to taxation by said city. The validity of the plaintiff's claim depends on the question whether or not the property was thus subject to taxation. The defendant appeals upon the judgment roll alone.

The assessment shows that it was made upon property of the plaintiff described as "franchise of the Postal Telegraph-Cable Company in the city of Los Angeles." Respondent claims that it has no franchise within the city of Los Angeles, except a federal franchise under the act of Congress of July 24, 1866, to operate and maintain telegraph lines over the military and post roads of the United States. It is conceded by the city that the streets of Los Angeles are military and post roads of the United States, that the plaintiff has a franchise from the United States under said act to operate telegraph lines thereon, and that said franchise is not taxable for local, state, or municipal purposes. The position of the counsel for the city is that the plaintiff, in addition to its federal franchise, owns and is in the use of a franchise from the state of California to operate its telegraph lines over said streets, and that it is this state franchise, and not the federal franchise, which is described in said assessment.

[1, 2] If, under the facts as found by the court, plaintiff owns a state franchise in said streets, then, under the decisions of this court in *Western U. T. Co. v. Los Angeles County*, 160 Cal. 124, 116 Pac. 564, and *Postal T. C. Co. v. Los Angeles County*, 160 Cal. 129, 116 Pac. 566, the description given in said assessment is to be deemed to refer to that franchise alone and not to the federal nontaxable franchise, and it is a sufficient description of the state franchise. The descriptions held sufficient in those cases were in the words, "right to occupy the streets of the city of Los Angeles." It was held that it would not be assumed from the

face of the description that the assessor thereby intended to describe the nontaxable federal franchise, but, on the contrary, that he intended to refer only to the state franchise which he had the power to assess.

[3] A "right to occupy the streets" is a franchise. There is no material difference between the language of the descriptions in those cases and that in the case at bar and the same reasoning applies.

The finding is that "the allegations of fact contained in plaintiff's complaint are true." It is contended that these allegations of the complaint show that the plaintiff did not own any state franchise, but was operating its lines in the city solely under its federal franchise. This claim is not supported by the allegations of fact referred to. After describing the federal franchise, the complaint alleges that "under and by virtue of such federal franchise, and not otherwise, plaintiff has been for many years last past, was on the first Monday of March, 1907, and still is, constructing and maintaining and operating lines of telegraph through and over the public roads and highways of the city of Los Angeles," that all said lines in said city are maintained and operated only through and over public highways which have been declared post roads by act of Congress, and that "plaintiff has not now, and never had, any franchise of any kind or description for any purpose whatever from the state of California," or from any political or municipal incorporation thereof. The controlling fact here averred is that the plaintiff is, and was at the time of the assessment, maintaining and operating its telegraph lines through and over the streets of Los Angeles.

[4] It is now the settled law of this state that the franchise granted by the act of Congress aforesaid does not give the telegraph company an unincumbered right to occupy the highways of a state by its poles and wires, but that the right is subject to charges which may be imposed by the state for such occupancy and use of its public ways, and that if the state grants the right to such company to use such part of the highways without compensation, such right is a privilege which is nothing more nor less than a franchise in such highways, a franchise having a local situs and assessable in each city or county in which such highways are situated. *Western U. T. Co. v. Hopkins*, 160 Cal. 106, 116 Pac. 557; *Western U. T. Co. v. Los Angeles County*, supra; *Postal T. Co. v. Los Angeles*, supra.

[5] It is also settled by these cases that section 536 of the Civil Code constitutes a continuing offer by the state to all telegraph companies of the right to use without compensation such portions of the streets of any city as may be necessary or convenient for the operation of its lines, that, when such company accepts this offer by placing and maintaining its poles and wires in,

along, and over said streets, it thereby acquires from the state a right in the parts of the streets so occupied, which right is a taxable franchise, and distinct and separate from the federal franchise. The parts of the streets so taken are in the exclusive occupancy of the company. The state and the public are excluded therefrom, and cease to use such portions for ordinary highway purposes. The company which erects its poles and wires in the streets of a city in this manner, by permission of the state so given, cannot lawfully claim or maintain that it does this solely under and by virtue of the federal franchise, or that it has no franchise from the state. The statement by the plaintiff of the physical fact that it is and has been maintaining and operating its lines of telegraph through and over the public highways of the city of Los Angeles establishes, as a matter of law and of fact, the proposition that it has accepted and owns the state franchise for that purpose which was offered to it by section 536. The state cannot deny that this right is vested in the company, nor can the company dispute it while admitting and averring that it is using the streets as a place for its poles and wires.

[6] The additional averments of the complaint that the plaintiff does this solely by virtue of the federal franchise, and that it has no franchise from the state, are nothing more than conclusions, and, in view of the other facts stated, they are mere erroneous conclusions of law.

[7] The finding that the allegations of fact in the complaint are true is not a finding that any conclusions of law therein are true, much less that these unfounded conclusions are true. It follows that the tax was lawfully assessed upon property lawfully taxable, and that plaintiff had no right to demand reimbursement.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

164 Cal. 154

PACIFIC ELECTRIC RY. CO. v. ROLKIN  
et al. (L. A. 3,315.)

(Supreme Court of California. Nov. 13, 1912.  
Rehearing Denied Dec. 13, 1912.)

1. TAXATION (§ 373\*)—PUBLIC SERVICE CORPORATION—REPORTS OF OPERATIVE PROPERTY—PROTEST—TIME.

Under St. 1911, p. 538, § 10, relative to taxation of property of public service corporation, its operative property being taxable only for state purposes, providing that, if an assessor finds in the company's report of its operative property in his city any property he regards as nonoperative, he shall, within 30 days after receiving the report, give notice of protest to the State Board of Equalization, which shall then consider and decide the matter, his giving notice in such time is jurisdictional, so that being given later the board need not consider the protest.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 622; Dec. Dig. § 373.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**2. MANDAMUS (§ 117\*)—PUBLIC OFFICERS—BREACH OF DUTY.**

Mandamus will not lie to the State Board of Equalization to make an order disposing of an assessor's protest that a public service company's report of operative property for taxation includes nonoperative property, its failure to make the order not being a breach of duty, because the protest was made within the time required by St. 1911, p. 538, § 10, to entitle it to a hearing.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 249; Dec. Dig. § 117.\*]

In Bank. Application by the Pacific Electric Railway Company for writ of mandate to Edward Rolkin and others, members of the State Board of Equalization. Denied.

J. W. McKinley, of Los Angeles, for petitioner.

PER CURIAM. [1, 2] The city assessor of Los Angeles did not file any protest against the taxation of the property in question as operative property of the Pacific Electric Railway Company until more than 30 days after he had received the copy of the company's report which the law requires to be served upon him. The provision of the statute (Stats. 1911, p. 538, § 10) that such protest shall be filed within 30 days thereafter is jurisdictional. A protest filed later has no effect, and does not require the state board to revise or alter its action in placing such property on the roll as operative property, or to dispose of the protest in any way. Its failure to make any order disposing of the protest is therefore not a breach of duty, and mandamus will not lie to compel the entry of such order. Its act placing such property on the roll as operative property is as valid as if the belated protest had not been filed.

For these reasons, the application for a writ of mandate is denied.

164 Cal. 117

THAYER et al. v. CALIFORNIA DEVELOPMENT CO. et al. (IMPERIAL WATER CO. NO. 1, Intervener). (L. A. 3,015.)

(Supreme Court of California. Nov. 8, 1912. Rehearing Denied Dec. 7, 1912.)

**1. WATERS AND WATER COURSES (§ 23\*)—WATER RIGHTS—NATURE OF PROPERTY.**

The water right which a person gains by diversion and appropriation from a stream is private property.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 15, 18; Dec. Dig. § 23.\*]

**2. WATERS AND WATER COURSES (§ 23\*)—WATER RIGHTS—NATURE OF PROPERTY—STATUTES.**

Under Act of Congress July 26, 1866, c. 262, 14 Stat. 251, whereby the United States confirmed all water rights then vested in streams upon the public domain in California, and provided for the acquisition of similar rights in the future, such rights became private property when acquired.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 15, 18; Dec. Dig. § 23.\*]

**3. WATERS AND WATER COURSES (§ 23\*)—WATER RIGHTS.**

In view of Civ. Code, § 1410, declaring that the right to the use of running water of a stream, canyon, or ravine may be acquired by appropriation, a mere appropriation of water is not in itself a dedication or appropriation to a public use, and an additional act of dedication is necessary to the creation of a public use therein.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 15, 18; Dec. Dig. § 23.\*]

**4. WATERS AND WATER COURSES (§ 249\*)—APPROPRIATION—DEDICATION TO "PUBLIC USE."**

Where an irrigation company which appropriated water from a river to irrigate a named county, organized subsidiary corporations for the purchase of the land in that territory, and transferred to them perpetual water rights for the irrigation of land owned by them, there was no dedication of the water right to public use; the essential feature of a public use being that it shall not be confined to privileged individuals, but open to the indefinite public, while in this case not every landowner could use water.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 249.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5825-5837; vol. 8, p. 7774.]

**5. WATERS AND WATER COURSES (§ 249\*)—WATER RIGHTS—APPROPRIATION—DEDICATION TO PUBLIC USE.**

Where an irrigation company whose ditch in part was located in Mexico, the company being there incorporated under another name, the selling in Mexico of water to the public generally does not constitute a dedication or its appropriation in the United States to the public use.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 249.\*]

**6. WATERS AND WATER COURSES (§ 249\*)—WATER RIGHTS—APPROPRIATION—CONSTITUTIONAL PROVISIONS—CONSTRUCTION.**

As Const. art. 14, § 1, which has been in force for over 30 years, and which provides that the use of the water now appropriated for sale, rental, or distribution is a public use, has never been construed as declaring that water taken for the irrigation of a fixed tract is appropriated for the public use, and it has been expressly declared by statute that such water rights are appurtenant to the land, the mere appropriation of water for the purpose of sale to given individuals is not a dedication or appropriation to public use.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 249.\*]

**7. WATERS AND WATER COURSES (§ 249\*)—SCOPE OF REMEDY—WATER RIGHTS.**

Though an irrigation company, entitled to take only a given amount of water, took more, and some of it was wasted, a party cannot maintain mandamus to compel the company to furnish him with the water thus wasted; the company not being a common carrier of water.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 249.\*]

In Bank. Appeal from Superior Court, Imperial County; George H. Hutton, Judge.

Petition by C. E. Thayer and another for writ of mandamus against W. H. Holabird, as receiver of the California Development Company, in which the Imperial Water Company No. 1 intervened. From a judgment for plaintiffs, defendants and intervenor appeal. Reversed.



W. B. Mathews and S. B. Robinson, both of Los Angeles (J. W. McKinley and S. V. McClure, both of Los Angeles, of counsel), for appellant. Conkling & Brown, of El Centro, for respondents. Hunsaker & Britt, of Los Angeles (W. N. Goodwin, of Los Angeles, of counsel), for intervener and appellant.

**PER CURIAM.** This is a proceeding in mandamus, instituted in the superior court of Imperial county on December 20, 1910, to compel the California Development Company, a corporation, through its receiver, to deliver to plaintiff C. E. Thayer, the wife of her co-plaintiff, W. A. Thayer, out of its central main in Imperial valley, water to irrigate her lands, upon the theory that the water therein is appropriated and held by it for sale, rental, and distribution generally to the members of that farming neighborhood. Defendants and intervener joined issue on that question. The trial court found with plaintiffs and entered judgment accordingly. These are appeals from such judgment by defendant Holabird, the receiver, and by the intervener.

The California Development Company was organized under the laws of the state of New Jersey for the purpose, among others, of acquiring, holding, constructing, and maintaining headings, dams, ditches, etc., for collecting, storing, and conducting water and irrigating land; supplying and distributing water to and irrigating and cultivating the land of itself and of others; and of selling or letting such water or the right to use the same. On December 15, 1895, it caused to be posted at a point on the Colorado river in this state, distant 1,600 feet north of the point where the international boundary line between the United States and Mexico crosses said river, a notice of appropriation claiming for itself and others 10,000 cubic feet flow per second of the waters of said river at that point. The notice further stated that it claimed the right to said water for the purpose of "developing power and for the irrigation of land in San Diego county, state of California, and in Lower California, Republic of Mexico." It was also stated in said notice that "we purpose carrying the water from the above-described point of diversion through a canal which will run in a southwesterly direction through Lower California, Republic of Mexico, and thence into that portion of San Diego county, state of California, lying to the east of the San Jacinto mountains and known as the 'New River Country.' Said canal will be 200 feet in width, and will carry a depth of 10 feet of water. Its length will be 50 miles, more or less." The detour into Mexico was rendered necessary by topographical conditions. The portion of San Diego county referred to was what is now known as the Imperial valley, and all of the same is now contained in the subsequently created county known as Imperial county.

In furtherance of its general plan, the California Development Company caused a corporation to be formed under Mexican laws, as its agent and instrument in Mexico, known as "La Sociedad de Yrrigacion y Terrenos de law Baja California (Sociedad Anonima)," the capital stock of which has always been owned and controlled by it, and which practically is the California Development Company under another name. Through this agency, it holds all its Mexican property, including some 100,000 acres of land, and enters into contracts, including contracts for the furnishing of water in Mexico. The existence of this separate corporation is really an immaterial matter so far as the questions involved in this case are concerned. Whatever was done through it will be regarded as in fact done by the California Development Company.

Before January 11, 1902, said Development Company had constructed from said point on the Colorado river at which its notice of appropriation was posted, known as "Hanlon's heading," southwesterly through Mexico a distance of 20 miles, and thence northwesterly to a point on the international boundary line, a canal with the capacity sufficient to carry and deliver at said point not less than 1,500 cubic feet of water per second. Said company has never owned any of the land in Imperial valley to which it proposed to furnish water for irrigation. Those lands are naturally arid and desert in character, and without irrigation are worthless and uninhabitable, but are of great and exceptional fertility when irrigated. They are irrigable from the Colorado river and from no other source. At the date of the organization of the Development Company, such valley was unoccupied and a dessert, and substantially the whole thereof was surveyed public land of either the United States or the state of California.

The plan adopted by the Development Company for its disposition of the water for irrigating such lands was substantially as follows: The company mapped out districts of territory in Imperial valley as units of irrigation, each of which was to be occupied by a mutual water company formed under the laws of this state. These companies were to be organized by the Development Company, each of said companies to have a capital stock divided into as many shares as there were approximately acres of land in the district described in its articles of incorporation, which the Development Company believed could be reasonably irrigated. The purpose of each said company was to be to procure water for the irrigation of said tract and distribute the same upon land owned by its stockholder only within said general tract, at the rate of not to exceed four acre feet per annum per acre for such share of stock owned by each stockholder, and for its stockholders only. Each share of stock was to be lo-

cated upon lands at the rate of one share per acre for each acre of land owned by stockholders, where the same could be served by the ditches of the company. The Development Company was to furnish to each of said mutual companies the requisite water for its purposes at a fixed charge per acre foot.

The Development Company caused seven of such mutual companies to be organized, known as Imperial Water Companies Nos. 1, 4, 5, 6, 7, 8, and 12, with an estimated aggregate of irrigable land of 400,000 acres. Imperial Water Company No. 1 was organized by five agents of the Development Company on March 23, 1900. The district allotted to it was estimated to contain 100,000 acres of irrigable land, and the capital stock therefor was made 100,000 shares, with a par value of \$10 per share. Among its purposes declared in its articles was one to secure a supply of water for irrigation, domestic, and other purposes, and to distribute the same at cost among its stockholders only for use on the lands situated in its district, which were described therein. The by-laws were in accord with the plan already referred to, and required each share of stock to be located on land in the district, and restricted the use of water to land on which stock had been located. The stock was transferable, and its place of location could be changed by the owner to any land within the district of a mutual company issuing it. Under a contract between said Imperial Water Company No. 1 and the Development Company, all of the stock of the former, except 2,500 shares, was sold by the Development Company for its own benefit, at an average of \$15 per share, in consideration of which the Development Company constructed a main canal through the territory of the mutual water company of sufficient capacity to convey the requisite amount of water to irrigate the lands of the stockholders, being an amount in the aggregate not less than sufficient to furnish annually four acre feet of water for each outstanding share of stock of the mutual water company, and also constructed the necessary lateral or distributing ditches which are owned by the mutual water companies. The Development Company agreed to perpetually furnish said water through such canal and the lateral ditches for 50 cents for each acre foot delivered. Substantially similar contracts were made with each of the other water companies.

All of the stock of Imperial Water Company No. 1, including the 2,500 shares retained by it, has been sold to individuals who have located the same upon land in the district of said company, and are cultivating the same, and the Development Company has been delivering water to such mutual company in accordance with its undertaking. The same is true as to the other mutual companies. Neither the Development Company

nor its receiver has ever delivered or furnished any water for irrigation or other purposes to any land in Imperial valley, or to any consumer of water other than under and in accordance with such agreements, except that water has been furnished under contract to the city of Imperial, a municipal corporation, and to the Holton Power Company, and all water delivered to such companies has been delivered under and in pursuance of the terms of said agreement. Since the year 1904, said mutual corporations have not been controlled or dominated by the Development Company.

There are between 15,000 and 30,000 acres of land within the district of Imperial Water Company No. 1 in excess of the number of shares of the capital stock provided in its articles of incorporation. Plaintiff C. E. Thayer owns 40 acres of such land which is in condition for cultivation and irrigation, and which she desires to irrigate and plant, but upon which no water stock has been located. This land is under the flow of the canal of the Development Company, and constitutes a part of the lands for irrigation of which the said waters were appropriated. By reason of the fact that all of the stock of said Imperial Water Company No. 1 has been disposed of to others who have located it upon other land, she is unable to procure stock to locate thereon, and Imperial Water Company No. 1 has no water except such as it has procured for its stockholders. On October 18, 1910, she demanded of the defendant receiver that he deliver to her water for the irrigation of such land, namely, 100 miner's inches for 24 hours, tendering him \$20 therefor, which, as we understand, is at the rate of 50 cents for each acre foot, which it is claimed was the rate fixed and charged by said Development Company to the other consumers of water. The board of supervisors of Imperial county has never fixed the rates at which the Development Company shall sell, etc., water in such county. The receiver refused to comply with the demand of Mrs. Thayer.

On December 13, 1909, an action was commenced in the superior court of Imperial county by the Title Insurance & Trust Company, a corporation, against the Development Company and others to foreclose the mortgage held by the plaintiff therein upon the irrigation system of the Development Company, and on the same day defendant Holabird was appointed by said court receiver of said system, and has ever since been in control and management of said system. There was, we think, enough in the evidence to sustain the conclusion of the trial court substantially to the effect that the Development Company had sufficient water to comply with the demand of Mrs. Thayer without impairing its ability to furnish to those with whom it was under contract the water required by them. The evidence shows that



the Development Company, through its Mexican agency, furnishes water for irrigation to individual consumers in Mexico at the rate of 50 cents for each acre foot. The agreements between the Imperial Water Company No. 1 and the Development Company provided that all water delivered to the former is delivered at the Mexican boundary line, and the Development Company has no interest in said water so delivered after it is delivered at said place. Said Development Company is the owner of the main canal in such district through which such water is carried.

The claim of the plaintiff is, and of necessity must be, that the California Development Company is, either directly or indirectly through auxiliary companies, engaged in supplying water for public use; that the water controlled by it is dedicated to such use; that the land of plaintiff C. E. Thayer is a part of the lands to which such water is dedicated; and therefore that she is entitled to a portion of the water for the irrigation thereof on payment of the lawfully established rate therefor. See *Fellows v. Los Angeles*, 151 Cal. 58, 90 Pac. 137. The controlling question in the case, therefore, is whether or not the water here involved is devoted to public use.

[1] Under the law of this state as established at the beginning, the water right which a person gains by diversion from a stream for a beneficial use is a private right—a right subject to ownership and disposition by him, as in the case of other private property. All the decisions recognize it as such. Many of them refer to it in terms which can have no other meaning than that the right is private property. We need not cite them all. The following early cases sufficiently establish the proposition: *Eddy v. Simpson*, 3 Cal. 251, 58 Am. Dec. 408; *Irwin v. Phillips*, 5 Cal. 146, 63 Am. Dec. 113; *Tartar v. Spring Creek Co.*, 5 Cal. 398; *Conger v. Weaver*, 6 Cal. 557, 65 Am. Dec. 528; *Hoffman v. Stone*, 7 Cal. 49; *Maeris v. Bicknell*, 7 Cal. 262, 68 Am. Dec. 257; *Hill v. King*, 8 Cal. 337; *Kimball v. Gearhart*, 12 Cal. 47; *Ortmian v. Dixon*, 13 Cal. 38; *Kidd v. Laird*, 15 Cal. 180, 76 Am. Dec. 472; *Rupley v. Welch*, 23 Cal. 455.

[2] By the act of Congress of July 26, 1866 (Act July 26, 1866, c. 262, 14 Stat. 251), the United States confirmed all water rights then vested in streams upon the public domain in California, and provided for the acquisition of similar rights therein in the future. These, of course, became private property when so acquired. *De Necochea v. Curtis*, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; *Natoma Co. v. Hancock*, 101 Cal. 43, 31 Pac. 112, 35 Pac. 334.

[3] The Civil Code of 1872 recognizes and declares the same doctrine and prescribes the mode by which water rights may be gained and protected. Section 1410 declares that "the right to the use of running water"

of a stream, canyon, or ravine "may be acquired by appropriation." The succeeding sections to 1422, inclusive, prescribe the mode by which it may be acquired. The language plainly imports that the right, when acquired, is the property of the person who claims it and takes the steps prescribed to gain it. And generally it is true that, even when property is dedicated or appropriated to public use for gain by persons or private corporations, the title and ownership is private, and the only interest of the public is that of beneficiaries of the use or trust. The property does not become impressed with a public use or trust until after the owner has first acquired it and then dedicated it to the use. The acts of acquisition and of dedication, respectively, are distinct from each other. Technically the latter must follow the former and cannot precede or accompany it. An "appropriation of water" under the Code is therefore not, ipso facto, a dedication or appropriation to public use. The additional act of dedication is as necessary to the creation of a public use in a water right so acquired as it would be if the right was acquired by conveyance or in any other manner, or as in the case of any other property dedicated to public use. It follows that, if the water appropriated from the Colorado river by the California Development Company is now devoted or dedicated to public use so as to be available to the use of the plaintiffs, it is because of some acts or declarations of that company other than those by which it acquired the right to divert the water from the river.

[4] Definitions of the term "public use" are usually found in decisions involving the right of eminent domain or in those relating to public charities. A bequest to establish a home for the orphans of deceased Odd Fellows is not made to a public use. In deciding this point the court says: "It is an essential feature of the latter (a public trust) that the beneficiaries are uncertain; a class of persons described in some general language, often fluctuating, changing in their individual members, and partaking of a quasi public character. \* \* \* The smallest street is public, for all have an equal right to travel on it; but a way used by thousands, which may be shut against a stranger, is private." *Troutman Co. v. De Boissiere*, 66 Kan. 1, 71 Pac. 286; *Pennoyer v. Wadhams*, 20 Or. 274, 25 Pac. 720, 11 L. R. A. 210; *Burd Orphan Asylum v. School Dist.*, 90 Pa. 29. "The general public must have a definite and fixed use of the property to be condemned; a use independent of the will of the private person or private corporation in whom the title to the property, when condemned, will be vested; a public use which cannot be defeated by such private owner." *Fallsburg P. Co. v. Alexander*, 101 Va. 98, 43 S. E. 194, 61 L. R. A. 129, 99 Am. St. Rep. 855. This case holds that water to be ac-



quired by a company for transmission and distribution to any place "for its own use, or for the use of other individuals or corporations," would not be devoted to public use, because the company retained power to choose who should have it. See, also, *Tyler v. Beacher*, 44 Vt. 648, 8 Am. Rep. 398; *In re Barre*, 62 Vt. 32, 20 Atl. 109, 9 L. R. A. 195; *Ryerson v. Brown*, 35 Mich. 333, 21 Am. Rep. 564. The term "public use" "implies 'the use of many' or 'by the public,' but it may be limited to the inhabitants of a small or restricted locality, but the use must be in common and not for a particular individual." *Pocantico v. Bird*, 130 N. Y. 249, 29 N. E. 246. Water carried in a ditch to be let out for hire to all who apply for it is devoted to public use. *Paxton v. Farmers' Co.*, 45 Neb. 894, 64 N. W. 343, 29 L. R. A. 853, 50 Am. St. Rep. 585. Market stalls which the owner lets out to such persons and upon such terms as he chooses are not in public use. The test is "whether the public have the legal right to the use, which cannot be gainsaid, or denied, or withdrawn, at the pleasure of the owner." *Farmers' Market Co. v. Railroad Co.*, 142 Pa. 580, 21 Atl. 902, 989. "The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefiniteness or unrestricted quality that gives it its public character. The smallest street in the smallest village is a public highway of the commonwealth, and none the less so because the vast majority of the citizens will never derive any benefit from its use. It is enough that they may do so if they choose." *White v. Smith*, 189 Pa. 228, 42 Atl. 125, 43 L. R. A. 498; *Donohugh's Appeal*, 86 Pa. 306. See, also, *Phillips v. Watson*, 63 Iowa, 33, 18 N. W. 659; *Bennett's Appeal*, 65 Pa. 250; *Dalles v. Urquhart*, 16 Or. 67, 19 Pac. 78.

In the case of the use of water in villages, towns, and cities, the right to the use usually extends to every inhabitant within the range of the distributing system or who can get access thereto. In the case of water for irrigation, the class is necessarily more select, and does not include the general public within the area served. But this is so because it is not every inhabitant that can make that use of the water. Only those occupying land can do so. And for this reason it is held that, while there may be a public use for the benefit of landowners, the use of water for irrigation is not public unless the water is available, as of right, upon equal terms, to all landowners of the class and within the area to be benefited who can get water from the ditches to their lands. If the dispenser of water has the right to say who shall have it, and upon what terms, selling to one and refusing to sell to another at will, it is not devoted to public use.

In *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 161, 17 Sup. Ct. 56, 41 L. Ed. 369, the United States Supreme Court was consider-

ing the question whether or not the water belonging to an irrigation district organized under the California statute of 1887, and acquired for and applied to its authorized uses and purposes, was water dedicated to a public use. The circuit court had decided that it was not for public use, and that the district works were not public improvements, because the water was held for the exclusive use of the landowners of the district and not for the general public within its limits. Upon this question the Supreme Court on appeal said: "The fact that the use of the water is limited to the landowner is not therefore a fatal objection to this legislation. It is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use. All landowners in the district have the right to a proportionate share of the water, and no one landowner is favored above his fellows in his right to the use of the water. It is not necessary, in order that the use should be public, that *every resident* in the district should have the right to the use of the water. The water is not used for general, domestic, or for drinking purposes, and it is plain, from the scheme of the act, that the water is intended for the use of those who expect to use it on their lands. \* \* \* We think it clearly appears that all who, by reason of their ownership of or connection with any portion of the lands, would have occasion to use the water would in truth have the opportunity to use it upon the same terms as all others similarly situated. In this way the use, so far as this point is concerned, *is public because all persons have the right to use the water under the same circumstances*. This is sufficient." (The italics are ours.)

The decisions in this state are to the same effect. The first and leading case on the general subject is *Gilmer v. Lime Point*, 18 Cal. 229, at page 252, where it was held that a fort for protection against foreign invasion was a public use for which the state might authorize the condemnation of land. The court said: "This public use need not be a use general or common to all the people of the state alike. It may be a use in which a small portion of the public will be directly benefited, as a street in a town, a bridge, or a railroad, necessarily local in its benefits and advantages, but it must be of such a character as that the general public may, if they choose, avail themselves of it." In *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, at page 590 (99 Am. Dec. 300), the plaintiff corporation was organized to take water from the Yuba river and use the same for mining and mechanical purposes and to sell it to others for mining purposes. It does not appear that it was offered generally to the public. The court said that the corporation was under no obligation to the public to continue the business, and that it "was created

for the immediate benefit of its stockholders, with no direct specific public purpose in view, as in the case of a railroad or turnpike or canal company. The only interest the public has in the continuance of the business is the remote, general interest, which it has in the proper development of the resources of the country"—in effect, that its property was not devoted to public use. In *Price v. Riverside*, 56 Cal. 432, it is said that every corporation formed under the act of 1862 (St. 1862, p. 540), "has impressed upon it a public trust—the duty of furnishing water, if water it has, to all those who come within the class or community for whose alleged benefit it has been created." In *McCrary v. Beaudry*, 67 Cal. 120, 7 Pac. 264, it was decided that water conducted through pipes laid in the streets by permission of the city of Los Angeles, and supplied by the owner to residences along those streets at fixed rates, was devoted to a public use, and that residents along such streets who had received the water were entitled to have the service continued on paying the rates. In *Merrill v. South Side I. Co.*, 112 Cal. 426, 44 Pac. 720, the defendant company was engaged in selling, distributing, and delivering water for irrigation upon the lands along the line of its pipe. Plaintiff's land was along said pipe line, and defendant had sold plaintiff water to irrigate the same, but refused to continue to do so and extended its pipes to new lands to which it delivered the water previously supplied to plaintiffs. It was held that this was a public use for the lands along the pipe line, and that mandamus would lie to compel a continuance of the supply to the plaintiff. In *Hildredth v. Montecito C. W. Co.*, 139 Cal. 29, 72 Pac. 395, it was held that, if the owners of several distinct water rights in a stream should form a corporation and give to it the duty of diverting and distributing the water to the respective persons entitled, such water was not thereby devoted to a public use. The court said that: "The right of an individual to a public use of water is in the nature of a public right possessed by reason of his status as a person of the class for whose benefit the water was appropriated or dedicated. All who enter the class may demand the use of the water, regardless of whether they have previously enjoyed it or not." In *McFadden v. Los Angeles*, 74 Cal. 571, 16 Pac. 397, a corporation had acquired water to be used on the land of its stockholders only, and at rates fixed by the corporation. It was not appropriated or offered for sale to others, or to the public generally, but the stockholders were very numerous and the corporation supplied water for some 12,000 acres of land. It was declared not to be a public use; the court saying: "We know of no reason why individuals cannot associate themselves together, take on a corporate form, and acquire water to be used on their own lands"—and that in such a case the supervisors had no power, under the act of

1885 (Stats. 1885, p. 95), to fix rates as for a public use, or at all. The proposition that such a use of the water is not a public use was again affirmed in *McDermont v. Anaheim U. W. Co.*, 124 Cal. 114, 56 Pac. 779, and in *Barton v. Riverside W. Co.*, 155 Cal. 518, 101 Pac. 790, 23 L. R. A. (N. S.) 331. In *Leavitt v. Lassen I. Co.*, 157 Cal. 83, 106 Pac. 404, 29 L. R. A. (N. S.) 213, the water had been appropriated for sale, rental, and distribution, the system had been in operation several years, and it was conceded to be a public use. It was held that the purveyor of the public use cannot make binding contracts to deliver to a landowner under the system more than his proportionate share of the water, or give him a preferential right over others, nor make any unfair discrimination between the beneficiaries of the use.

Under the doctrines thus established, it is evident that the California Development Company has not dedicated to public use the water which it diverts from the Colorado river, and that it has not offered it for sale, rental, or distribution in such a manner as to constitute a public use thereof. In its notice of appropriation, it declared that it claimed the water for itself and others. It did not claim it for use by the public, nor designate the "others" to whom it was to be furnished. The notice stated that the water was claimed for the purpose of developing power, and for the irrigation of lands in the "New River Country," situated in what was then San Diego county, but it did not say that it was to be used upon all said lands, nor generally upon the lands in said country. Upon each of these essential elements of a public use, the most that can be said is that the notice is silent. There never was any declaration by that company that the water was to be devoted to public use, or that it was to be offered generally for sale in California, or to all landowners in the New River Country, or in any district or part thereof, or even to all landowners along the lines of its ditches or the ditches of its auxiliary companies. No such offer or declaration has ever been made, nor has it ever been the custom or practice of the company or of its auxiliary companies to sell water in that way. The method adopted by it for the disposition of the water, and its conduct in distributing the same, have been wholly inconsistent with the idea that the water was held out for general sale or distribution, and it has been consistent only with the theory that the intention was to retain control of the water to the extent, at least, of choosing for itself the persons and corporations to whom it should be sold or delivered, and the terms and conditions on which such sales or deliveries should be made. It has, in fact, retained such control, and it has not disposed of the water otherwise than according to this plan. For this purpose it laid out seven separate districts in the New River Country, with distinct boundaries. In each of these it organized a pri-



vate water corporation. The purpose of each corporation, as expressed in its articles, was to procure water for the irrigation of such lands situated within the exterior limits of the district as should belong to its stockholders, and to no other persons. Each share of the stock was to be located upon certain designated lands—one share being allotted to each acre—and the water was to be apportioned ratably among the stockholders according to the number of shares owned. The stock was not free, but was to be sold at a fixed price. To these corporations, and to no other persons, the Development Company sold the water it diverted, receiving therefor certain shares of stock of said corporations, with the right to sell the same and have them located on lands in the district by the purchasers, and with an agreement by each auxiliary company to pay thereafter an annual charge of 50 cents per acre foot for the water delivered to it. There were other restrictions which it is not necessary to mention. The Development Company sold the stock of these auxiliary companies to the landowners within the respective districts, and the same has been located by the respective companies upon particular tracts of land therein. No water has ever been sold or distributed, or offered for sale or distribution, in any other way, or to any other persons, except small quantities furnished by special agreement to a power company and to the city of Imperial. No right in any other person to demand or receive water upon any terms or at all has ever been recognized, allowed, or conceded either by the Development Company or any of the auxiliary companies. It appears, therefore, that the Development Company has always, either directly or through the auxiliary companies, selected the persons to whom it would sell and distribute the water and fixed its own prices. A use thus restricted, limited, and controlled by the owner is in no proper sense, according to the foregoing authorities, a public use.

[5] We have hitherto considered the case upon the theory that all the other corporations mentioned, including the Mexican Company, are but subsidiary to and agents of the California Development Company for the carrying out of its plan for the distribution of its water. The effect is the same, however, if those companies should become, or be considered, independent companies—that is, merely purchasers of the Development Company's water. It is true that, since their organization, the districts, by reason of the sales of their corporation stock to the landowners, have become independent, so far as management is concerned, of the Development Company, although still bound by the contracts made between them. But if they are viewed as independent companies, the fact remains that the Development Company has not sold, or proposed to sell, or disposed of its water at all, except to those companies and to them only upon the terms and re-

strictions fixed by the respective contracts, and that those companies have not applied the water to public use, but have held the same exclusively for their respective shareholders upon terms fixed by the by-laws of the company. It appears that the Mexican Company is selling a part of the water to consumers in Mexico along its line. This does not change the result. It does not appear that this water is sold or offered to the public generally, or to all landowners along the line. Even if it were so, the fact that this company is carrying on a public use in Mexico would not affect the character of the service of the other companies doing business in California. It is very clear from all the proceedings taken that the Development Company not only did not intend to engage in a public service, but that it was well advised concerning such service, and carefully devised its plan and drew its contracts to avoid being placed in that position. The company has placed itself clearly within the principles stated in *McFadden v. Los Angeles*, supra, *McDermont v. Anaheim Co.* supra, and *Barton v. Riverside*, supra, under which the use which it makes of the water is not a public use.

[6] The plaintiff claims, however, that, notwithstanding these decisions and the well-established meaning of the phrase "public use," as shown by the other decisions cited, the meaning of the phrase is defined in section 1 of article 14 of the Constitution in terms which necessarily creates a public use whenever any water is sold or distributed, regardless of the number of persons to whom it is delivered, the manner or character of the disposition made of it, or of the transfer of the right thereto. The part of the section defining the phrase is as follows: "The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law." The remainder of the section provides for the fixing of rates for the use of water in municipalities. Section 2 declares that the right to collect rates for water supplied to a county, city, and county or town, or the inhabitants thereof, is a franchise to be exercised only under and as prescribed by law.

In *Merrill v. Southside I. Co.*, supra, it was held that the word "appropriation," in section 1 aforesaid, does not refer to the act by which the water is acquired, as the taking from the stream, for example, but to the act or acts by which it is designated, set apart, and devoted to the purposes of sale, rental, or distribution. According to the theory of the plaintiff in this case, whenever the owner of a water supply determines to and does sell it for a price agreed on between himself and the purchasers, it immediately becomes subject to public use, and



any other person to whom it can be conveniently distributed in the same manner would have the right to a proportionate share of the water on the same terms as the purchasers; and, if the supply is limited, the first purchasers must divide with all others who may come in and claim a share. Under that theory, where a person having a surplus of water parts with a portion of it by sales to others, he thereby appropriates such portion to purposes of sale and dedicates it to public use. This application of the section would destroy private rights in water and convert every sale thereof into a dedication to public use. We do not believe that the Constitution was intended to have such effect, or that it should be so construed. Article 14, taken as a whole, shows plainly that it was intended to regulate the use of water appropriated and dedicated generally for sale and distribution among an indefinite number of users. It could not have been intended to declare that a single sale of a part of his water by one having more than he needs would convert the use into a public use in which others could share. If a single sale could not do this, other sales of like character would not accomplish it. The section must be understood to apply to cases where one has appropriated water generally for sale, rental, or distribution, and not to cases where sales are made to particular persons at a fixed price by ordinary contracts of purchase and sale. To compel such a subdivision and distribution of water supplies as this construction would entail would destroy the value of all water rights. In this state the water supply is so small that large areas must go without irrigation entirely. Such water as there is must be applied, as far as it will go, in quantities sufficient to make the lands profitably productive. The principal benefit of irrigation comes from its use in growing vineyards and orchards. These require a large expenditure and a permanent water supply to make them profitable. If those engaging in such enterprises know that they must be ready always to divide their water supply with those in the vicinity who may subsequently choose to engage therein, such enterprises would be discouraged, the development, growth, and progress of the state would be much retarded, and its productive capacity greatly decreased.

This provision of the Constitution has been in force 33 years. It has never been understood that it had the effect here contended for. There have been many instances in which the owners of large tracts of land have acquired water, conducted the same to the land, and sold and conveyed the land in small tracts to actual settlers with a proportionate share of the water appurtenant to the land, coupled with an agreement to continue the water supply at a fixed annual rate. Such a disposition is essentially a

matter of private contract, and it shows no intent to create a public use. It has also been a frequent practice to effect the same general purpose by forming a corporation to hold the water supply and to issue stock at a fixed price entitling the holder to a share of the water at a fixed annual rate, thus making the stockholders themselves the indirect owners of the water. Many decisions of this court in various ways concern corporations of this character. Among them are the following: *Richey v. East R. W. Co.*, 141 Cal. 221, 74 Pac. 754; *Estate of Thomas*, 147 Cal. 236, 81 Pac. 539; *Southside I. Co. v. Burson*, 147 Cal. 406, 81 Pac. 1107; *Mabb v. Stewart*, 133 Cal. 556, 65 Pac. 1085; s. c., 147 Cal. 417, 81 Pac. 1073; *Curtin v. Arroyo, etc., Co.*, 147 Cal. 338, 81 Pac. 982; *Arroyo, etc., Co. v. Bequette*, 149 Cal. 546, 87 Pac. 10; *Fuller v. Azua I. Co.*, 138 Cal. 204, 71 Pac. 98; *Spurgeon v. Santa Ana, etc., Co.*, 120 Cal. 71, 52 Pac. 140, 39 L. R. A. 701; *Hewitt v. Irr. Dist.*, 124 Cal. 186, 56 Pac. 893; *Goodell v. Verdugo, etc., Co.*, 138 Cal. 310, 71 Pac. 354; *Barton v. Riverside W. Co.*, supra; *Miller v. Imperial W. Co.*, 156 Cal. 27, 103 Pac. 227, 24 L. R. A. (N. S.) 372. In none of them is there any suggestion that such disposition or distribution constitutes a public use. This method became so prevalent and so satisfactory that in 1895 section 324 of the Civil Code was amended so as to provide that, in such cases, the by-laws might require the stock certificates to describe the land to which the stockholders' share of water was to be applied, and that such stock should thereupon become appurtenant to such land.

This long-continued understanding and application of this section of the Constitution must be deemed to be a practical construction of it, contrary to the theory of plaintiff. It was not intended to declare that specific sales of water, or transfers thereof to a particular person or persons chosen at the will of the holder of the supply, or the distribution thereof by private corporations among their stockholders for an agreed price and at annual rates fixed by the corporation itself, should be considered a dedication thereof to public use. It would follow, as a matter of course, that neither the Development Company, nor either of the water companies organized by it, possesses the power of eminent domain. It is not asserted that either of them has ever claimed or attempted to exercise that power. The Mexican Company has received from the Mexican government a grant of that power. But the fact that that company is carrying on a public service in Mexico and has devoted some water to public use there does not affect the water carried into the United States nor the character of the use thereof in California. Nor is the fact that it is all derived from the same source of any importance. A part of

a stream, or a part of a single appropriation therefrom, may be devoted to public use and another part entirely to private use. *Leavitt v. Lassen I. Co.*, supra.

[7] Something is said in the argument in regard to the fact that the Development Company brings more water into California through its canal than is used, and that there is always some waste water discharged from the distributing canals or somewhere along the route, and that this is more than enough to supply the plaintiff. There is generally some unavoidable waste in any large irrigating system. Water must be turned into canals leading to lands where it is to be used. The users may not be ready to commence taking it. As it cannot then be turned back and made to run up hill, it must be allowed to run down and go to waste, unless some independent user takes it below the waste gate. So much of the water as may be unavoidably wasted is to be deemed a part of that which is appropriated to the beneficial use and which the company has the right to take. It is necessary to the use, and is in the same category as that lost in transmission by evaporation and unavoidable seepage.

So far as any other waste of the water is concerned, it is water to which the defendants have acquired no right. Their right is measured by the quantity which is put to beneficial use, by which is meant the quantity necessary to be taken to supply that use at the place of use. The taking of more would be a taking without right. But the excess, if any, has not been applied by any of the defendants to any public use in California. The plaintiff, or any person, could appropriate such excess by an independent diversion from the Colorado river, and thereby prevent defendants from taking it. Until she does so, she has no more right to it than the defendants have. Doubtless she is not in a position to do this, but the defendant is not a common carrier of water, and it cannot be compelled to take it from the river for the benefit of plaintiff, carry it through Mexico for her, and deliver it to her in California. The case, in this aspect, is one of apparent hardship, but the courts cannot compel such service. As a matter of general policy, we doubt if it is important, for it is not likely that the waste will be allowed to continue, since the defendants could readily make a profitable use of it by increasing their capital stock and applying it to the additional lands to which it could thus be made available without any change in their method of distribution. In any event, the plaintiff has no rights in it which can be enforced by mandamus.

The judgment is reversed.

BEATTY, C. J., does not participate in the foregoing decision.

(164 Cal. 160)

HART v. BUCKLEY. (S. F. 5,883.)

(Supreme Court of California. Nov. 15, 1912.)

1. WORK AND LABOR (§ 27\*)—ARCHITECT—QUANTUM MERUIT—EVIDENCE.

Where the complaint was in the form of a common count upon a quantum meruit and the evidence showed that defendant employed plaintiff to construct an entire building, and agreed to pay him a certain per cent. of the cost, and prematurely discharged him without cause, evidence of the reasonable value of the services performed was admissible.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 50-54; Dec. Dig. § 27.\*]

2. WORK AND LABOR (§ 14\*)—DISCHARGE OF EMPLOYÉ—QUANTUM MERUIT.

As a general rule, where an employé is, without cause, discharged by his employer during the term of his employment, he may regard the contract as rescinded and recover upon quantum meruit.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 29-33; Dec. Dig. § 14.\*]

3. TRIAL (§ 253\*)—INSTRUCTIONS—IGNORING EVIDENCE—DEDUCTION FROM COMPENSATION.

Where, in an architect's action for the value of his services and for damages for the premature termination of his employment to plan and supervise the construction of buildings, defendant's counterclaim and evidence showed defective workmanship by the contractor, at variance with the contract and that plaintiff had issued certificates stating that the work was according to the contract, and that defendant had thereupon paid the full contract price, it was error to refuse to instruct that if the work was defective and not according to the specifications, and the plaintiff failed to properly inspect the work and carelessly certified that it was done properly, and if defendant was damaged thereby, such damages should be deducted from the value of plaintiff's services.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\*]

4. CONTRACTS (§ 322\*)—INSPECTION BY ARCHITECT—PRESUMPTION.

Where an architect certifies that defective work, not in conformity with the contract, conforms to the contract, the presumption is either that he did not inspect the work, or was negligent in so doing.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1306, 1307, 1339, 1347, 1348, 1465, 1492, 1534-1542, 1768; Dec. Dig. § 322.\*]

5. TRIAL (§ 253\*)—INSTRUCTION—ISSUES—EVIDENCE.

The introduction of contradictory evidence upon an issue merely raises a question of fact to be submitted to the jury, and does not authorize the court to refuse an instruction thereon.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\*]

6. TRIAL (§ 296\*)—INSTRUCTIONS—REQUESTS—OTHER INSTRUCTIONS.

Error in refusing defendant's instruction that damages to him from the plaintiff's having, as an architect, certified that defective work was properly done should be deducted from the value of plaintiff's services was not cured by an instruction that, in determining the reasonable value of plaintiff's services, the jury could consider defendant's damages from negligent inspection of the work by plaintiff; such instruction not covering the point, since the amount of damages from plaintiff's negli-



gence was not directly relevant to the value of his services.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

Department 1. Appeal from Superior Court, City and County of San Francisco; Geo. H. Buck, Judge.

Action by Ralph W. Hart against C. F. Buckley. From an order denying defendant's motion for a new trial, he appeals. Reversed.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for appellant. De Laveaga & Magee and Frank L. Owen, all of San Francisco, for respondent.

SHAW, J. Defendant appeals from an order denying his motion for a new trial.

The complaint is in two counts, each upon a distinct claim for money due, aggregating \$2,706.80. The first count alleges that between February 1, and August 30, 1907, plaintiff performed services, as architect, for the defendant, at his request, in making plans and specifications and in superintending the erection of a building on Market street, in San Francisco, which services were reasonably worth \$1,506.80, for which sum defendant is indebted to him, and the same is wholly unpaid. The second count alleges that on February 2, 1907, defendant employed plaintiff, as an architect, to draw plans and specifications for a building to be erected by defendant on Larkin street, and to superintend the erection thereof, and agreed to pay plaintiff therefore a sum equal to 5 per centum on the cost of the building; that plaintiff began the performance of said services; and that while he was diligently engaged therein the defendant, without cause or excuse, terminated his employment and refused to allow him to continue therein, although he was ready and willing to do so, whereby he was damaged in the sum of \$1,200, which remains wholly unpaid.

The answer to the first count denies that any service in superintending the building mentioned was performed, except in the excavation of the basement and the erection of the concrete work; and it denies that the service was of any value. It further alleges that the plaintiff was negligent in the performance of said services, and that because of said neglect of the plaintiff the defendant, on August 30, 1907, discharged him. The answer to the second count denies the making of the agreement alleged, the performance of any services thereunder, the wrongful discharge, and the damages. By the way of set-off to both counts, it is alleged that plaintiff was employed by defendant to draw the plans and specifications for the said building on Market street, and to superintend the erection thereof, and that he undertook to use due care and skill therein; that the work was carelessly done by

the contractor "in an unworkmanlike manner and not in conformity with said specifications;" that the plaintiff negligently "failed to properly inspect or test said work," and negligently issued certificates, as architect, that said work was properly done, and that \$4,279.59 was due the contractor therefor, and thereby caused the defendant to accept said work and pay said sum; and that the said work was not worth more than \$1,500.

There was a jury trial, and a verdict was returned for the plaintiff in the sum of \$1,500. The defendant claims that the court erred in certain rulings admitting evidence offered by the plaintiff and in refusing certain instructions requested by the defendant.

The Larkin street building was not erected. The plaintiff's services in relation to it consisted only of the preparation of the plans and specifications. The main controversy was over the services upon the Market street building. The plaintiff prepared the plans and specifications for the entire structure, let the contract for the basement excavation and for the concrete foundation walls, and superintended the erection of said walls. He was discharged by the defendant when the foundation was completed.

[1, 2] It was not error to allow testimony as to the reasonable value of the services performed by the plaintiff upon the Market street building. The complaint with respect to that building was in the form of a common count upon the quantum meruit for the value of the services performed. There was evidence that defendant had agreed to employ the plaintiff, as architect, thereon for the construction of the entire building, and to pay him as compensation 5 per cent. of the cost thereof; and that the premature discharge was without good cause. "It is the general rule that, where an employé is, without cause, discharged by his employer during the term of his employment, he may regard the contract as rescinded and sue upon a quantum meruit and recover the reasonable value of his services, as if the special contract of employment had never been made." *Brown v. Crown G. M. Co.*, 150 Cal. 384, 89 Pac. 86, and cases cited. The evidence was therefore relevant to the issue, and there was no variance between this proof and the allegations.

[3] The defendant asked an instruction to the effect that if the jury should find that the contractor for the foundation carelessly did the work in an unworkmanlike manner, and not in conformity with the specifications, and that plaintiff carelessly failed to properly inspect or test the work, and carelessly certified that the work was done properly and as specified, and that this negligence of the plaintiff caused damage to defendant, the damage should be deducted from the value of the plaintiff's services.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

This instruction was refused. There was no demurrer to the counterclaim on the ground of uncertainty, and evidence was given in support of it without objection. It appears to have been treated as sufficient in that respect. The record recites that evidence was given tending to show that the walls of the foundation were not, nor were any of them, constructed by the contractor in a workmanlike manner, nor in accordance with the contract; that they were insufficient to sustain any four-story building; that pieces of the concrete in them could easily be broken off, and would easily crumble in one's hands; and that the value of the work so done by the contractor did not exceed \$1,500. It also appeared that plaintiff had issued certificates stating that the work was completed according to the contract, and that the defendant had thereon paid the contractor the full contract price therefor.

[4] The instruction should have been given. It contains a correct statement of the law, and it was applicable to the case as presented by the pleadings and the evidence above recited. It is true that in the recital referred to there is no express statement that there was any evidence tending to show that the plaintiff failed to inspect or test the work, or that he was negligent in his inspection or test. But it was his duty to inspect and test it and use due care and skill thereon. If no part of it was done in conformity with the contract, and he certified that it was all done in accordance therewith, the jury might reasonably infer, either that he did not inspect it at all, or that he was negligent in so doing.

[5] The recital, of course, implies that the evidence tending to show the facts stated was substantial in character and sufficient to warrant the jury in finding that said facts existed. Consequently we cannot consider the error as a trivial one. The introduction of contradictory evidence would merely raise a question of fact to be submitted to the jury. It would not authorize the court to refuse the instruction.

[6] The plaintiff claims that the refusal of this instruction was rendered harmless by an instruction given, directing the jury that "the mere fact that some of the work was negligently done does not defeat the plaintiff's right to compensation. He is still entitled to compensation for the reasonable value of his services; and in determining such reasonable value of his services you may take into consideration the actual amount of damages, if any, which defendant has proved that he has suffered by reason of such negligence." This instruction does not properly cover the point. The amount of damage caused by plaintiff's negligence is not directly relevant to the value of the services performed by him. It might have some bearing on the character of the

services, and in that way relate to the question of value. The jury may have understood the instruction to mean that they might consider the damage in this light, not for the purpose of deducting it from the value of the services proved, but to show that the services were poor in character, and that because of that fact they might reduce the estimate of the value of the plaintiff's services. This is not the same process as that of finding the true value of the services and the true amount of damage and deducting one from the other, which was the proposition contained in the instruction refused. The defendant was entitled to have it given as asked.

The order is reversed.

We concur: SLOSS, J.; ANGELLOTTI, J.

164 Cal. 150

PURCELL v. RICHARDSON. (Sac. 1,983.)  
(Supreme Court of California. Nov. 12, 1912.)

1. JUSTICES OF THE PEACE (§ 93\*)—PLEADINGS—CROSS-COMPLAINT.

Code Civ. Proc. § 852, provides that the pleadings available to a defendant in a justice court shall consist of a demurrer or answer to the complaint. Section 855 provides that the answer may contain a denial of any or all the material facts stated in the complaint, and also a statement of any other facts constituting a defense or counterclaim, on which an action might be brought by the defendant against plaintiff or his assignor in a justice court. *Held*, that section 442, authorizing a defendant in the superior court to file a cross-complaint, has no application to suits before a justice; and hence, no such pleading having been authorized, defendant was not entitled to judgment in a justice court on a pleading claimed to constitute a cross-complaint, because of plaintiff's failure to answer the same.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 326; Dec. Dig. § 93.\*]

2. JUSTICES OF THE PEACE (§ 92\*)—COUNTERCLAIM—DENIAL.

Where, in a suit before a justice of the peace, defendant's pleading, that by plaintiff's negligence in performing the services sued for defendant had suffered damages in the sum of \$272, constituted at most a defense and counterclaim, it was deemed controverted by virtue of Code Civ. Proc. § 880, for the purpose of establishing an issue for trial.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 324, 325; Dec. Dig. § 92.\*]

In Bank. Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Petition by Marcus Purcell to obtain a writ of mandate to compel R. M. Richardson, a justice of the peace, to issue an execution on a judgment theretofore entered in favor of petitioner and against A. A. Atkinson. From an order denying the petition on the merits, petitioner appeals. Affirmed.

Marcus Purcell, of Dorris, in pro. per. R. S. Taylor and Taylor & Tebbe, all of Yreka, for respondent.



LORIGAN, J. Appellant filed a petition in the superior court of Siskiyou county for a writ of mandate to compel the defendant, as justice of the peace of Lake township, in said county, to issue an execution from his court on a judgment entered therein in favor of appellant and against one A. A. Atkinson. An alternative writ was issued, which respondent answered, and on the hearing an order was made by the superior court denying the petition. From this order an appeal was taken to the District Court of Appeal for the Third District, which affirmed the judgment of the superior court. The matter is here on an order of this court granting a further hearing.

It appears from the record that on July 13, 1910, Atkinson brought suit in said justice's court against the petitioner, Purcell, to recover the sum of \$9, the value of services alleged to have been rendered the latter by Atkinson as a physician. On July 18, 1910, Purcell filed a pleading in that action, which he denominated an "answer, demurrer, and counterclaim," wherein he demurred to the complaint, denied the alleged indebtedness, and "by way of counterclaim" alleged negligence on the part of Atkinson in prescribing treatment for him as his physician, and claimed that he had suffered damage thereby in the sum of \$272. On July 28, 1910, Purcell applied to said justice for the entry of a judgment in his favor under that portion of his pleading filed as a "counterclaim," upon the theory that, while so denominated, it was in legal effect a "cross-complaint," which, the plaintiff, Atkinson, having failed to answer, entitled him to a judgment by default against said Atkinson on the cross-complaint. The justice accorded with this claim on the part of Purcell, and entered a judgment by default against Atkinson for the full amount of damages claimed—\$272 and costs. Subsequently, on August 8, 1910, the justice, on motion of Atkinson, and after notice to Purcell, set the aforesaid judgment aside, and fixed September 15, 1910, as the date for the trial of the cause. On September 3, 1910, Purcell filed a written demand upon the said justice for the issuance of an execution on the said judgment so entered against Atkinson. The justice refused to issue it, and this proceeding in mandate was thereupon commenced by Purcell to compel its issuance.

The position of appellant on this appeal is that, while his pleading was denominated a "counterclaim," still his denomination of it as such is of no consequence; that it is the facts set up in the pleading, and not what the pleader may call it, which determines its character, and that, so tested, the facts set up therein constitute it a "cross-complaint," and not a "counterclaim"; that the failure to answer said cross-complaint in due time entitled appellant to the judgment in his favor against Atkinson which was entered by the justice; and that the attempt subse-

quently by the justice of the peace under section 859 of the Code of Civil Procedure to set aside this judgment was beyond his jurisdiction, and the order doing so was void, because no affidavit of merits had been filed as by the section it is provided must be done. In this view, and insisting that the judgment by default is a valid judgment, it is claimed that it was the duty of the justice to have issued the execution thereon when demanded, and that it was error on the part of the superior court to have denied appellant a writ of mandate to compel the justice to do so.

[1] It is unnecessary to determine anything respecting the order of the justice setting aside the judgment. We deem this matter immaterial, because we are satisfied that the judgment by default itself, entered by the justice, and upon which appellant relies, was clearly void, as beyond the jurisdiction of the justice to enter it. It was entered by him on the theory that the facts set forth in that portion of the answer filed by appellant and which he denominated a counterclaim constituted it in legal effect a cross-complaint. But this theory of the justice was erroneous, for the clear reason that there is no such pleading as a cross-complaint provided for among the pleadings available to a defendant in a justice's court. The provisions of the Code of Civil Procedure relative to pleadings in those courts prescribe specifically of what they shall consist, and those available to a defendant consist of a right to demur or answer the complaint. Section 852, Code Civ. Proc. As to the answer, it is provided that it "may contain a denial of any or all of the material facts stated in the complaint \* \* \* and also a statement \* \* \* of any other facts constituting a defense or counterclaim upon which an action might be brought by the defendant against the plaintiff or his assignor in the justice's court." Section 855. It is quite apparent from a simple reading of this last section that no such pleading as a cross-complaint in a justice's court is permitted. Appellant has apparently sought to invoke in aid of the right to set up a cross-complaint in a justice's court the provisions of the Code of Civil Procedure which apply to actions in the superior court, and where the filing of a cross-complaint is specifically provided for. Code Civ. Proc. § 442. But that section has no application to pleadings in the justices' courts. While it is true that by section 925 of the Code of Civil Procedure those provisions of that Code which in their nature are applicable to proceedings in justices' courts are made applicable thereto, this section cannot be extended to authorize other pleadings to be filed there-in than those specifically enumerated as being permitted in justices' courts. The Code, having particularly designated of what the pleadings in such court shall consist and what they shall contain, is conclusive on the subject.

[2] In this view the pleading filed by appellant in the justice's court amounted simply to an answer, the only pleading which he was allowed to file, and in which, under section 855, supra, he was permitted in addition to a denial of the allegations of the complaint to set up any facts constituting a defense or counterclaim. As a matter of pleading in the justice's court the facts set forth in the answer of appellant could only be treated as a counterclaim, and as such the plaintiff in that action was not called upon to file any answer respecting it. It constituted an allegation in the answer of new matter, which was deemed controverted. Under section 880 of the Code of Civil Procedure applicable to justices' courts, when the answer of the appellant was filed, an issue of fact arose as to all allegations in the complaint controverted by the answer and "upon any new matter in the answer." Upon such issue being made, it was the duty of the justice to fix a day for the trial of the action and to give notice thereof to the parties. Proceeding, however, on the theory that the matter set forth by appellant in his answer in the justice's court constituted a cross-complaint, the justice entered judgment by default against Atkinson without any notice of the trial being given. As pointed out, this construction of the pleading on the part of the justice was erroneous. The pleading was simply an answer setting up new matter by way of counterclaim under section 855, supra, which, when filed, raised an issue of fact, to be tried under notice given to the respective parties to the action. The justice was without jurisdiction to enter any judgment at all in the case before him until after such notice of the trial had been given, and as, of course, no notice was given, the judgment entered by him against Atkinson in favor of the appellant was void. *Jones v. Justice's Court*, 97 Cal. 523, 32 Pac. 575; *Elder v. Justice's Court*, 136 Cal. 364, 69 Pac. 1022.

In this view, as the judgment entered by the justice was void, the refusal of the superior court to grant a writ of mandate in favor of petitioner to compel the issuance of an execution thereon was correct, and the order denying the writ is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; SHAW, J.; HENSHAW, J.

(164 Cal. 165)

FRASER v. SHELDON et al. (Sac. 1,875.)  
(Supreme Court of California. Nov. 15, 1912.  
Rehearing Denied Dec. 13, 1912.)

#### 1. APPEAL AND ERROR (§§ 105, 870\*)—DECISIONS REVIEWABLE.

An order denying defendants' motion for nonsuit on a bill of exceptions is not appealable, though it can be reviewed on an appeal from the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 717-723, 3451, 3487-3512; Dec. Dig. §§ 105, 870.\*]

#### 2. APPEAL AND ERROR (§ 937\*) — PRESUMPTIONS—TIME FOR PERFECTING.

Where an appeal was taken within 6 months after entry of judgment, but more than 60 days after that date, and the record did not show that any notice of entry of judgment was served on the appellant, it will be presumed that none was served, and that the appeal was good under Code Civ. Proc. § 941b, providing for the taking of appeals within 60 days after service of entry of judgment or within 6 months from judgment in the absence of such service.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3788-3794; Dec. Dig. § 937.\*]

#### 3. APPEAL AND ERROR (§ 858\*) — QUESTIONS PRESENTED FOR REVIEW—TIME OF TAKING APPEAL.

On an appeal duly perfected under Code Civ. Proc. § 941b, any question may be reviewed which could have been reviewed had it been taken within 60 days after rendition of judgment under the provisions of section 939, and hence the sufficiency of the evidence may be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3435, 3439, 3440, 3446; Dec. Dig. § 858.\*]

#### 4. CHATTEL MORTGAGES (§ 34\*)—WHAT CONSTITUTES—STATUTES.

In view of Civ. Code, §§ 2888, 2889, providing that, notwithstanding an agreement to the contrary, a contract for a lien transfers no title, and that all contracts for the forfeiture of property subject to a lien in satisfaction of the obligation secured thereby are void, a bill of sale absolute on its face, but given with the understanding that the vendee should sell the property back to the vendor on his paying the amount advanced by the vendee, does not operate as a transfer of title to the property, even though the vendee refused to accept a chattel mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 24, 35; Dec. Dig. § 34.\*]

#### 5. CHATTEL MORTGAGES (§ 132\*)—EVIDENCE—SUFFICIENCY.

In an action to recover property, title to which defendant claimed under a purported sale, evidence held insufficient to sustain a finding of title as against a claim that the transaction was a mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 218; Dec. Dig. § 132.\*]

In Bank. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by J. R. Fraser against G. M. Sheldon and another. From a judgment for plaintiff, defendants appeal. Reversed.

H. W. Hutton, of San Francisco, for appellants. George Clark and T. T. C. Gregory, both of San Francisco, for respondent.

PER CURIAM. The complaint was filed on April 22, 1909, and the action is to recover possession of the value of certain personal property which plaintiff alleges in his complaint that he "is the owner of, and entitled to the immediate and exclusive possession of," namely, "one twin-screw boat called the Skimmer, formerly named the Fruitvale, including the pair of new Clifton engines upon said boat" and other described articles constituting her equipment; also two old barges and their equipment which, it is al-



leged, "lay on September 16, 1907, on the mud flat just below Benicia, Cal., at the old Delaney's Ways and Shipyards"; also "one barge known as R. T. & C. Co. No. 1, including the engine centrifugal pump used in or connected therewith," said scow being on September 16, 1907, "anchored at Benicia." It is also alleged that at the time of filing the complaint all said property was in the possession of defendants, and wrongfully withheld from plaintiff, and that "the foregoing description is as accurate as plaintiff can give." A general demurrer to the complaint was overruled, as was also a demurrer that several causes of action had been improperly united.

Defendants answered by general denials of the averments of the complaint, and also claiming ownership and right of possession in themselves then and at all times mentioned in the complaint. The cause was tried by the court, and it made findings: (1) That the defendant company was a duly organized corporation; (2) that at the commencement of the action plaintiff "was and he ever since has been the owner of and entitled to the immediate and exclusive possession of all the personal property mentioned in the complaint"; (3) that at the commencement of the action all said property "was in the possession of defendants" without right and was being wrongfully detained; (4) that prior to the trial of the action the possession of all said property, except the barge described as R. T. & C. Co. and its equipment had been delivered to plaintiff by the sheriff and plaintiff retained such possession "under proceedings duly and regularly had for that purpose in this cause"; (5) that the delivery of possession of the said barge last above particularly referred to and its equipment had not been made, and was being withheld from plaintiff, and that the value of said property so withheld was \$500. As conclusion of law, the court found that "plaintiff is entitled to judgment against defendants for the possession of the personal property described in the complaint, and, if delivery of the personal property mentioned in finding 5 cannot be had, then, in addition, plaintiff shall have judgment against defendants for the value thereof amounting to \$500 in lieu of said property, and costs of suit." Judgment was entered accordingly.

[1] Defendants appeal "from the judgment \* \* \* entered \* \* \* on the 25th day of February, 1910, and also from the order \* \* \* denying defendants' motion for a nonsuit" on bill of exceptions. The order denying defendants' motion for a nonsuit is not an appealable order. Such an order, however, can be reviewed on an appeal from the judgment.

[2] While the notice of appeal from the judgment was not filed within 60 days from the date of entry of the judgment, it was filed within 6 months after said date, and

the appeal was one perfected under the provisions of section 941b of the Code of Civil Procedure. It was duly taken within the time prescribed in said section, if no notice of the entry of said judgment had been served on appellants more than 60 days prior to such filing of the notice of appeal, the section providing substantially that such notice of appeal must be filed within 60 days after notice of entry of judgment has been served on the attorneys of record of the adverse party, and must, in any event, be filed not later than six months after such entry. If no notice of entry of judgment is so served, the party may file his notice of appeal at any time within six months from the date of such entry. The record here does not show that any notice of entry of judgment was served on appellants, and it must be assumed, in the absence of a showing to the contrary, that no such notice was served. See *Foss v. Johnstone*, 158 Cal. 119, 110 Pac. 294.

[3] Upon an appeal duly perfected pursuant to the provision of section 941b of the Code of Civil Procedure, any question may be reviewed which could be reviewed upon an appeal taken, pursuant to the provisions of section 939 of the Code of Civil Procedure, within 60 days of the rendition of the judgment. Section 941c, Code Civ. Proc. The claim that the evidence is not such as to sustain the findings of the trial court must therefore be considered.

[4, 5] Looking at the evidence in the light most favorable to plaintiff, as we must do in view of the findings of the court, the material facts appear to be as follows: In the early part of the year 1907, two sisters, Mattie and Cherrie Bailey, were the owners of the personal property in question, and it was in charge of defendant Sheldon, their brother-in-law. It does not appear that any of the property was ever in the possession of plaintiff, and, as we understand the record, it was at all times prior to the organization of defendant corporation in the possession of Sheldon, as agent of the Bailey sisters. The boat originally named "Fruitvale" and now named "Skimmer" needed new engines and certain repairs, and plaintiff desired water transportation between Benicia, where he was engaged in business, and San Francisco. It was arranged between plaintiff and Sheldon, acting for the Baileys, that plaintiff should furnish the engine and other necessary things for the boat, and that a corporation to be known as the Rivers Transportation & Construction Company should be formed with a capital stock of 75,000 shares, of which plaintiff should have 25,000 shares for the money advanced, while the Baileys were to have the remaining 50,000 shares. An instrument in the form of a bill of sale of the personal property was executed and delivered by the Baileys to plaintiff. It does not appear that plaintiff was ever giv-

en possession of any of the property. There is no conflict in the evidence on the proposition that the bill of sale was given and received solely as "security." Plaintiff furnished the engines and expended money for other purposes, including \$400 for certain lands, the deeds to which were taken in his name, the aggregate amount of his bill being practically \$4,000. For some reason the original plan for the incorporation of a company was not carried out, but late in the year, namely, on November 26, 1907, the attempted organization of defendant corporation was had. This was capitalized at \$50,000, and there were 10,000 shares. On September 16, 1907, a written agreement was entered into between plaintiff and Sheldon, whereby plaintiff agreed to convey to Sheldon the land purchased by him and all personal property here involved for \$4,000, \$10 of which was paid at once and \$3,990 was to be paid one year thereafter, with interest. This amount Sheldon agreed to pay at the time specified. It was provided therein: "The said party of the second part (Sheldon) is to have immediate possession, use, and control of all the above-described property, and is to care for the same and pay all state, town, and county taxes or liens of whatsoever nature which may become due on the property above described. In the event of a failure to comply with the terms hereof by the said party of the second part, the said party of the first part may be released from all obligations in law or equity to convey said property, and the said party of the second part shall forfeit all right thereto, and all money theretofore paid thereon shall be considered as rent for the use of said property and for liquidated damages for the nonfulfillment hereof by the said party of the second part. And the said party of the first part, on receiving such payment, at the time and in the manner above mentioned, agrees to execute and deliver to the said party of the second part, or to his assigns, a good and sufficient deed and bill of sale conveying all of the above described property free and clear of all incumbrance made, done, or suffered by the said party of the first part."

The agreement was signed by plaintiff and Sheldon. There is absolutely no evidence to the effect that the Baileys ever had any knowledge of the provisions of this agreement, and there was nothing to indicate any authorization on their part to Sheldon to enter into any such agreement. When the agreement was signed, plaintiff receipted as paid his bill against Miss Cherrie Bailey for the money due him and gave it so receipted to Sheldon. In the early part of March, 1908, as we understand the record, he returned to Sheldon the bill of sale he had received from the Baileys, apparently surrendering all claim thereunder. Defendant Carquinez Transportation Company was in pos-

session of the personal property at all times after its attempted incorporation November 26, 1907, operating the steamer from at least March, 1908, Sheldon being the general manager of said company. In the early part of 1908 it was orally agreed between plaintiff and those interested in defendant corporation that plaintiff would take one-third of the residue of the stock thereof after deducting 600 shares sold to one Needham for \$1,000 (one-third of which amount was paid to and accepted by plaintiff) in full satisfaction of his claim. According to the plaintiff's testimony he "agreed that after that 600 shares that was issued to Needham that was to be deducted, and I was to have one-third of the balance." Stock was subsequently tendered him, but the claim was made that he was not being given the amount he was entitled to, and he refused to accept it, and declared the agreement at an end. The certificate for such stock is still being held for him. No part of the amount due under the agreement of sale was ever paid in money, and this action was brought after the expiration of the time prescribed therein for such payment. The boat was enrolled at the custom house in San Francisco on March 16, 1908, plaintiff then certifying that he had built it in 1908 for the Carquinez Transportation Company. Plaintiff testified that it was to be enrolled in his name, but could not be as he was not a citizen of the United States.

The difference between the parties as to the stock was due to the fact that 1,000 shares of the 10,000 were never issued, but were proposed to be retained as treasury stock. This left the total issue 9,000 shares, of which Needham was given 600 for \$1,000 cash, in which plaintiff participated by receiving his one-third. This left 8,400 shares to be divided among plaintiff and the two Baileys; each being entitled to 2,800 shares. This was the amount the tendered certificate represented. The plaintiff claimed that under his agreement he was entitled to one-third of all the capital stock provided for in the articles of incorporation, after deducting Needham's 600 shares; in other words, that he should also have one-third of the 1,000 shares treasury stock, which, of course, would entitle the two Baileys to the remaining two-thirds thereof, for it is clear that all the arrangements contemplated that plaintiff and each Bailey should be equal owners, each owning one-third.

It is respondent's theory that the bill of sale from the Baileys to him was absolute, and not a mortgage; that although he had some negotiations with Sheldon and the Carquinez Transportation Company with a view to the acceptance of the stock for his interest in the property, and had even surrendered his bill of sale in contemplation of the completion of the transaction, nevertheless he had never become bound to take such



stock; and that the contract between him and Sheldon had been accepted and recognized by the corporation which, through its president Frame, and its manager, Sheldon, had urged him to procure the enrollment of the "Skimmer" as his own, but, finding that impossible because he was an alien, had induced him to swear that he had built the vessel for the company. Respondent also insists that even assuming the bill of sale to be a mortgage, and assuming the transfer of their title by the Baileys to the corporation after the execution of that instrument, the superior court was justified in referring that the corporation accepted the benefits of the promoter's contract and consented to what is termed "a common method of private foreclosure—a sale by the mortgagee with the mortgagor's consent." And, finally, respondent submits that his refusal to take security which was a mortgage in form, together with the absence of any evidence that the Baileys intended the bill of sale as a mortgage, justified the conclusion that title to the property had unqualifiedly passed to him to be properly asserted by him after the breach of the contract of sale to Sheldon. The first contention is without merit, because the respondent testified that he took the bill of sale as security. We quote some of the questions and his answers thereto as indicating how unqualified was his statement upon this point: "Q. Isn't it a fact that this paper which you say was written was given to you simply as a guaranty for this \$4,000? Is that right? It was given to you as security for this money which you paid for the machinery, and as security that it be carried out? A. Yes, sir. The Court: Q. It was given to you as security, that is what he asked you; do you understand it? A. Yes, sir. It was given to me as security. Q. For what? A. For that money that I advanced. Q. The four thousand dollars? A. Yes, sir." Further answering a question propounded by his own counsel, he said: "Mr. Sheldon offered to give me a mortgage also as security. He offered to give me a mortgage and I would not accept a mortgage; and then he gave me that bill of sale of the property, and then issued an agreement whereby I was to sell it back to him, when he paid me the full amount." Clearly such a contract, even though the plaintiff refused to take an agreement which was a mortgage in form, could not operate as a transfer of title to the property. Secs. 2888 and 2889, Civ. Code.

Plaintiff's position that he was not bound

to accept stock cannot be maintained, because the agreement by which he was to take such stock in lieu of his claim against the boats was partially executed by his acceptance of some of the money received from Needham. At the very least he should have returned this money to the corporation before seeking to foreclose his lien, if he still had one. The same reasoning applies to respondent's other contentions. Even if the conduct of Sheldon and Frame amounted to a recognition by the corporation of the contract between Sheldon and himself, the subsequent acts of plaintiff in surrendering the bill of sale, the evidence of his lien, and in accepting the money received from the sale of stock, showed that he had abandoned all idea of enforcing that contract. So, too, any right of "private foreclosure" was cut off by the partially consummated exchange of all of plaintiff's interest for stock. And, finally, although there is no evidence that the Baileys executed the bill of sale as a mortgage, there is the plaintiff's own statement that he took it as security for the money he had advanced. This emphatically negatives his claim of unqualified title. We conclude, therefore, that the evidence was not sufficient to support the finding that the plaintiff was the owner and entitled to the exclusive immediate possession of the property involved.

This conclusion makes it unnecessary to indulge in more than a brief reference to other alleged errors. One of these related to the admission of parol evidence of the contents of the bill of sale, which was not in the custody of either of the defendants, but was, according to the affirmation of their counsel, in the possession of the Misses Bailey. Of course, we need not review this matter at length, because in case of the necessity of procuring the document in the trial of this or any other action a new demand will become necessary and counsel will naturally take all proper means of producing the exhibit. Testimony given by plaintiff with reference to the value of one of the barges was also attacked as insufficient to justify the finding that it was worth \$500. In any view of the matter this testimony was far from satisfactory, and, if it becomes necessary again to establish the value of the missing barge, doubtless testimony more ample will be adduced.

No other alleged errors require comment. The judgment is reversed.

BEATTY, C. J., does not participate in the foregoing decision.

vendor would consider the contract at an end, the purchaser's right to remain in possession and operate the mining property depended on the payment of 10 per cent. of the gross amount of each clean-up, and a tender after maturity of an amount not sufficient to pay the percentage on clean-ups admittedly due did not prevent a forfeiture at the vendor's election.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 147, 148; Dec. Dig. § 53.\*]

## 2. MINES AND MINERALS (§ 53\*)—OPTIONS—RIGHTS OF PURCHASER.

An option to purchase mines for a fixed price payable in installments, which makes time of the essence, and declares that, on the failure to make any of the specified payments, the rights of the holders of the option shall terminate and all payments made shall be forfeited, is terminated for inexcusable failure to pay at maturity payments specified, unless the vendor waives nonpayment, and this is true, though the purchaser is in possession under the option, and notice is not essential to terminate the purchaser's rights on nonpayment at maturity of the sums called for.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 147, 148; Dec. Dig. § 53.\*]

## 3. MINES AND MINERALS (§ 53\*)—PAYMENTS IN INSTALLMENTS—TENDER AFTER MATURITY—EFFECT.

A tender by a purchaser under an option contract stipulating for payments at specified times, and declaring time shall be of the essence, of all amounts due made subsequent to a default, is not available to him, though made prior to an actual service of notice by the vendor for possession, and the mere fact that the vendor demanded a payment in excess of the amount due under the contract is not a waiver of the vendor's rights to declare the contract forfeited for nonpayment of the installments at maturity.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 147, 148; Dec. Dig. § 53.\*]

## 4. TRIAL (§ 139\*)—DIRECTION OF VERDICT—WHEN AUTHORIZED.

A directed verdict for defendant is proper when the court would be compelled on motion to set aside a verdict for plaintiff and grant a new trial on the ground of the insufficiency of the evidence to sustain the verdict.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.\*]

## 5. MINES AND MINERALS (§ 53\*)—RECOVERY OF POSSESSION BY PURCHASER—ACTIONS—ISSUES.

Where a purchaser under an option contract given possession on the payment of an installment of the price sued to recover possession from the vendor regaining possession for failure to make payments as specified in the contract, the failure of the vendor to deny the allegations of the complaint as to the manner in which he obtained possession from the purchaser's employes was immaterial, since the only effect of the allegations of the complaint was to show that the purchaser did not consent to the taking of possession by the vendor.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 147, 148; Dec. Dig. § 53.\*]

## 6. MINES AND MINERALS (§ 53\*)—ACTION BY PURCHASER FOR POSSESSION — REMEDY — JUDGMENT.

A purchaser in an option contract stipulating for payment in installments who sues to recover possession from the vendor, who on de-

164 Cal. 205

## CHAMPION GOLD MINING CO. v. CHAMPION MINES. (Sac. 1,949.)

(Supreme Court of California. Nov. 20, 1912.)

## 1. MINES AND MINERALS (§ 53\*)—OPTIONS—RIGHTS OF PURCHASER.

Where an option to purchase mines for a fixed price payable in installments stipulated for delivery of possession to the purchaser on the payment of the first installment, and called for payment of 10 per cent. of the gross amount of bullion obtained at clean-ups, such payment to be made within 10 days after clean-ups, and declared that time was of the essence, and that, on the failure to make any of the payments specified, all payments made should be forfeited, and the vendor could immediately re-enter, and the vendor by letter demanded as of right the sending by the purchaser of a verified statement of the product for the month, and a check for ten per cent. and that unless the amount already due was at once paid, and payments made promptly at the close of each month on account of the clean-ups, the



fault in payments obtained possession, is not entitled to recover the money paid.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 147, 148; Dec. Dig. § 53.\*]

#### 7. MINES AND MINERALS (§ 53\*)—DEFECTIVE TITLE—EFFECT.

Where a purchaser in an option contract obtained possession on the payment of an installment, but failed to make the payments called for in the contract, which made time of the essence, and the vendor on the default in the payments regained possession, the fact that the vendor's title was incumbered by a mortgage and by a lien for taxes was of no avail to the purchaser suing to recover possession, and to obtain an accounting of the proceeds obtained by the vendor while wrongfully in possession, and for damages caused the purchaser by the alleged unlawful withholding, since the purchaser could not remain in possession, though the title of the vendor was defective without complying with the conditions of the contract as to payment.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 147, 148; Dec. Dig. § 53.\*]

Shaw, J., dissenting.

In Bank. Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Action by the Champion Gold Mining Company against the Champion Mines. From a judgment for defendant, plaintiff appeals. Affirmed.

The following is the opinion of Shaw, J., in Department 1, hereinafter referred to:

"The plaintiff appeals from a judgment in favor of the defendant, and from an order denying a new trial.

"The action was to recover possession of mining property and damages for the detention thereof. A jury was impaneled to try the case. After the evidence was closed, the court, at the request of the defendant, directed the jury to return a verdict for the defendant. This was done, and thereupon judgment was given for the defendant. It is claimed that this ruling is contrary to the evidence.

"The plaintiff was in possession of the mining property under a contract of sale thereof executed by defendant as vendor to Phillips, Fitz Gerald, and Stewart as purchasers and by them assigned to the plaintiff. The contract provided that the purchasers should take possession upon the payment of the first installment of the price, and that upon the failure to make any payment, or other breach of the agreement, the vendor should have the right immediately to re-enter and take possession of the property. Among other things, it provided that the purchasers should have the right to operate the mines, and that they should pay 10 per cent. upon the gross amount of bullion obtained at clean-ups, which payments were to be applied upon the installments due upon the price. The first payment upon the contract was made by the plaintiff, and it took possession and began the operation of the mines. On April 26, 1910, the plaintiff was in posses-

sion and had been operating the mines for something over two months, and had extracted at clean-ups bullion of the value of about \$20,000, upon which there was due to the defendant \$2,000, none of which had been paid. On that day the defendant, claiming that this payment was past due and that the plaintiff also owed the sum of \$1,600 for the taxes of 1909 on the property, demanded of the plaintiff the payment of said sums of money, or the immediate possession of said property in case the plaintiff failed to make payment. The plaintiff refused to pay the tax demanded, but offered to pay the full amount due as royalty upon the bullion extracted. This the defendant refused to accept without payment of the additional \$1,600. No other demand was made, and in pursuance of the demand stated the defendant on April 26, 1910, without the consent of plaintiff, took possession of the property and held it thereafter until this suit was begun. This action was begun on July 8, 1910. The plaintiff was not then in default upon any subsequent installment of the price.

"It is the established rule in this state that where a vendee in an executory contract of sale of land is put in possession of the premises, and refuses to pay the installments of the price when due, the vendor has the right to retake possession. The vendee cannot retain possession, and at the same time refuse to pay the price when due. The offer of the plaintiff on April 20, 1910, to pay the amount due as percentage of the bullion extracted, was a sufficient tender, provided the plaintiff was not required by the contract to pay the tax demanded. The decision of the case, therefore, depends upon the question whether or not the contract required such payment by the purchasers.

"The contract was executed on December 18, 1909. The first clause provided that the Champion Mines, a corporation, granted to Phillips, Fitz Gerald, and Stewart the option to purchase the mines at the price of \$347,000, to be paid in installments, the first, \$9,500, to be paid on or before January 1, 1910, the second, \$12,500, on or before July 1, 1910, the others in different amounts on or before the 1st day of January and July of each year thereafter, the last being \$137,000, on or before January 1, 1913. It was further provided that, after the first payment, the purchasers should be entitled to 10 days additional time in which to make each of the other payments, but that otherwise time should be of the essence of the contract. Possession was to be delivered to the purchasers upon the making of the first payment of \$9,500. Simultaneously therewith a deed was to be placed in escrow conveying to the purchasers 'a clear, unincumbered, marketable title' to the property. The fourth clause contains the provision upon which it is claimed the purchasers were required to pay the taxes. It is as follows: 'Phillips, Fitz Ger-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

aid, and Stewart agree to keep the water out of said mines to at least the present depth in each shaft and to keep all machinery and pumps in order and to keep all present openings in said mines in as good condition as they are now, and to pay all taxes on said properties, and to keep said properties free and clear from all liens and incumbrances arising or growing out of their possession of said mines or operation thereof; said, the Champion Mines is to at all times have the right of access to said mines and all said properties and examination thereof, and the right at all times to be present at all clean-ups, and the right to at all times have access to all records and books of said Phillips, Fitz Gerald and Stewart used in the operation of said mines.'

"The \$1,600 in question consisted of the second installment of the taxes on the properties assessed for the year 1909, which became a lien thereon upon the first Monday of March, 1909. It was payable when the contract was executed, but did not become delinquent until the fourth Monday of April, 1910. The second clause of the contract, as we have stated, required the Champion Mines at the time of the payment of the first installment to execute and put in escrow a deed conveying to the buyers a clear and unincumbered title to the property. By the terms of the contract the buyers had the right to pay the whole price at any time, and thereupon demand delivery of this deed. From these circumstances, if not from the express language used, the implication is imperative that the title was to be free of all incumbrances at the time of the execution of this deed and delivery of the possession of the mines. In order to bring about this condition, the vendors must necessarily pay all taxes which then constituted a lien upon the property, including the second installment of the tax of 1909 which it demanded of the plaintiff. That this would be the effect of the contract cannot be gainsaid, unless it is qualified by the provisions of the fourth clause. This clause clearly shows by its terms that it was intended as a declaration of the respective duties and rights of the parties to accrue after the delivery of the possession. If, as the previous clause contemplated, the vendor had paid all tax liens against the property before executing the deed, the statement in the fourth clause that the buyers were 'to pay all taxes on said properties' could cover only the taxes subsequently assessed. The obligation imposed upon the vendors, independent of all express covenants, would be to convey a title free of all incumbrances existing upon the property at the time the contract was made. The express covenant in the second clause implies the same obligation. If the phrase quoted from the fourth clause has the effect contemplated for by the defendant, it would be repugnant to the other provisions of the con-

tract. Every other provision of the fourth clause refers to the duties of the purchasers and rights of the vendors after the delivery of possession. In view of all these circumstances, we think this phrase in the fourth clause should be construed in harmony with the other provisions thereof, and that its effect is that the buyers were required to pay all taxes assessed during the time of their possession under the contract and up to the time of final payment, but not the taxes which had accrued at the time they took possession. If the vendors had delivered a deed conveying a clear title and the vendees thereafter paid all taxes accruing, the result would be that the deed, when finally delivered, would convey a title clear of all incumbrances, and the object of the contract in that regard would be carried out. The conclusion is that the defendant was not entitled to demand payment of these taxes and consequently, that the tender of the royalties alone was good, and the plaintiff was not in default at the time defendant took possession. Upon these facts the plaintiff, not being in default on succeeding installments, was entitled to recover possession, and upon the evidence adduced the instruction should not have been given.

"Some minor points made by the respondent remain to be noticed. It does not appear that any consideration was paid at the time the contract was executed. It therefore constituted a mere option until the making of the first payment. But upon the making of that payment it became an executory agreement for the sale of the property, binding upon both parties and revocable by neither except for good cause and in the manner required by the Code and the principles of equity. *Smith v. Bangham*, 156 Cal. 363, 104 Pac. 689, 28 L. R. A. (N. S.) 522, and cases there cited. It was not a lease, and the relation it created was not that of landlord and tenant, but that of vendor and purchaser. *Willis v. Wozencraft*, 22 Cal. 616. We cannot see any ground for the claim that the provision for ten days' grace did not apply to the 10 per cent. of the gross to be paid at clean-ups. By its terms this clause applied to 'any of the above payments' except the first. This would embrace the clean-up payments mentioned in the third clause, as well as the installments specified in the first clause. In stating the facts as aforesaid we are compelled by the rules of law applicable in such cases to give the evidence the effect most favorable to the plaintiff. All statements therein favorable to the plaintiff must be taken as true, and, if other statements conflict therewith, they are to be rejected. It was for the jury, and not for the court, to determine which of two conflicting statements it would accept, and, as it might have taken those favorable to the plaintiff, we must, upon a review of the instruction to return a verdict for the defendant, pre-



sume that the jury would have resolved all questions arising upon the evidence in favor of the plaintiff.

"The judgment and order are reversed."

J. M. Walling, of Nevada City, Cal., for appellant. Metson, Drew & Mackenzie, of San Francisco, and Fred Searls, of Nevada City, Cal. (Horatio Alling, of San Francisco, of counsel), for respondent.

ANGELLOTTI, J. This is an appeal by plaintiff from a judgment in favor of defendant, and from an order denying its motion for a new trial.

The action was one to recover possession of certain mining property and damages for the detention thereof. A jury was impaneled to try the case. After the evidence on the part of the plaintiff was closed, the trial court, on the motion of the defendant, directed the jury to return a verdict for the defendant. This was done, and thereupon judgment was given for the defendant. The action of the trial court in thus instructing the jury is alleged to have been erroneous; it being claimed that plaintiff made a sufficient case to support a verdict in its favor.

Considering the evidence in the light most favorable to plaintiff, the facts shown are substantially as follows:

Plaintiff is the assignee of all the rights of W. S. Phillips, George E. Fitz Gerald, and W. T. Stewart under a contract executed by them and defendant corporation on December 18, 1909. By this contract defendant corporation granted to said Phillips, Fitz Gerald, and Stewart "the option to purchase all of its mines and mining properties situated in the county of Nevada, state of California, at the total price of \$347,000, upon the following terms and conditions, to wit:" The purchase price was to be paid in installments, \$9,500 on or before January 1, 1910, \$12,500 on or before July 1, 1910, and other installments on January 1st and July 1st of each year until the final installment of \$137,000, which was to be paid on or before January 1, 1913. Possession of the property was to be delivered to Phillips and his associates upon the making of said first payment of \$9,500, and a deed was then to be placed in escrow by defendant conveying to them a clear, unincumbered, and marketable title to said mining property. Phillips and his associates were to have the right to operate the mines, they agreeing to expend a sum not less than \$100,000 in the development and operation of the mines during the first year, and to pay defendant 10 per cent. of the gross amount of bullion obtained at clean-ups, which amounts were to be applied upon the installments upon the purchase price. They were "to pay all taxes on said properties," and to keep the same free from all liens and incumbrances arising or growing out of their possession of said mines or the operation thereof. It was provided that "any

of the above payments, other than the said first payment of \$9,500, may be paid within ten days after the above specified dates, otherwise in all particulars, time is of the essence of this option." It was further provided as follows: "Upon the failure to make any of the payments above specified in accordance with the terms hereof, or upon the breach of any of the agreements herein provided, all payments theretofore made shall be forfeited and said corporation shall have the right to immediately re-enter and take possession of said properties and receive return of said deed placed in escrow."

The first payment (\$9,500) having been made, plaintiff went into possession of said property on or about January 12, 1910, and proceeded with the development and operation of said mines, and continued in such possession and operation until April 26, 1910, when defendant took possession, claiming that all rights of plaintiff under said contract had terminated. It was to recover such possession that this action was brought by plaintiff on July 8, 1910, two days prior to the day on which it would be in default for a failure to make the second payment, one of \$12,500, due July 1, 1910. At the time of the first payment defendant placed in escrow, in the Bank of California, a deed of said property subject to the terms and conditions of said agreement. The property was at that time, according to an undenied allegation of the complaint, incumbered by a mortgage placed thereon by defendant "in a sum of money in excess of" \$30,000, and according to the complaint and the proof, by a lien for unpaid state and county taxes for the year 1909, amounting to \$1,477.64, being the second installment of the taxes for said year, payable when the contract was executed, but not delinquent until the fourth Monday of April, 1910.

On April 19, 1910, plaintiff had been operating the mines for over two months, and had extracted at clean-ups bullion of the value of about \$20,000, but had not paid any portion of the 10 per cent. thereof to defendant. It cannot successfully be disputed that plaintiff's evidence shows that on April 1, 1910, at least \$658.69 was due defendant under the provision requiring the payment of 10 per cent. of the gross amount extracted at clean-ups. Indeed, according to Fitz Gerald's written acknowledgment on April 2, 1910, the amount due April 1st was \$975.58.

Fitz Gerald was at all times the general manager of plaintiff in this state, and one Thomas A. Kelly was superintendent of the mine and in possession thereof for the plaintiff. On March 17, 1910, defendant sent a formal letter to Fitz Gerald, as such manager, signed by its president and secretary and attested with its corporate seal, notifying him that plaintiff was delinquent in the matter of paying to defendant 10 per cent. of the clean-ups as made. The letter con-

tained the following statements, among others not material here: "On February 7, 1910, we wrote you in reference to this matter. You replied on February 9, 1910, promising to attend to this matter. You have now been in possession of the property for about two months. We know that you have had very many clean-ups, both of tributers and of company rock, amounting to several thousand dollars. According to our contract, we are entitled to a full statement and ten per cent. of the gross clean-ups. As you have not replied to our letter of February 7th, and have given us no statement and no payments, we hereby wish to inform you that we shall hold you strictly accountable to the letter and spirit of the contract. Kindly send us at once a statement of the total amount you have taken from the mines since they have been in your possession, and send us a check for ten per cent. of that amount. We do not desire in any way to hinder you in your operations, but we must insist, and do insist, upon a strict compliance with the contract; if said statement, accompanied by a check for ten per cent. of the amount taken out, is not received by us, we shall immediately take steps to take possession of the property, as provided in the contract. Kindly understand we do not wish to hamper you in any way, but we do insist that you must keep up to the letter and spirit of the contract. We hereby demand, as is our right, at the close of each and every month, you send us a verified statement of the total product for the month, and send us a check for ten per cent. of said amount." On April 2d Fitz Gerald sent by mail to defendant's president at San Francisco a draft on one Phillips in Chicago for \$975.58, with a statement showing such amount to be the amount due on clean-ups. On April 4, 1910, defendant by letter acknowledged receipt of the statement and draft, and said it would forward the same for collection, trusting it would be honored when presented. It was duly presented to Phillips for payment but payment was refused by him. On April 13, 1910, the secretary wrote Fitz Gerald as such manager that he had been directed to inform him that the draft had not been accepted, and "is being returned unpaid, and also to ask him to state by return mail what he proposed to do in these matters, and what might be expected in the future." On April 14, 1910, Fitz Gerald replied to this letter, expressing great surprise that the draft should not have been honored, and promising that he would pay all amounts due in a short time. A telegram was produced on the trial showing that he had been expressly authorized by Phillips to draw on him for "five hundred" only. On April 18, 1910, he again wrote defendant's president inclosing on account of royalties his personal check for \$500 on the Citizens' Bank of Nevada City. This check was never paid, being marked "No funds"; Fitz Ger-

ald stating that he had funds in the bank when he drew the check, but that he withdrew the same before its presentation for the purpose of preventing payment.

On April 19, 1910, at a regular meeting of the board of directors, the following resolution was adopted, viz.: "Whereas, W. S. Phillips, George E. Fitz Gerald and W. T. Stewart, have broken that certain contract, made and entered into between the said parties and the Champion Mines, on the 18th day of December, 1909: Now, therefore, it is hereby resolved that said agreement be, and it is hereby, terminated and canceled, and B. W. Shoecraft, secretary of this corporation, be and he is hereby authorized and directed for and on behalf of this corporation, and as its act and deed, to immediately take possession of all the properties of this corporation covered by said contract." On April 20 or 21, 1910, defendant's president and secretary went to the mine, and the secretary there delivered to Mr. Kelly, the superintendent in charge, a duly certified copy of this resolution. According to Kelly's testimony, he told them they would have to see Fitz Gerald about it, and left the paper on the desk or handed it to the secretary. Fitz Gerald came into the office while they were talking. According to Fitz Gerald's testimony the subsequent proceedings were as follows: The president of defendant told him he had come to take possession of the mine, because among other reasons the royalties had not been paid, and he, Fitz Gerald, at once offered to pay all royalties due. The president retired for a consultation with the secretary, and on his return said: "I don't want to be too hard on you Fitz. If you will pay me \$1,500 to \$2,000 in royalties and \$1,600 in taxes, I will let you off." The tax thus referred to was that we have spoken of, being the second installment for the year 1909. Fitz Gerald declined to pay anything on account of the taxes, but tendered the royalties demanded, which the president refused to accept. At the close of the interview either the president or secretary gave to Fitz Gerald the certified copy of the resolution we have referred to. According to Kelly, the president said he had not then received the \$500 check sent April 18th, but that, if it had been forwarded, Fitz Gerald would be likely to receive it back by return mail. The officers of defendant left, and on April 26th they returned and took possession of the property without plaintiff's consent, and defendant has ever since been operating the mine.

Plaintiff was entitled, of course, to continue in the possession and operation of the mining property as long as it fully performed the conditions imposed upon it by the agreement between its assignors and defendant.

The claim that there was a default in the matter of the payment of taxes was discuss-



ed in the opinion heretofore filed in this case by department one of this court, and it was concluded that plaintiff was not required to pay the tax in question, and that therefore there was no default in that matter. We adhere to the conclusion then reached in this regard, but, as will appear from what follows, this conclusion is immaterial in the disposition of this appeal, and it will not be necessary to here set forth the reasons for that conclusion.

[1] It was assumed in the department opinion, we are satisfied correctly, that one of the conditions imposed on plaintiff in the matter of remaining in possession and operating the mining property was the payment to defendant of 10 per cent. of the gross amount of each clean-up, within 10 days of the making of the clean-up; the provision for 10 days' grace as to payment being held applicable to "clean-up payments." The provisions of the agreement in this behalf may be held to have been waived by defendant to the extent stated in its formal letter of March 17, 1910, which stated that "we hereby demand, as is our right, at the close of each and every month, you send us a verified statement of the total product for the month, and send us a check for ten per cent. of said amount." But there was nothing to indicate a waiver to any greater extent. Indeed, the letter was explicit to the effect that there must be a strict compliance with the contract, and that unless the amount already due was at once paid, and payments were made promptly at the close of each month on account of the clean-ups during such month, defendant would consider the contract at an end, and would take possession of the property. Nothing was ever said or done by defendant to indicate that it would not maintain this position or that it would excuse any further delay in the matter of payments. And up to April 26, 1910, when a certified copy of the resolution of defendant's board of directors declaring the agreement terminated was served upon plaintiff's superintendent, neither any payment nor tender of payment on account of such clean-ups had been made, unless the check for \$500 dated April 18, 1910, which does not appear to have been accepted, and which was not, in fact, received by defendant until after April 19th, be considered a tender of the amount specified therein, an amount not sufficient to pay the percentage on clean-ups admittedly due not later than April 11, 1910.

[2] The relative rights of the respective parties under the contract before us are well established by the decisions in this state. The plaintiff, as successor of Phillips, Fitz Gerald and Stewart, held, upon certain specified conditions, the option to purchase the mining property for \$347,000, with the right to possess such property and operate the mines thereon after the first payment on

account of the purchase price had been made during the life of the option, and having made such first payment was in the possession of and operating the property. Among the conditions were some requiring the making of certain payments within ten days of certain specified dates, and one requiring the payment of 10 per cent. of the gross amount of any clean-up (to be applied on the purchase price) within 10 days of the making of the clean-up. Although it is held that, where mines or mining properties are the subject of contract, time is of the essence, independent of any express stipulation inserted in the instrument (see *Skookum Oil Co. v. Thomas*, 123 Pac. 363), it was expressly provided in regard to the payments that "time is of the essence of this option," and it was substantially provided that "upon the failure to make any payments above specified, or upon the breach of any agreements herein provided," all rights of the holders of the option shall terminate, and all payments theretofore made by them shall be forfeited. Such is the clear effect of the provisions contained in the agreement. Under such circumstances, it is well settled that an inexcusable failure on the part of the holder of the option to make a payment when the same should be paid according to the agreement terminates his rights under the option, and makes it impossible for him to enforce the same, in the absence of waiver on the part of the other party. See *Oursler v. Thacher*, 152 Cal. 739, 93 Pac. 1007; *Glock v. Howard*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17. It can make no difference that the vendee is in possession under the option. His right to the possession is only such as the contract gives, and, if the contract substantially provides that the right of possession shall cease upon the failure to perform a specified condition, the failure to perform such condition entitles the owner to the immediate possession of the property. See *Hegler v. Eddy*, 53 Cal. 597. The evidence in the case at bar was not such as would sufficiently support a conclusion that the failure of plaintiff to make this payment on or before April 11th was in any way excusable, or that defendant prior to the adoption of its resolution of April 19, 1910, had in any way waived the making of such payment at the prescribed time, or waived any of its rights in consequence of such nonpayment. Plaintiff's rights under the contract were therefore on April 19, 1910, at an end, unless defendant elected to waive plaintiff's failure to comply with the terms thereof. Instead of doing anything of this kind, it by its board of directors adopted a formal resolution declaring the agreement to be terminated, and directing its secretary to immediately take possession of the property. We do not understand that any notice was essential to terminate plaintiff's rights under

the contract. See *Commercial Bank v. Welton*, 148 Cal. 601, 608, 84 Pac. 171. Its default, unexcused and not waived, ipso facto terminated those rights and practically the only effect of the resolution was to express the determination of defendant corporation not to waive such default, and that the contract was, by reason of the default, terminated, and to authorize the designated officer for and in its name to retake possession. Unless defendant elected to recede from this determination, nothing remained for plaintiff to do but to surrender possession on demand therefor.

[3] A tender of all the amounts due made subsequent to such default could not avail it (*Skookum Oil Co. v. Thomas*, 123 Pac. 363), even if such tender was made prior to the actual service of demand for possession. Even if we assume that what was said by defendant's president to Fitz Gerald at the time of serving the notice on him could be taken as binding on the corporation, clearly nothing was said by him except to indicate certain terms and conditions upon which the corporation would waive the default. The right of defendant to possession being already fixed and established, it had the right to prescribe any terms it saw fit as the condition upon which it would waive and forego that right, and reinstate plaintiff under the contract. It is entirely immaterial that the payment demanded as such a condition was larger than the amount that would be due under the terms of the contract and included charges that plaintiff would not have been required to pay thereunder. Plaintiff did not see fit to accept the offer made by defendant's president, and that officer did not attempt to waive any of the rights of his corporation in the matter.

[4] From what we have said, it is clear that if the case had been allowed to go to the jury, and the jury had found in favor of plaintiff, the court would have been compelled, on motion to that effect, to set aside the verdict and grant a new trial on the ground of insufficiency of evidence to sustain the verdict. The trial court did not therefore err in directing a verdict for defendant.

In view of what we have said the other points made in the briefs of counsel for plaintiff require little discussion.

[5] The denials and affirmative allegations contained in the amended answer made sufficient issues as to the alleged performance by plaintiff of the condition entitling it to remain in possession of the property and sufficiently showed the determination of defendant to consider the contract at an end by reason of the default alleged, and a taking of possession in pursuance of that determination. The failure to deny the allegations of the complaint as to the manner in which defendant obtained possession of the property from plaintiff's employes was of no impor-

tance. This is not an action of forcible entry, but one brought long after the time within which such an action could be brought, and the only effect of the allegations of the complaint in this regard was to show that plaintiff did not consent to the taking of possession by defendant. The demurrer to the answer was properly overruled.

[6] Even if it be assumed, as claimed by plaintiff, that the pleadings are in such condition as to prevent defendant from asserting in this action that it is entitled to retain the \$9,500 paid to it by plaintiff, a matter we by no means concede, nevertheless plaintiff was not entitled to recover such money in this action, which is brought by plaintiff solely to recover possession of the mining property, and to obtain an accounting as to the proceeds obtained by defendant while wrongfully in possession, and to recover damages caused plaintiff by the alleged unlawful withholding. No other relief was suggested in the complaint by either allegation or prayer, and the right of plaintiff to recover the money was not in issue.

[7] The fact that the title of defendant was incumbered by a mortgage for \$30,000, and by the lien for the taxes already referred to is of no avail to plaintiff in this action, involving, as it does, only the question of the right to the possession and operation of the mining property. Even if the title of defendant was in any way defective or incumbered, nevertheless plaintiff was not entitled to remain in possession without complying with the conditions as to payment. The principle involved is discussed in the opinion in *Garvey v. La Shells*, 151 Cal. 526, 531, 91 Pac. 498, and the cases therein cited.

There is no other matter requiring notice.

The judgment and order denying a new trial are affirmed.

We concur: SLOSS, J.; BEATTY, C. J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.

SHAW, J. I dissent. The opinion of the majority is based on the proposition that the plaintiff's right to pay the amount due for "clean-up" royalties and thereby to continue in possession of the mine had terminated before the offer of April 20th to pay said royalties was made. I think that the evidence shows a waiver of the forfeiture growing out of the failure to pay said royalties, and that in holding that it does not the majority opinion fails to consider the true rules of law applicable to such cases. The summary of Prof. Pomeroy in his work on Contracts has been accepted for many years as a correct statement of the law on this subject. It is as follows: "The one who is entitled to insist upon a punctual performance by the other or else that the agreement be ended may waive his right and the benefit of any objection he might raise to performance after the prescribed time,



either expressly or by conduct; and his conduct will operate as a waiver when it is consistent only with a purpose on his part to regard the contract as still subsisting, and not ended by the other's default." Pom. on Cont. § 394. In section 395 he states the well-established rule that, when the right to a forfeiture is once waived, time is no longer essential as to the payments included in the waiver, that it cannot again be made essential as to them, except by a notice again fixing the time of the payment, and that the time so fixed must be reasonable under all the circumstances. In section 397 he proceeds to say that the time thus newly fixed by notice may again be waived by conduct, and that, "if the time is once allowed to pass and the parties still go on negotiating for the completion of the purchase, this conduct amounts to a waiver, and time is then no longer essential."

With these rules in view the evidence sufficiently establishes the waiver. As the trial was before a jury and the court directed a verdict for the defendant, the rule prevails that every fact in issue favorable to the plaintiff, of which there was substantial evidence, must be considered as proven and evidence inconsistent therewith must be disregarded. Forfeitures are not favored either in law or equity. In considering the effect of the evidence due weight must be given to both of these propositions.

While it must be conceded that the language used in the agreement clearly includes the clean-up payments among those as to which time is essential, it is at least doubtful from the whole case and from the nature of these payments whether the parties at the time really understood that it had that effect. The main object of the provision that time was essential and that a forfeiture would result from a failure to pay promptly obviously was to secure prompt payment of the installments of the price agreed upon. The clean-up payments were, in fact, advance payments on those installments, and the contract so declares. It must be admitted that where payments as to which time is made essential are for very small amounts, becoming due at irregular intervals, and both the amounts and dates of payment are determined by subsequent events brought to pass in part by the acts of third persons and are not fixed in advance by the contract itself, it would be much more than probable that prompt payment, or forfeiture for nonpayment, would be waived than it would be with regard to regular installments of the price to be paid at times fixed by the agreement. Consequently slighter evidence would suffice to establish such waiver.

The contract fixed no definite time for making clean-up payments. The amounts thereof depended on the amount of precious metal obtained. Both amount and date became known for the first time when the clean-up

was made. At the time of the sale and until the supposed forfeiture, the operations at the mine were largely carried on by "tributers," persons taking out ore independently for a percentage of its value. Clean-ups were made for their benefit as the ore was mined. By the language of the contract payment of the royalty upon each of these clean-ups was to be made within 10 days thereafter, and a failure by the plaintiff as to any one of them would ipso facto forfeit all of the plaintiff's rights. According to the testimony of Fitz Gerald, the plaintiff had paid \$12,500 on the price, and it had a very substantial interest at stake. Four or five "tributers" clean-ups were made between February 1 and March 4, 1910, but the respective dates and amounts were not proven. The following are the dates of other tributers clean-ups shown and the amounts are the royalties due thereon: March 4th, \$43.02; March 7th, \$91.22; March 11th, \$26.42; March 14th (three clean-ups), \$51.17; March 17th, \$5.47; March 23d, \$86.23; March 20th, \$2.08; March 30th, \$11.97; April 1st, \$3.94; April 7th, \$28.72; April 8th (2 clean-ups), \$66.67. I mention these to show the irregular dates and the varying amounts of royalty payments. The plaintiff's manager testified that the nature of the business was such that it was a very difficult matter to ascertain at any time the royalties that were then due. None of the above amounts were paid, and, under the contract, at the expiration of 10 days from each clean-up a forfeiture of all of plaintiff's interest would have occurred if there had not been a waiver by the defendant. Obviously there was such waiver as to all clean-up royalties that became due on or before March 17th, the date of the letter of the defendant to plaintiff mentioned in the majority opinion. This letter was received by Fitz Gerald, the manager of the plaintiff, on March 18th. The statement therein demanded of him was not made until April 2d. He then rendered the statement accompanied by a draft to cover the royalties shown to be due thereby, although, in fact, the 10 days' grace had not expired as to all of them. The evidence shows that this draft was drawn in good faith and with the belief that it would be paid. It was not paid on presentation, and thereupon, under date of April 13th, defendant wrote to Fitz Gerald, informing him that the draft had not been accepted, and that the "board of directors desire you to state by return mail what you propose to do in these matters and what may be expected in the future." Fitz Gerald received this letter on April 14th. He immediately replied, saying that he would begin payments on the royalties on April 20th, by applying thereon all the proceeds of tributers' rock, and that he expected to pay it all up in four weeks, as the ore was becoming more valuable. On April 18th Fitz Gerald sent to defendant his personal check for \$500 to ap-

ply on the amount due from plaintiff on royalties. On April 19th, before the last check was received, the defendant's board of directors made and adopted a resolution declaring the agreement ended, and authorizing its secretary to immediately take possession of the mine. No officer or agent of the plaintiff was present, and it had no knowledge of this action at the time. It is obvious that the resolution could not of itself affect the plaintiff's rights. A copy of it was served on the plaintiff on April 20th, and immediate possession of the mine was then demanded. Plaintiff's manager thereupon offered to pay all royalties then due which defendant refused to accept, unless plaintiff also paid \$1,600 in taxes which it was not bound to pay. Plaintiff was allowed to continue in the possession and operation of the mine until April 26th. No previous notice had been given that this demand for possession would be made on April 20th, or at any other time.

The defendant's letter of March 17th clearly shows a waiver of the forfeiture for all the defaults which had then occurred. It even went further and proposed a distinct alteration in the terms of the contract, namely, that thereafter, instead of paying the royalty on each clean-up as it became due, the plaintiff should render an account at the close of each month and pay the royalties monthly according to such account. This alteration was accepted and acted upon by the plaintiff, and this conduct must be accepted as a waiver of the strict terms of the contract with respect to royalties on clean-ups. In the letter of April 13th, after the default in the payment of the draft, the defendant did not insist upon the right of forfeiture which, technically, had accrued to it by reason of the dishonor of the draft and the failure to pay the amount due for the March royalties. On the contrary, it desired plaintiff to say what it proposed to do in the matter and to state what it could expect in the future. Defendant evidently then regarded the contract as still subsisting, and not as having terminated with the default, and the language of the letter plainly shows a desire to negotiate for its future perform-

ance. This, under the doctrine above stated, was a clear waiver of the previous defaults. If this case had been submitted to a jury and a verdict for the plaintiff rendered, this waiver would have been supported by the evidence, and should be regarded here as an established fact. Under the change in the terms made by the letter of March 17th, no additional payment would become due until May 1st. In the meantime none would become due so as to cause a forfeiture, unless by some notice or demand the defendant informed the plaintiff that after a reasonable time it would no longer stand by the proposition of March 17th.

The result is that the time, having been once allowed to pass for the March payment, became no longer essential as to that payment, and it could not again be made essential, except by notice fixing a new date upon which such payment would be demanded or a forfeiture declared. Payment was not wholly waived, but payment at the exact time was waived, when the defendant, in effect, asked plaintiff to negotiate for a future date. Plaintiff having replied by a promise of payment at an indefinite time, it was necessary for the defendant, if it still intended to insist upon a forfeiture on account of such payment, to fix a new date and give the plaintiff notice thereof a reasonable time in advance. It could not work a forfeiture by demanding immediate possession on account of a prior default which it had waived in this manner.

The offer of the plaintiff to pay the amount due, being made at the time of the unannounced demand for possession, was in time. It should have been accepted by the defendant. The demand of the defendant for more than was due was, in effect, a rejection of the offer. The defendant had no right to take possession, and in doing so it committed a wrongful act. There is nothing in the evidence to show that its possession became rightful before this suit was begun. It follows that the court erred in directing the jury to return a verdict for the defendant.

For these reasons I think the judgment should be reversed.



(264 Cal. 174)

**PEOPLE v. METROPOLITAN SURETY CO. et al. (S. F. 5,553.)**

(Supreme Court of California. Nov. 16, 1912.)

**1. JURY (§ 28\*)—WAIVER OF JURY TRIAL—STATUTORY PROVISIONS.**

The right to a jury trial, guaranteed by Const. art. 1, § 7, declaring the inviolability of the right of jury trial, and providing for a waiver thereof by consent of the parties, signified in the manner prescribed by law, may only be waived in the manner prescribed by Code Civ. Proc. § 631, providing that a jury trial may be waived in specified modes.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 176-196; Dec. Dig. § 28.\*]

**2. JURY (§ 25\*)—WAIVER OF JURY TRIAL—STATUTORY PROVISIONS.**

Notwithstanding Code Civ. Proc. § 631, prescribing the mode in which trial by jury may be waived, the court may make reasonable rules regulating the right of a party to claim a jury trial; but a rule of court that on the calling of the trial calendar in all cases answered "Ready" the parties shall demand a jury, or a jury shall be deemed waived, is not authorized.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 154-173; Dec. Dig. § 25.\*]

**3. JURY (§ 25\*)—WAIVER OF JURY TRIAL—STATUTORY PROVISIONS.**

The facts in the record, reciting that both parties were present by counsel when the case was called, and that defendant moved for a continuance, which was granted, do not show that the case was announced as "ready" by both parties, within a rule of court declaring that on the call of the calendar in all cases answered "Ready" the parties shall demand a jury, or a jury will be deemed waived, since the right to a jury trial will not be held waived by implication.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 154-173; Dec. Dig. § 25.\*]

**4. JURY (§ 28\*)—WAIVER OF JURY TRIAL—STATUTORY PROVISIONS.**

Code Civ. Proc. § 631, authorizing waiver of jury trial by consent, in open court, entered in the minutes, and a rule of court also providing for such entry, a mere failure to demand a jury, not entered in the minutes, is not a waiver.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 176-196; Dec. Dig. § 28.\*]

**5. COUNTIES (§ 98\*)—LIABILITIES ON OFFICIAL BONDS—EXTENT OF LIABILITY.**

The rule that a surety on the official bond of a county treasurer is liable only for any default of the treasurer during his term, in the absence of express stipulation to the effect that he shall be liable for defaults occurring before the execution of the bond, is not altered by the fact that the officer has been the incumbent of the office for a preceding term.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 141-143, 147; Dec. Dig. § 98.\*]

**6. COUNTIES (§ 101\*)—LIABILITIES ON OFFICIAL BONDS—EXTENT OF LIABILITY.**

The mere fact of the discovery of a shortage in the office of a county treasurer, who has held the office for successive terms, raises no presumption as to the time when it occurred; and in an action on the bond for the last term the jury must determine from all the facts, without reference to any presumption, whether the defalcation occurred, in full or in part,

during such term—the burden of proof on the issue being on plaintiff.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 152-159; Dec. Dig. § 101.\*]

Department 1. Appeal from Superior Court, Contra Costa County; W. S. Wells, Judge.

Action by the People of the State of California against the Metropolitan Surety Company and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

Edward C. Harrison, of San Francisco, for appellants. H. V. Alvarado, Dist. Atty., of Richmond, for the People.

SLOSS, J. The defendants appeal from a judgment in favor of plaintiff and against the corporation defendant for \$18,732.85, and from an order denying their motion for a new trial.

The above-mentioned sum was the amount of an alleged shortage in the accounts of George A. Wiley, as treasurer of Contra Costa county, and the action was brought to recover this sum from the corporation defendant as surety on Wiley's official bond.

Wiley was elected county treasurer in November, 1902, to serve for a term beginning January 5, 1903, and ending on January 7, 1907. He duly qualified, giving a bond in the penal sum of \$80,000, executed by United States Fidelity & Guaranty Company as surety. In November, 1906, he was elected for a second term, and in the same month he executed a bond, with the defendant, the Metropolitan Surety Company, as surety, in the penal sum of \$100,000, to secure the faithful performance of his duties during the succeeding term. He continued to occupy the office of treasurer of the county until the 4th day of February, 1907, when he committed suicide. A count of the money remaining in the treasurer's vault disclosed a shortage as above stated, and this action followed.

When the cause came on for trial, the defendant demanded that a jury be impaneled, and that the trial be had before a jury. The action was unquestionably one in which either party was entitled to a jury trial, unless the right had been waived. The court, however, declined to comply with the demand, and proceeded to try the cause without a jury, taking the position that the following circumstances, disclosed by the record, constituted a waiver by defendant of its privilege of a jury trial.

A rule of the superior court of Contra Costa county, in force at the time of the proceeding under review, read as follows: "Upon the calling of the trial calendar, in all cases answered 'Ready' the parties shall announce whether a jury is required, and shall at such time demand a jury, if desired, and if no jury is demanded at such calling it shall be

deemed to be waived and a waiver of a jury will thereupon be entered on the minutes by the clerk." The case had originally appeared on the trial calendar of the said court on June 8, 1908, to be set for trial. On that day the cause was set for trial for July 16, 1908; the clerk's minute entry showing that the setting had been so ordered on motion of plaintiff's attorney.

On July 16, 1908, the cause was regularly called for trial; counsel for both parties being present. Counsel for defendants urged a continuance for two weeks, filing an affidavit in support of his motion. The motion was granted, and the cause was peremptorily set for trial on the 30th day of July, 1908. The clerk made an entry in the minutes, stating merely that the cause came regularly before the court, counsel for the respective parties appearing; that defendant, by its counsel, filed an affidavit and made a motion for a continuance; and that the court ordered that "this cause be and the same is hereby continued to and peremptorily set for Thursday, July 30, 1908, at 10 o'clock a. m." No jury was in attendance upon the court on July 30th, and no demand for a trial by jury had theretofore been made.

[1] We think the court erred in holding that the facts above recited constituted a waiver of defendant's right to a jury trial. The Constitution (article 1, § 7), after declaring the inviolability of the right of trial by jury, provides that such trial may be waived in civil cases "by the consent of the parties, signified in such manner as may be prescribed by law." The Legislature is thus given the sole power of declaring what shall constitute a waiver of trial by jury (*Exline v. Smith*, 5 Cal. 112), and has exercised its power by the enactment of section 631 of the Code of Civil Procedure. That section provides that trial by jury may be waived " \* \* \* in actions arising on contract \* \* \* in manner following: 1. By failing to appear at the trial. 2. By written consent, in person or by attorney, filed with the clerk. 3. By oral consent, in open court, entered in the minutes." This court has repeatedly held that a jury may be waived only in one of the three modes prescribed by this section. *Swasey v. Adair*, 88 Cal. 179, 25 Pac. 1119; *Farwell v. Murray*, 104 Cal. 464, 38 Pac. 199; *Platt v. Havens*, 119 Cal. 244, 51 Pac. 342. The record here shows no waiver by any of these modes.

[2] The respondent relies, however, upon the rule of court, providing that a failure to demand a jury when the cause is answered "Ready," upon the calling of the trial calendar, shall be deemed a waiver. It has been held, notwithstanding the provisions of section 631, that the court may make reasonable rules regulating the right of a party to claim a jury trial, and that such trial may properly be refused when there has been a

failure to comply with such rules. But the cases so holding go no further than to uphold a rule requiring the deposit of jury fees as a condition to the insistence upon the right. *Adams v. Crawford*, 116 Cal. 495, 48 Pac. 488; *Naphtaly v. Rovegno*, 130 Cal. 639, 63 Pac. 66, 621. And this conclusion may be readily supported in view of the fact that, in the absence of such deposit, the payment of the fees which must be incurred by reason of the demand could not be adequately secured. The ruling has been otherwise, however, with regard to a rule like the one here involved. In *Biggs v. Lloyd*, 70 Cal. 447, 11 Pac. 831, a judgment was reversed on account of the refusal of a jury trial, notwithstanding the failure of the appellant to comply with a rule of court requiring that, "if a jury is desired, it shall be demanded on the law day when the case is set for trial." It follows that the rule involved in this case did not authorize the refusal of a jury trial.

[3] But, even if the rule be regarded as valid and effective, the respondent's position is open to the further objection that the facts necessary to constitute a waiver under the terms of the rule were not shown. The requirement is that a jury be demanded upon the calling of the trial calendar in all cases answered "Ready." It does not appear that the case at bar was answered "Ready" by either party. All that is stated in the bill of exceptions is that both parties were present by counsel, and that the defendant moved for a continuance, which was granted. The record is entirely consistent with the view that the plaintiff's counsel was not ready to go to trial. The right to a jury trial should not be held waived by implication. *Platt v. Havens*, supra.

[4] Furthermore, there was no entry in the minutes of a waiver of jury trial, as required by the rule. This might not be very important, if a similar requirement were not also contained in subdivision 3 of section 631. But that subdivision makes such entry necessary in the case of an oral waiver. The purpose doubtless was to furnish record evidence of a consent which would otherwise rest merely on parol proof, and the rule was apparently framed with the intent of following the Code section. The entry was therefore a necessary part of a waiver under the rule, as under the Code; and the mere failure to demand a jury, not entered in the minutes, did not constitute the waiver contemplated.

These views will necessitate the reversal of the judgment. As an aid to the conduct of another trial, some of the other questions presented may be briefly noticed.

[5] The appellant had, by the provisions of the bond which it executed, made itself liable only for any default of which Wiley might be guilty during his second term, beginning in January, 1907. It could not, in



the absence of express stipulation to that effect, be held for defaults or delinquencies of the principal occurring before the execution of the bond sued upon. *Mechem*, Pub. Off. § 285. This rule is not altered by the fact that the principal has been the incumbent of the office for a preceding term. *U. S. v. Boyd*, 15 Pet. (U. S.) 187, 10 L. Ed. 706; *Bissell v. Saxton*, 66 N. Y. 60; *Detroit v. Weber*, 29 Mich. 24; *McPhillips v. McGrath*, 117 Ala. 549, 23 South. 721. The plaintiff, recognizing the force of this consideration, alleged in its complaint the misappropriation and conversion by Wiley of the sum sued for "during his last term of office." This allegation the defendant denied, and the plaintiff was accordingly bound to prove it, in order to be entitled to a judgment. The finding of the court was in favor of the plaintiff on this issue. We shall not stop to detail the evidence, or to consider at any length the appellant's contention that the finding in question is not supported. Since there must be a new trial for reasons already indicated, it will suffice to say that we think the proof offered was such as to have justified a jury (or the court, in the absence of a jury) in finding either way on the question whether the defalcation had occurred during the first or the second term. The case was one in which the time of the defalcation was to be determined by inference from the various facts and circumstances shown.

[6] The respondent contends that, in a suit to recover the amount of a shortage discovered in the accounts of an officer who has filled several successive terms, the presumption is that the misappropriation took place during the last term. There are authorities declaring this to be the rule; the theory underlying it being that the presumption of the performance of official duty authorizes the conclusion that the officer, at the end of one term, has duly accounted to himself as his own successor. *Bruce v. U. S.*, 17 How. (U. S.) 437, 15 L. Ed. 129; *U. S. v. Earhart*, 4 Sawy. 245, Fed. Cas. No. 15,018; *Kelly v. State*, 25 Ohio St. 567. A similar declaration was made by this court in *Heppe v. Johnson*, 73 Cal. 265, 14 Pac. 833, but the ruling was not, apparently, necessary to the decision.

On the other hand, various well-considered

cases deny the existence of any such presumption, or confine its applicability to cases where there is no evidence at all tending to show that the misappropriation was during the earlier term. *Williams v. Harrison*, 19 Ala. 277; *McPhillips v. McGrath*, 117 Ala. 549, 23 Pac. 721; *Trustee v. Smith*, 88 Ill. 181; *Myers v. U. S.*, 1 McLean, 493, Fed. Cas. No. 9,996; *Williams v. State*, 89 Ind. 570; *Freeholders v. Wilson*, 16 N. J. Law, 110. We think the sound view is that from the mere fact of a defalcation, without more, no presumption as to the time when it occurred arises. The presumption that an officer has performed his official duty is, at best, "weak and inconclusive" (*Williams v. Harrison*, supra), and whatever force it possesses would seem to vanish upon proof that the particular duty in question (i. e., that of safe-keeping and accounting for the public funds) had in fact been violated. In *Anaheim U. W. Co. v. Parker*, 101 Cal. 483, 487, 35 Pac. 1048, 1049, this language was used: "Where a second bond is executed, the sureties are not liable for money converted by the officer prior to its execution, and the plaintiffs are bound to show a conversion after the execution of the bond sued upon." The decision, in effect, overrules the dictum in *Heppe v. Johnson*, above referred to.

The case should therefore be submitted to the jury without any instruction that there is a presumption that a defalcation (if one be shown) occurred at one time rather than another. The jury is to be permitted to find, from all the facts in evidence, whether such defalcation occurred, in whole or in part, during Wiley's second term; the burden of proof, on this issue, being on the plaintiff.

There was no error in permitting the plaintiff to prove the receipt by Wiley, as treasurer, of sums not shown in the auditor's books, such as moneys belonging to the estates of deceased persons. The allegations of the complaint, fairly construed, are sufficiently broad to cover these items.

The foregoing, we think, covers all the material matters that are likely to arise upon another trial.

The judgment and the order appealed from are reversed.

We concur: SHAW, J.; ANGELLOTTI, J.

(164 Cal. 199)

MILLER v. PILLSBURY et al. (S. F. 6,205.)

(Supreme Court of California. Nov. 20, 1912.)

**1. STATES (§ 112\*)—STATE AS EMPLOYER—INJURY TO EMPLOYÉ.**

The Employers' Liability Act (St. 1911, p. 797) § 4, providing that the state and its subdivisions, public corporations, and every person, firm, and private corporation employing labor who shall have elected to become subject to the provisions of such act shall be subject thereto, does not commit the state to an election of compensation as the method of satisfying claims for injuries to its employés, where it has not made such an election; and an injured employé was not entitled to a mandate requiring the industrial accident board to hear his application concerning compensation for his injuries.

[Ed. Note.—For other cases, see States, Cent. Dig. § 111; Dec. Dig. § 112.\*]

**2. STATES (§ 112\*)—STATE AS EMPLOYER—INJURY TO EMPLOYÉ.**

The state is not bound to compensate an individual employé for injuries sustained while in its service, and no right of recovery in favor of such employé exists by inference or legal construction, or otherwise than by statute.

[Ed. Note.—For other cases, see States, Cent. Dig. § 111; Dec. Dig. § 112.\*]

**3. STATES (§ 191\*)—RIGHT TO BE SUED—CONSTRUCTION OF STATUTES.**

Statutes permitting a state to be sued, being in derogation of its sovereignty, will be strictly construed.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 179-184; Dec. Dig. § 191.\*]

In Bank. Petition by Fred Miller against A. J. Pillsbury and others for a writ of mandamus. Demurrer to petition sustained, and writ discharged.

Aaron L. Sapiro, of San Francisco, for petitioner. U. S. Webb, Atty. Gen., for respondents.

MELVIN, J. Fred Miller, petitioner herein, applied to the respondents, constituting the industrial accident board of the state of California, to hear his application concerning compensation for injuries received by said Miller in the course of his duties as an employé of the state. The board refused to hear said application upon the ground that the state is not an employer bound by the provisions of the "Employers' Liability Act." Stats. 1911, p. 796. An alternative writ of mandate was issued in which the board was required to hear Miller's application, or to show cause why such action should not be had. Respondents appeared and demurred to the petition for a writ of mandamus. The questions raised being purely those which arise out of the interpretation of the "Employer's Liability Act," the controversy may be determined by our decision upon this demurrer.

[1] By the terms of the statute its application is, generally speaking, made to depend upon the election of both parties to the contract of employment. In the absence of such mutual agreement, the injured employé must have recourse to his claim for damages, or,

in other words, must proceed to enforce the employer's "liability" as distinguished from the "compensation" which might be due under the act. By section 3 of the act the general responsibility of employers under the theory of compensation is fixed as follows: "Liability for the compensation hereinafter provided for, in lieu of any other liability whatsoever, shall, \* \* \* exist against an employer for any personal injury accidentally sustained by his employés, \* \* \* where the following conditions of compensation concur: (1) Where \* \* \* both the employer and employé are subject to the provisions of this act. \* \* \* (2) Where \* \* \* the employé is performing service growing out of and incidental to his employment. \* \* \* (3) Where the injury is approximately caused by accident. \* \* \* And where such conditions of compensation exist \* \* \* the right to the recovery of such compensation \* \* \* shall be the exclusive remedy against the employer for such injury or death. \* \* \*"

The principal point of difference between petitioner and respondents arises over the interpretation of section 4, which is as follows: "The following shall constitute employers subject to the provisions of this act within the meaning of the preceding section: (1) The state, and each county, city and county, city, town, village and school districts and all public corporations, every person, firm, and private corporation (including any public service corporation), who has any person in service under any contract of hire, express or implied, oral or written, and who, at or prior to the time of the accident to the employé for which compensation under this act may be claimed, shall, in the manner provided in the next section, have elected to become subject to the provisions of this act, and who shall not, at the time of such accident, have withdrawn such election, in the manner provided in the next section." Petitioner insists that it was the intention of the Legislature by this section not only to divide employers into two classes, but to commit the state to an election of "compensation" as the method of satisfying claims for injuries to its employés. He believes that the section should be read as if a semicolon were placed after the words "all public corporations," and that, so punctuated, the section would designate two classes of employers: (1) The state and the specified public corporations; and (2) persons, firms, and corporations having people in their service and further that all employers in the first group would come under the compensation provisions, while those in the second class would come within the terms of the act only by election.

As a preliminary reason for a reading of the act in such manner as to sustain his views, petitioner's counsel is at some pains



to assure us that "the best modern judgment favors the theory of compensation" and "the state of California expects employers to elect compensation as preferable to liability." Even if we concede his first proposition, we cannot be swayed to any great extent by it, unless the legislative branch of our government has expressed similar views because legislation is not one of the functions of this court.

[2] If, however, the state has indicated a policy in favor of such election by employers, we should, of course, be bound to consider that fact in our efforts to interpret statutes having reference to employers other than the state itself, but the state's preference in that regard, even if for the purposes of argument we admit its existence, would be of small value to us in construing the intention of the state, as expressed by the Legislature, where the subject involved is the attitude of the state when it is itself an employer, because the sovereign is not bound at all to compensate an individual employé for injuries sustained while in its service, and no right of recovery in favor of such employé exists except by statute. *Bourn v. Hart*, 93 Cal. 321, 28 Pac. 951, 15 L. R. A. 431, 27 Am. St. Rep. 203; *Chapman v. State*, 104 Cal. 690, 38 Pac. 457, 43 Am. St. Rep. 158; *Melvin v. State*, 121 Cal. 16, 53 Pac. 416; *Denning v. State*, 123 Cal. 316, 55 Pac. 1000.

[3] "Public rights will not be treated as relinquished or conveyed away by inference or legal construction. Statutes permitting the state to be sued are in derogation of its sovereignty and will be strictly construed." *Lewis' Sutherland*, Stat. Constr. § 558. The statute before us must, therefore, be strictly construed and in such manner, if possible, to preserve to the state its nonliability for injuries to those in its service.

But petitioner calls our attention to two other sections of the act which, as he believes, when read in connection with section 4, compel the interpretation of that section which he favors. Section 6 defines the term "employé" as "(1) Every person in the service of the state, or any county, city and county, city, town, village or school district therein, and all public corporations, under any appointment or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city and county, city, town, village or school district therein or any public corporation, who shall have been elected or appointed for a regular term of one or more years, or to complete the unexpired portion of any such regular term. (2) Every person in the service of another under any contract of hire, express or implied, oral or written, \* \* \* but not including any person whose employment is but casual and not in the usual course of the trade, business, profession or occupation of his employer." The above classification, he says, is based not upon any

difference or distinction in the employés themselves, but solely upon the classification of employers. Section 7 provides that "any employé as defined in subsection (1) of the preceding section shall be subject to the provisions of this act and of any act amendatory thereof. Any employé as defined in subsection (2) of the preceding section shall be deemed to have accepted and shall \* \* \* be subject to the provisions of this act \* \* \* if \* \* \* (1) The employer \* \* \* is subject to the provisions of this act, whether the employé has actual notice thereof or not; and (2) at the time of entering into his contract of hire, express or implied, with such employer, such employé shall not have given to his employer notice in writing that he elects not to be subject to the provisions of this act, or, in the event that such contract of hire was made in advance of such employer becoming subject to the provisions of the act, such employé shall, without giving such notice, remain in the service of such employer for thirty days after the employer has filed with said board an election to be subject to the terms of this act."

Petitioner's position then is this: Employés are classified by section 6 simply as those hired by the two kinds of employers—public and private. By section 7 the public employé is given no election, and therefore, petitioner reasons, section 7 was based upon the conclusion that by section 4 the Legislature had already elected for the state the system of compensation. That is, according to petitioner, the statute was intended to classify employers and employés, and to impose the provisions for compensation automatically upon public employers and those in their service, and to permit the privilege of election to private employés and employers. "The Legislature," says counsel for petitioner, "could never have intended to mix this privilege of election—to allow election to both classes of employers and to only one class of employés." But we see no incongruity in a situation denying to public employés the right of election. The state by virtue of its sovereignty may refuse all redress to its injured servants. When it elects to adopt the compensatory system, that becomes the only recourse of the employé. His election is not between such recourse and a suit for damages, but between the privilege extended to him and resignation from public service. All who seek employment under the state must be willing to accept it, if at all, under such terms as are offered. Returning to a consideration of section 4: If we so separate the section that the modifying clauses each beginning with the word "who" are made to modify only the nouns following the words "public corporations," we take away from the act its elective features so far as the state and the employés thereof are concerned, and make it compulsory as to them. Such purpose on the part of the Legislature is neg-

ated by several circumstances. For example, we find the expression "who has any person in service under any contract of hire" in section 4. If petitioner is correct in his views, these words apply only to the nouns "person," "firm" and private "corporation"; but we find essentially the same formula used twice in section 6—once in the definition of an employé of the state and again with respect to one who has been hired by a private person. Such use of the expression in the latter section would indicate that, when it appeared in section 4, it was meant (as the punctuation would imply) to modify all of the preceding nouns. Another argument against petitioner's position is that the act contains no provisions for the payment of awards which might be in favor of an employé and against the state. Again, it is noticeable that no machinery is supplied by the act whereby the services of the industrial accident board may be invoked by the state. No officer is named as the proper functionary to receive service of notices mentioned in the act. None is authorized to represent the state in requesting examinations of employes or the hearing of any controversies. These omissions are significant. They indicate that the Legislature did not regard the state as being bound by the act in its present form, and therefore omitted to provide for those contingencies which would arise if, at some time in the future, the state should elect to place itself within the terms of the act, and which could then be met by appropriate legislation. We are convinced that the Legislature did not intend the reading of section 4 which petitioner would have us give to it.

Let the demurrer be sustained and the writ discharged.

I concur: LORIGAN, J.

HENSHAW, J. I concur. It is apparent that this statute raises a doubt whether or not it was contemplated by its framers that the state should be subject to its provisions. Under fundamental and familiar principles of construction of statutes such as this, the existence of the doubt is the solution of the inquiry. Wherever such a doubt does exist the construction favors the sovereign. The sovereign is not brought within the scope of its own laws, unless the intent that this should be done is made plainly to appear. This general rule of construction favoring the sovereign in case of doubt is applied to grants by the state to statutes of limitation to rights of action, and, indeed, to all laws and contracts concerning which it may be thought that the state is included or is a party. If, in truth, the state desires to subject itself to the law here in question, it could and should do so in language of clear and unmistakable import.

We concur: SLOSS, J.; SHAW, J.

164 Cal. 196

CLASSEN et ux. v. THOMAS et al.  
(S. F. 6,240.)

(Supreme Court of California. Nov. 19, 1912.)

1. APPEAL AND ERROR (§ 533\*)—RECORD—  
OPINION OF TRIAL COURT.

The opinion filed by the trial judge in determining a motion for a new trial is no part of the appellate record, and cannot limit the effect of the order actually made, which must be limited, if at all, by its own provisions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2339, 2400; Dec. Dig. § 533.\*]

2. APPEAL AND ERROR (§ 533\*)—RECORD—  
OPINION OF TRIAL COURT.

The paper sought to be filed as the copy of the order granting a new trial stated at length the trial judge's reasons for granting a new trial, and concluded, "The motion for a new trial will be granted;" but the appellate record contained a copy of the general order granting a new trial, without reasons. *Held*, that the paper sought to be filed was merely the written opinion of the trial judge, and not the order granting a new trial, and hence was not a part of the appellate record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2339, 2400; Dec. Dig. § 533.\*]

In Bank. Appeal from Superior Court, Alameda County; J. D. Murphy, Judge.

Action by John A. Classen and wife against H. G. Thomas and others. On motion by defendant appellants for an order allowing them to file, as a part of the appellate record, an alleged copy of the order granting a new trial, from which they appealed. Motion denied.

Coogan & O'Connor, of San Francisco, Snook & Church, of Oakland, and J. A. Elston, of Berkeley, for appellants. Mastick & Partridge, of San Francisco, and Dudley Kin-sell, of Oakland, for respondents.

PER CURIAM. This is a motion by appellants for an order allowing them to file, as a part of the record on appeal, what they claim is a certified copy of the order from which their appeal is taken, which is the order granting a new trial in the above-entitled action.

The record on appeal does contain a copy of an order made March 25, 1912, granting a new trial, as the same was entered on the minutes of the court, and the order as so entered was simply a general order granting a new trial, without the statement of any reason therefor, or the specification of the grounds upon which the same was based. The paper sought to be filed here as a copy of the order granting a new trial is obviously merely a copy of the signed opinion filed in the lower court by the trial judge in determining the motion for a new trial. It states at considerable length the reasons of the learned judge for his conclusion that a new trial should be granted, and ends with the words, "The motion for a new trial will be granted." It is admitted that, subsequent



to the making of the minute entry of the order granting a new trial, a motion was made in the lower court for the correction of the same, so that it would show that the new trial was not granted on the ground of insufficiency of evidence, and that this motion was denied.

[1] It is conceded, as it must be under the decisions, that a written opinion of the trial judge, filed in determining a motion for a new trial, constitutes no part of the record on appeal, and cannot operate to limit the effect of the order as actually made. Any limitation of the grounds upon which the order is made must, to be effectual, be specified in the order itself.

[2] We are satisfied that it must be held, under the decisions, that the paper signed and filed by the trial judge was simply a written opinion, and in no sense an order granting a new trial. In both *Newman v. Overland Pac. Ry. Co.*, 132 Cal. 73, 64 Pac. 110, and *Ben Lomond Wine Co. v. Sladky*, 141 Cal. 619, 75 Pac. 332, the paper signed and filed by the judge purported to order a new trial; the language in the former of these cases being, "The motion for a new trial is granted." In such case it was held that, where there is an order granting a new trial entered upon the minutes of the court, and also an opinion filed showing the reasons for the granting of the motion, and concluding with the words, "The motion for a new trial is granted," the order entered in the minutes is the only record of the court's action, and is to be measured by its terms, and not by the reasons which the court may give for it. See, also, *Weisser v. Southern Pacific Ry. Co.*, 148 Cal. 426, 83 Pac. 439, 7 Ann. Cas. 636.

The motion is denied.

BEATTY, C. J., does not participate in the foregoing decision.

164 Cal. 188

RUIZ v. SANTA BARBARA GAS & ELECTRIC CO. (L. A. 3,010.)

(Supreme Court of California. Nov. 18, 1912.)

#### 1. DEATH (§ 49\*)—ACTIONS FOR CAUSING—COMPLAINT—REQUISITES.

A complaint, in an action for wrongful death, which fails to allege that deceased left any heir, is insufficient, although it alleges that by reason of his death his heirs and personal representatives have suffered damage in a specified sum.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 64–66, 69; Dec. Dig. § 49.\*]

#### 2. PARTIES (§ 59\*)—SUBSTITUTION—PARTIES ENTITLED TO BE SUBSTITUTED.

Under Code Civ. Proc. § 1416, providing that the powers of a special administrator cease upon the granting of letters testamentary or of administration, and that the executor or administrator may prosecute any suit commenced

by the special administrator, the general administrator is entitled to be substituted as plaintiff in any action which the special administrator was authorized to commence.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 90–94, 165; Dec. Dig. § 59.\*]

#### 3. EXECUTORS AND ADMINISTRATORS (§ 51\*)—ACTIONS FOR DEATH.

An action under either Code Civ. Proc. § 377, giving a right of action for damages for the death of a person not a minor caused by the wrongful act or neglect of another, to his heirs or personal representatives, or Civ. Code, § 1970, as amended by St. 1907, p. 119, giving a right of action for the death of an employé to his personal representative for and on behalf of his widow, children, dependent parents, or dependent brothers or sisters, is brought by the personal representative as statutory trustee for the heirs, and the recovery belongs, not to the estate of deceased, but to such heirs.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 51.\*]

#### 4. DEATH (§ 31\*)—ACTIONS FOR CAUSING—PERSONS ENTITLED TO SUE—SPECIAL ADMINISTRATOR.

Under Code Civ. Proc. § 1411, authorizing the appointment of special administrators to collect and take charge of the estate and to exercise such other powers as may be necessary for the preservation thereof, section 1412, providing that the appointment must be made by entry upon the minutes of the court specifying the powers to be exercised by the administrator, and section 1415, providing that he shall collect and preserve the personal property and demands and take charge of the real estate and for such and all necessary purposes may commence, maintain, or defend suits as an administrator, such a special administrator may bring an action for wrongful death under either Code Civ. Proc. § 377, or Civ. Code, § 1970, as amended by St. 1907, p. 119, giving the right of action therefor to the personal representative, since, although the recovery does not constitute assets of the estate, it constitutes property which it is the right and duty of the personal representative of the deceased to collect for the benefit of the heirs.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 35–46, 48; Dec. Dig. § 31.\*]

#### 5. EXECUTORS AND ADMINISTRATORS (§ 420\*)—ACTIONS—RIGHT TO SUE.

Code Civ. Proc. § 1415, providing that special administrators must collect and preserve the personal property and demands of the estate and take charge of the real estate, and for any such and all necessary purposes may commence, maintain, or defend suits as an administrator, authorizes the commencement and maintenance by a special administrator when authorized by the court appointing him of any suit or legal proceeding that might be commenced or maintained by a general administrator or executor.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1060–1661; Dec. Dig. § 420.\*]

#### 6. LIMITATION OF ACTIONS (§ 127\*)—PENDENCY OF LEGAL PROCEEDINGS—AMENDMENT OF COMPLAINT.

Where a complaint, in an action for wrongful death, failed to allege that deceased left any heirs, an amendment, after the time for bringing a new action was barred by limitations remedying this omission, did not state a new or different cause of action.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 543–547; Dec. Dig. § 127.\*]

**7. LIMITATION OF ACTIONS (§ 127\*)—PENDENCY OF LEGAL PROCEEDINGS—AMENDMENT OF COMPLAINT.**

Where an amended complaint does not attempt to state a new cause of action, but merely adds matters essential to make the original cause of action complete, the amendment, although made after the expiration of the period of limitation, relates back to the commencement of the action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.\*]

**8. PLEADING (§ 238\*)—AMENDMENT—SUFFICIENCY OF AMENDED PLEADING.**

The sufficiency of an amended complaint should be tested by demurrer after it has been filed, and not by objections on application for leave to file.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 602, 620-625; Dec. Dig. § 238.\*]

Department 1. Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by A. M. Ruiz, as special administrator of Friedrich Joseph Litterst, against the Santa Barbara Gas & Electric Company. From a judgment for defendant on demurrer, plaintiff appeals. Reversed and remanded.

Richards & Carrier, of Santa Barbara, for appellant. H. H. Trowbridge, of Los Angeles, and Hamilton A. Bauer and Henley C. Booth, both of San Francisco, for respondent.

ANGELLOTTI, J. This is an appeal by plaintiff from a judgment that he take nothing by his action and that defendant recover its costs, given upon sustaining a demurrer to plaintiff's complaint after failure on plaintiff's part to amend.

The action is one instituted October 19, 1910, by plaintiff as special administrator of the estate of decedent to recover damages for the death of deceased, an employé of defendant, on October 23, 1909, alleged to have been caused by the wrongful neglect of defendant in furnishing defective and insufficient appliances with which to perform his work. It appeared from the allegations of the complaint that an application on plaintiff's part for general letters of administration of said estate was pending at the time of the institution of the action, that he had already been appointed special administrator by an order expressly empowering him to institute this action, and that letters of special administration had been issued to him in conformity with the order. A demurrer was interposed to the complaint on various grounds, among others being the ground that the complaint did not state facts sufficient to constitute a cause of action.

[1] The complaint did fail to state a cause of action, in that it failed to allege that the deceased left any heir, an allegation absolutely essential in an action of this character. *Webster v. Norwegian Mining Co.*, 137 Cal. 399, 70 Pac. 276, 92 Am. St. Rep. 181.

It did allege that, by reason of the death, "his heirs and personal representatives have suffered damage in the sum of \$10,000"; but there was no other allegation referring to any heir. The trial court sustained the demurrer, with leave to plaintiff to amend. Within the time given by the court and by stipulation for such amendment, plaintiff was duly appointed general administrator of the estate of deceased, general letters of administration were issued to him, and as such general administrator he regularly applied, on notice, to be substituted as plaintiff in place of the special administrator, and to be allowed to file an amended complaint, a copy of which proposed amended complaint was presented with his application. In the meantime, the time within which, under our statute of limitations, an action of this character may be instituted, viz., one year (subdivision 3, § 340, Code Civ. Proc.), had expired. Such time expired prior to the appointment of plaintiff as general administrator. Objection was made to the proposed substitution and the filing of the amended complaint on two grounds, which were substantially: (1) That plaintiff as special administrator was not authorized under the statutes to commence or maintain an action of this character, that the order of the court authorizing him to do so was beyond its jurisdiction and void, and that, no proper action having been instituted within a year from the date of death of deceased, the alleged cause of action was barred by subdivision 3 of section 340, Code of Civil Procedure; and (2) that the proposed amended complaint set up a new and different cause of action from the one attempted to be declared by the original complaint, and therefore attempted to state a cause of action barred by the provisions of our statute just cited. The objection was sustained, and the application of plaintiff denied. Thereupon judgment was given for defendant, as already stated.

[2] 1. As to the first objection made to the granting of plaintiff's application: If the special administrator was authorized to commence the action, the general administrator was entitled to be substituted as plaintiff. Section 1416, Code of Civil Procedure, provides that the powers of the special administrator cease upon the granting of letters testamentary or of administration, and that "the executor or administrator may prosecute to final judgment any suit commenced by the special administrator."

The objection is based upon the character of this action, as defined by our decisions, and the language of our statute relative to the powers and duties of special administrators.

[3] Section 377, Code of Civil Procedure, gives a right of action for damages for the death of a person not a minor, caused by



the wrongful act or neglect of another, to the "heirs or personal representatives" of the deceased. Section 1970, Civil Code, as amended in 1907 (St. 1907, p. 119), purports to give a right of action, for and on behalf of "the widow, children, dependent parents, and dependent brothers and sisters," against an employer, for damages resulting from the death of an employé in certain cases, to "the personal representative of such employé." It is settled by the decisions that an action of the character authorized by section 377 of the Code of Civil Procedure is one solely for the benefit of the heirs, by which they may be compensated for the pecuniary injury suffered by them by reason of the loss of their relative, that the money recovered in such an action does not belong to the estate but to the heirs only, and that an administrator has the right to bring the action only because the statute authorizes him to do so, and that he is simply made a statutory trustee to recover damages for the benefit of the heirs. See *Webster v. Norwegian Min. Co.*, 137 Cal. 399, 70 Pac. 276, 92 Am. St. Rep. 181; *Munro v. Pacific Const., etc., Co.*, 84 Cal. 515, 528, 24 Pac. 303, 18 Am. St. Rep. 248; *Jones v. Leonardt*, 10 Cal. App. 284, 286, 101 Pac. 811. The same is manifestly made to appear as to the persons mentioned therein by the language used in the provision of section 1970 of the Civil Code, hereinbefore referred to.

[4] Section 1411 of the Code of Civil Procedure provides that in the event of delay in granting letters testamentary or of administration from any cause, and in other specific cases, "the superior court, or a judge thereof, must appoint a special administrator to collect and take charge of the estate of the decedent in whatever county or counties the same may be found, and to exercise such other powers as may be necessary for the preservation of the estate." Section 1412 of the Code of Civil Procedure provides that the appointment must be made "by entry upon the minutes of the court, specifying the powers to be exercised by the administrator." Section 1415 of the Code of Civil Procedure provides that the special administrator "must collect and preserve for the executor or administrator, all the personal property of the decedent and demands of the estate, and must take charge of the real estate, and for any such and all necessary purposes may commence and maintain or defend suits and other legal proceedings as an administrator." As already noted, section 1416 of the Code of Civil Procedure provides that the executor or administrator may prosecute to final judgment any suit commenced by the special administrator.

The theory of learned counsel for respondent is that the powers conferred by statute on a special administrator have to do solely with the collection and preservation of the property of the estate, that the superior

court has no jurisdiction to confer a power not authorized by the statute, and that as the money recovered in such an action has been held not to belong to the estate, but solely to the heirs, the commencement and maintenance of such an action is a matter not embraced within the powers conferred upon the special administrator.

We are of the opinion that the commencement and maintenance of such an action should be held to be within the scope of the powers and duties of a special administrator, as such powers and duties are defined by our statute. Although the moneys recovered in such an action do not constitute assets of the estate, they do constitute property which it is the right and duty of the personal representative of the deceased to collect for the benefit of the heirs, and the right to maintain an action for the recovery of the same is expressly conferred upon such personal representative.

[5] Section 1415 of the Code of Civil Procedure appears to us under any fair and reasonable construction to authorize the commencement and maintenance by the special administrator, when authorized by the order of court appointing him, of any suit or legal proceeding that might be commenced or maintained by the general administrator or executor. He for any of certain enumerated purposes "and all necessary purposes may commence and maintain or defend suits and other legal proceedings as an administrator" may do. Any action thus commenced by him may be prosecuted to final judgment by the general administrator or executor when appointed. No reason is apparent why the special administrator should be held to be excluded from the exercise of this power conferred upon general administrators, and in many cases it may be exceedingly necessary for the protection of the rights of the heirs interested that he should have such power, in view of the fact that such an action must be instituted within one year from the date of death of the deceased. It has been held that such an administrator may maintain the action given to the "executor or administrator" by section 1589 of the Code of Civil Procedure to recover, when there is a deficiency of assets "for the benefit of the creditors" of the decedent, real estate conveyed by him during his lifetime with intent to defraud his creditors. See *Forde, Special Adm'r, v. Exempt Fire Co. et al.*, 50 Cal. 299. It has also been held that such an administrator may maintain an action to quiet title to real property of the deceased, and that special as well as general administrators are included within the term "administrators" as used in section 1582 of the Code of Civil Procedure. *McNeil v. Morgan*, 157 Cal. 373, 380, 108 Pac. 69. We can see no good reason why the same should not be held as to the term "personal representative" in section 377 of the Code of Civil Procedure

and section 1970 of the Civil Code, and believe, as already stated, that by the language used in section 1415 of the Code of Civil Procedure it was intended to make it possible for a special administrator to commence and maintain any action that an executor or general administrator is authorized to commence and maintain.

[6] 2. We cannot see that any new or different cause of action from that attempted to be set up in the original complaint was attempted to be stated in the proposed amended complaint. By each it was attempted to state the cause of action given by the statute to the personal representative of the deceased for the benefit of heirs of the deceased, where his death is caused by the wrongful act or neglect of another. It would appear to be immaterial in this connection whether the personal representative in this case has the right of action by virtue of section 377 of the Code of Civil Procedure or by virtue of section 1970 of the Civil Code, as amended in 1907. In either event he has such a cause of action, under one section it being, in view of our decisions, for the benefit of heirs generally who are damaged, and under the other it being for the benefit of certain designated persons only, including "dependent parents and dependent brothers and sisters."

[7] If the amended complaint did not attempt to set up a new and different cause of action from that attempted to be set up in the original complaint, there is nothing in the contention made by respondent based upon the statute of limitations. Where there is no attempt to state a new cause of action in an amended complaint, but merely the addition of matters essential to make the original cause of action complete, the amendment, though made after the expiration of the period of limitation, relates back to the time of the commencement of the action. This was expressly held by the District Court of Appeal for the First District in *Rauer's Law, etc., Co. v. Leffingwell*, 11 Cal. App. 494, 105 Pac. 427, in which a rehearing was denied by this court, where the original complaint on a promissory note did not contain an allegation of nonpayment, an allegation absolutely essential to the statement of a cause of action. The amended complaint was filed after the statute would have run, if it had not been for the original complaint. It was held that it could not properly be said that no action was brought on the obligation until the amended complaint was filed, that the filing of the first complaint was the bringing of the action on the particular obligation, and the filing of the amended complaint was simply a continuance of the same action upon the same obligation. It was recognized that there was some conflict of authority in other states, but the rule adopted was declared to be supported by the better reasoning. In *Frost v. Witter*, 132 Cal.

421, 427, 64 Pac. 705, 708 (84 Am. St. Rep. 53), it was said, citing several authorities, that, "where the cause of action is not changed, the time to which the statute of limitations runs is the filing of the original complaint." In *Tiffany's Death by Wrongful Act*, § 187, it is said: "The complaint or declaration may be amended as in other actions where the amended pleading does not state a new cause of action; and such amendment, although made after the expiration of the period of limitation, will relate back to the commencement of the suit. Thus, an amendment may be made \* \* \* which adds an allegation that the deceased left a wife and children." This statement is supported by the decisions cited, viz.: *South Carolina R. R. Co. v. Nix*, 68 Ga. 572, and *Haynie, Adm'r, v. Chicago, etc., R. R. Co.*, 9 Ill. App. 105. In the latter of these cases the original complaint did not contain the necessary averment that the deceased left a widow or next of kin. The amended complaint, presented after the statute would have run had it not been for the original complaint, contained the necessary allegation in this behalf. It was held that no new cause of action was stated, that the effect of the amendment was simply to state truly the cause of action as it existed at the time of the commencement of the suit and was defectively stated in the original complaint, and that the objections of the defendant based on the statute of limitations should have been overruled. The case of *Lilly v. Railroad Co.*, 32 S. C. 142, 10 S. E. 932, may support respondent's claim in this behalf to some extent; but this case does not appear to us to be in accord with the doctrine of *Rauer's, etc., Co. v. Leffingwell*, supra, which we think states the better rule. We find no other case cited by respondent in this matter that requires notice.

[8] 3. Basing its contention upon the claim that this action must be held to be subject to the limitation in section 1970 of the Civil Code to the effect that it can be maintained only for the benefit of "dependent parents and dependent brothers and sisters," where there is no widow or child, it is urged here that the proposed amended complaint is fatally defective in not alleging that the parents of deceased, who are alleged to be his only heirs at law, were "dependent parents." This objection does not appear to have been made in the trial court. We are of the opinion that such an objection should not be considered on such an application as the one made to the trial court, and probably the same is true as to the objection based on the statute of limitations, which we have already considered on its merits. The usual and orderly way to test the sufficiency of an amended complaint is, in the first instance, by demurrer, after the same has been filed, when the questions presented in regard thereto may be considered and determined,



and leave given to the pleader to amend if the pleading be held insufficient and the court deem it proper that the party should have such leave.

In view of what we have said, we are of the opinion that the trial court erred in not granting the application for substitution and leave to file an amended complaint.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

We concur: SHAW, J.; SLOSS, J.

164 Cal. 181

In re SEILER'S ESTATE. (S. F. 6,108.)

(Supreme Court of California. Nov. 18, 1912.)

1. DESCENT AND DISTRIBUTION (§ 63\*)—SURVIVING HUSBAND OR WIFE—EFFECT OF DIVORCE.

A husband's right to inherit from his wife, and to administer her estate, is not affected by an interlocutory decree of divorce, where she dies before the final judgment has been or can be entered.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 190–193; Dec. Dig. § 63.\*]

2. DIVORCE (§ 169\*)—JUDGMENT—OPERATION AND EFFECT.

It is the final judgment of divorce alone, and not the interlocutory decree, that grants the divorce, dissolves the marriage, restores the parties to the status of single persons, and permits them to marry again, and, until such final judgment, the relation of husband and wife is not dissolved.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 551; Dec. Dig. § 169.\*]

3. DESCENT AND DISTRIBUTION (§ 63\*)—JUDGMENT—TIME OF ENTRY.

Under Civ. Code, § 132, providing that the death of either party after the entry of an interlocutory decree of divorce does not impair the court's power to enter final judgment, a final judgment entered after the death of a party cannot operate retroactively to take away the surviving spouse's right of inheritance which has become vested by the death.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 190–193; Dec. Dig. § 63.\*]

Department 1. Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Petitions by Philipp Seiler and George R. Andrews, public administrator, for letters of administration on the estate of Catarina Seiler. From an order granting letters to the public administrator, Seiler appeals. Reversed.

Frank Kauke, of Fresno, for appellant. M. F. McCormick and Barnard & Watters, all of Fresno, for respondent.

SLOSS, J. Catarina Seiler died intestate on the 3d day of October, 1911. She was a resident of the county of Fresno, and left estate therein. Petitions for letters of administration were filed by Philipp Seiler, claiming to be the surviving husband of the

decedent, and by the public administrator. The court made its order denying the application of Seiler and granting that of the public administrator. Seiler appeals from the order.

[1, 2] The appellant was concededly entitled to administer if he was the surviving husband of the decedent. That he had been her husband was not disputed. The public administrator was permitted, over Seiler's objection, to prove that in April, 1911, some six months before Mrs. Seiler's death, and about seven months before the hearing on the applications for letters, an interlocutory decree in favor of plaintiff had been given and entered in a divorce action instituted by Catarina Seiler against Philipp Seiler. The trial court apparently took the view that the entry of this decree terminated the relation of husband and wife between the parties to the action, and deprived the former husband of the right of inheritance from his wife. This was error. Any doubt that may have existed on this point at the time of the hearing has been resolved by the decision of this court in *Estate of Dargie*, 121 Pac. Rep. 320, filed in January of the present year. It was there held, in a case presenting a similar question to the one now before us, that the entry of the interlocutory decree does not dissolve the marriage. "By the terms of the statute," says the opinion, "it is the final judgment alone that grants the divorce, dissolves the marriage, restores the parties to the status of single persons, and permits each to marry again." Until the court has by final judgment declared the marriage dissolved, "the parties remain in the legal relation of husband and wife." At the time of the hearing for letters of administration in this case no final decree of divorce had been rendered. In fact, none could have been rendered; the interlocutory decree being then less than one year old. It follows that, under the rule declared in the *Dargie* Case, the appellant was the surviving husband of the decedent, and as such entitled to letters.

[3] It is suggested by respondent in his brief that pending the present appeal a final decree of divorce has been entered. While this does not appear in the record, the appellant concedes the fact, and states his willingness to have it considered here. Section 132 of the Civil Code contains a provision to the effect that the death of either party to a divorce action after the entry of the interlocutory judgment does not impair the power of the court to enter final judgment. The purpose of this provision is not entirely clear. Possibly it was designed to enable the court to establish, by final decree rendered after the death of a party, property rights which had been passed upon, provisionally or otherwise (*Pereira v. Pereira*, 156 Cal. 1, 103 Pac. 488, 23 L. R. A. [N. S.]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

880, 134 Am. St. Rep. 107), in the interlocutory decree. But certainly such final decree could not have been intended to effect the dissolution of the marriage. This result is already accomplished by the death of one of the parties. Nor can we believe that the Legislature intended to authorize the court, possibly of its own motion and against the will of the only remaining party in interest (Civ. Code, § 132), to enter a decree which should operate retroactively to take away rights of inheritance which had, by the death, become vested in the surviving spouse. So that if we may act upon the appellant's concession to the extent of considering a fact occurring since the taking of the appeal, and not shown by the record, it must still be held that the husband's right of succession with respect to his wife's estate was not affected by the divorce proceedings.

The order is reversed.

We concur: SHAW, J.; ANGELLOTTI, J.

164 Cal. 183

LUNDEEN v. OTTIS. (L. A. 2,993.)

(Supreme Court of California. Nov. 18, 1912.)

1. BROKERS (§ 48\*)—COMPENSATION—CONTRACT.

Where, by written contract, a person agreed to pay a broker a definite sum as a commission for his services in procuring a third person to execute an agreement to exchange certain parcels of land belonging to such person for certain other parcels belonging to the client, and the broker procured such an agreement, he was entitled to the commission provided for, in the absence of the impeachment of the contract thereby by a showing that its execution was obtained by duress, menace, fraud, undue influence, or mistake, within the prohibition of Civ. Code, § 1567.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 65; Dec. Dig. § 48.\*]

2. EVIDENCE (§ 413\*)—PAROL TO VARY TERMS OF WRITTEN INSTRUMENT—CONTEMPORARY NEGOTIATIONS.

Under Civ. Code, § 1625, which provides that the execution of a contract in writing supersedes all negotiations which preceded or accompanied the execution, and Code Civ. Proc. § 1856, providing that an instrument in writing is presumed to be the whole agreement of the parties in regard to the subject-matter, where mistake is not alleged, or validity of the agreement in issue, though a broker stated to a client, when the latter signed an agreement to pay a sum for the services of the broker in procuring a contract to trade property of the client for other property belonging to a third person, that he would not accept a commission unless the exchange was actually consummated, where there was no consideration for such statement, it must be considered a part of the contemporary negotiation, and cannot be allowed to vary the terms of the writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1855–1857, 1859, 1860; Dec. Dig. § 413.\*]

3. BROKERS (§ 7\*)—COMPENSATION—CONTRACT—CONSIDERATION.

A contract to pay a commission for a broker's effecting the execution of a contract was based on sufficient consideration, where the bro-

ker agreed to act as the agent of the other party in "negotiating an exchange" of certain property, and secured an agreement binding the third person designated to make the exchange.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 5–8; Dec. Dig. § 7.\*]

4. BROKERS (§ 40\*)—COMPENSATION—CONTRACT—AVOIDANCE—FIDUCIARY RELATION.

The fact that a broker stood in a fiduciary relation to a client at the time a contract for the payment of a commission upon the broker's "negotiating an exchange" of certain properties was executed would not avoid the contract, where the representation which induced it was not shown to be false or misleading.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 38–40; Dec. Dig. § 40.\*]

Department 1. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by K. Lundeen against George M. Ottis. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Avery & French, of Los Angeles, for appellant. E. B. Drake, of Los Angeles, for respondent.

SHAW, J. The defendant appeals from the judgment, and from an order denying a new trial.

The action is upon a written contract whereby Ottis agreed to pay Lundeen \$2,933 as commission for his services in procuring one W. H. Graham to accept a written offer of Ottis to exchange certain parcels of land belonging to Ottis for certain other parcels belonging to Graham. The offer of Ottis described the respective lands, stated the terms of the proposed exchange, authorized Lundeen to negotiate the exchange as agent of Ottis, and concluded with the following provision: "And it is further agreed with said Lundeen that when he has secured an acceptance of the within proposition I will then pay the sum of two thousand nine hundred and thirty-three and no 100 dollars as commission for said services." It was signed by both Ottis and Lundeen. On the following day Lundeen induced Graham to accept the offer and to sign a written statement, indorsed on said offer, accepting the proposal, and agreeing to furnish an abstract of title within 30 days, and thereupon to make and deliver a deed conveying to Ottis the title to his property.

The answer admitted the execution of the contract with Lundeen, contained in the written offer, and the acceptance of the offer by Graham. It further alleged that the offer was prepared by Lundeen, partly in print and partly in typewriting; that the "major portion" of the agreement to pay the commission was in print; that prior to signing the same Ottis had agreed to pay Lundeen a commission if the exchange were consummated; that at the time of signing the said document Lundeen handed to Ottis the written offer so prepared, and stated to Ottis that



he, Lundeen, would expect him, Ottis, to pay a commission only in the event that the exchange was consummated; and that, relying on this statement, Ottis signed the written offer containing said agreement for commissions. It was also alleged that Ottis, in pursuance of the accepted offer, put deeds conveying his property to Graham in escrow, to be delivered on performance by Graham of his part in the exchange, that Ottis was at all times ready and able to carry out his proposal, but that Graham neglected to perform, and that, after waiting five months, Ottis demanded performance, which Graham refused, whereupon Ottis withdrew his deeds from escrow, and the exchange was never made. The prayer of the answer was that the agreement with Lundeen for commissions be reformed by striking out the words "when he has secured an acceptance of the within proposition," and inserting instead thereof the words, "upon the consummation of said exchange," and that plaintiff take nothing by his action.

[1] These facts constitute no defense to the action. The clause quoted from the writing constituted a valid contract binding Ottis to pay Lundeen the commissions sued for upon the acceptance of the offer by Graham. Its execution by Lundeen and Ottis is admitted. It could be impeached or set aside only by showing that its execution was obtained by duress, menace, fraud, undue influence or mistake (Civ. Code, § 1567), or that it was without consideration. The allegations do not suggest menace, duress, or undue influence. They are not sufficient to show fraud or mistake. It is not alleged that Ottis did not read the contract before he signed it, or that he was then ignorant of its contents. There is an allegation that when Lundeen handed Ottis the written offer, before signing, he, Ottis, "thought it was an agreement for an exchange of properties." The contract when signed by Graham, as was contemplated, would be, in fact, an agreement for such exchange. This statement, therefore, shows no misunderstanding, as to the agreement. Hence there was no mistake. It is not stated that any artifice was practiced to induce him to refrain from reading it or that he was unable to read, or that the contents of this clause were in any way misrepresented.

[2] The statement by Lundeen that he would expect the commission only in the event that the exchange was completed was not a representation that the agreement so provided, nor a representation of any kind in regard to the contents of the instrument. It was, at most, a voluntary promise by Lundeen that he would, to that extent, disregard or waive the agreement. Being without consideration, it was not binding, and, being a part of the contemporary oral negotiations, it cannot be allowed to vary the terms of the writing. Civ. Code, § 1625; Code Civ. Proc. § 1856. It is not alleged that it was made without any intent to perform

it, and therefore it is no basis for a charge of fraud. There are no facts alleged sufficient to constitute such charge. What has been said sufficiently disposes of the claim that the contract should be reformed in the particulars prayed for.

[3] There was no want of consideration. According to the terms of the offer, all that Lundeen was to do to earn the commission was to act as the agent of Ottis in "negotiating an exchange" of the properties. The answer states on this point that Ottis desired to obtain an agreement that would bind Graham to make the exchange. It does not appear that he desired anything more, or that further action was necessary. Lundeen accomplished this task. The offer and the acceptance of Graham constitute a valid contract between Ottis and Graham binding on both. No further negotiations remained to be made. The only thing remaining undone was performance, which Ottis could have enforced by suit against Graham. Lundeen did not undertake to compel such performance. He was entitled to the commission, even according to defendant's own statement, when he procured Graham to execute the acceptance. Ottis could not defeat Lundeen's right to commission by abandoning, as it seems he has, his own right to enforce performance by Graham.

On the trial, when Ottis offered to introduce evidence in support of his answer, the court ruled that the facts alleged constituted no defense to the action, excluded all the evidence offered and directed the jury to render a verdict for the plaintiff, which was accordingly done. For the reasons above stated, we conclude that there was no error in this.

[4] Defendant at that time asked leave to amend his answer by adding thereto an allegation that at the time he signed the written proposal Lundeen, who had prepared it, represented it to be an agreement for an exchange of property, and the further allegation that Lundeen was then "the trusted agent of defendant and stood in relation of special trust and confidence to defendant and was relied upon by defendant as such confidential agent." Leave to do so was refused. The amendment would not have made the answer good. The executed offer did constitute an agreement for exchange. The representation as alleged was therefore not false, but true, and nothing is alleged to show that it was misleading. It is not alleged that Lundeen stated that the offer contained nothing else except an agreement to exchange properties or represented that it did not contain the agreement to pay commissions. Consequently, whether at the time the alleged statement was made Lundeen was a trusted agent or was acting at arms' length, the representation was true, and did not constitute fraud.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

20 Cal. App. 71

**BROWN v. LELANDE**, County Clerk. (Civ. 1,243.)

(District Court of Appeal, Second District, California. Oct. 11, 1912. On Application for Rehearing, Oct. 15, 1912.)

**INTOXICATING LIQUORS (§ 31\*)—ISSUANCE OF LICENSES—SUBMISSION TO ELECTION.**

County Government Act (St. 1897, p. 454; Henning's Gen. Laws, p. 193) § 13, providing that the board of supervisors at any election may submit any question or proposition on which they may desire the opinion of the voters of the county, authorized the board to pass an ordinance for the submission of local option questions for the issuance of liquor and billiard room licenses outside incorporated cities and towns in a county, at every general election, notwithstanding a preceding part of the section had been declared unconstitutional.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 31.\*]

Application by Ralph H. Brown for writ of mandate against H. J. Lelande, County Clerk of Los Angeles County. Writ denied.

Waterman & Green and Alfred H. McAdoo, all of Los Angeles, and W. S. Wright, of Pasadena, for petitioner. J. D. Fredericks, Dist. Atty., B. C. Hanna, Chief Deputy Dist. Atty., and A. J. Hill, Deputy Dist. Atty., all of Los Angeles, for respondent.

**PER CURIAM.** Original application by a taxpayer of Los Angeles county for a peremptory writ of mandate.

It appears from the petition, to which a general demurrer is interposed: That on August 30, 1910, the board of supervisors of Los Angeles county adopted an ordinance, No. 245 (New Series), entitled "An ordinance regulating and licensing certain kinds of business in the county of Los Angeles." That section 25 of this ordinance provides: "At every general election hereafter held, the following four propositions shall be severally submitted to the electors of each voting precinct in the county of Los Angeles, outside of incorporated cities and towns, to wit: (1) Shall wholesale and retail dealers' licenses be granted in this precinct? (2) Shall winery keepers' licenses be granted in this precinct? (3) Shall hotel and restaurant liquor dealers' licenses be granted in this precinct? (4) Shall licenses for public billiard rooms be granted in this precinct? The county clerk is hereby authorized and directed to put each of said propositions upon the ballots for each of said precincts at every general election, in the manner prescribed by law, without any further order to that effect. The number of votes in each of said precincts for and against each of said propositions shall be entered in the minutes of the board of supervisors." That respondent as county clerk of Los Angeles county in preparing and having printed the ballots to be used at the general election to be held on November 5, 1912, intends to and will include and have printed thereon the four propositions specified in

section 25 of said ordinance so required by the provisions thereof to be submitted to the electors of the county outside of incorporated cities. The prayer is for a writ of mandate to be issued to respondent as county clerk commanding him in the preparation and printing of the sample ballots required to be mailed to the electors in precincts of said county outside of incorporated cities therein, as well as the ballots to be used at the general election to be held in said precincts on November 5, 1912, to omit therefrom, and from each and all of them, the four propositions specified in section 25 of said ordinance.

Petitioner contends that the ordinance directing the proposed action of the clerk is void in that there is no provision of the statute authorizing the board of supervisors to submit such questions to the electors. In thus contending petitioner has apparently overlooked section 13 of the County Government Act, enacted in 1897 (Stats. 1897, p. 454; Henning's Gen. Laws of Cal., p. 193), which in express terms provides: "The board of supervisors may also, at any election, submit any question or proposition upon which they may desire the opinion of the voters of the county." The power so to do is in no wise affected by the fact that the preceding part of the section of which it forms an independent part has been held to be unconstitutional. Ex parte Anderson, 134 Cal. 69, 66 Pac. 194, 86 Am. St. Rep. 236; Ex parte Young, 154 Cal. 317, 97 Pac. 822, 22 L. R. A. (N. S.) 330. So far as we are advised, this provision has never in express terms been repealed, and we are unable to find any subsequent act with which it in any manner conflicts upon which to base a claim of an implied repeal. The board is not bound by the result of the election, and hence the expression of opinion by the electors is ineffectual for any purpose; but the validity of the provision is not affected by such fact. As said by Chief Justice Beatty in Ex parte Anderson, supra: "It might well be argued that such a law would be inexpedient, or even foolish, but laws cannot be invalidated upon that ground." Our attention is not directed to any provision of the Constitution to which the statute quoted is obnoxious, and we know of none. This provision of the law, through which the electors are permitted to express their views upon the question of the desirability of the enactment of police measures, is in harmony with the general trend of modern legislation conferring upon the people the right to determine such questions for themselves.

Writ denied.

On Application for Rehearing.

The application for rehearing is not without merit. The propositions advanced are, however, argued for the first time upon such application. The limited time afforded the respondent to cause the ballots to be printed



and the probable effect upon the general election, were the alternative writ revived, appeal to us as sufficient reason for denying a rehearing. In addition to this, it is not probable that a different judgment would meet with the unanimous concurrence of the justices of this court.

Rehearing denied.

18 Cal. App. 739

**EDINGTON v. SUPERIOR COURT OF  
YOLO COUNTY.**

(District Court of Appeal, Third District,  
California. May 23, 1912.)

On petition for rehearing. Petition denied.  
For former opinion, see 124 Pac. 450.

**PER CURIAM.** We have carefully examined the points made in the petition for a rehearing of this matter, but find no reason for changing our views expressed in the opinion filed herein on April 23, 1912.

The rehearing is therefore denied.

20 Cal. App. 117

**HAMILTON v. HAMILTON. (Civ. 989.)**

(District Court of Appeal, Third District,  
California. Oct. 15, 1912.)

**1. PROCESS (§ 137\*)—SERVICE—AFFIDAVIT.**

Where the only evidence that a summons was served is the affidavit of the person making the service, the affidavit, to give the court jurisdiction, must show the facts required by statute and must be sworn to before used by the court as evidence of service.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 177-180; Dec. Dig. § 137.\*]

**2. JUDGMENT (§ 17\*)—SERVICE — DEFECTS—OBJECTIONS—WAIVER.**

A defendant who, in his application to vacate a default judgment, admits that the summons was in fact duly and regularly served, though the affidavit of service is defective, may not object to defects in the affidavit, nor object to the jurisdiction of the court to enter the default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25-33, 157, 422; Dec. Dig. § 17.\*]

Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss, Judge.

Action by Jeanie Hamilton against Samuel Hamilton. From an order refusing to vacate a default judgment, defendant appeals. Affirmed.

Henry N. Beatty, of San Francisco, for appellant. Knight & Webster, of San Francisco, for respondent.

**CHIPMAN, P. J.** This is an appeal from an order made in the minutes of the court on March 10, 1911, "denying defendant's motion to set aside and vacate the default judgment made and entered against defendant herein on the 13th day of September, 1910, and permitting defendant to appear and answer, and from the whole thereof." The only judgment found in the transcript ap-

pears to have been entered and filed on September 8, 1910.

It appears that plaintiff brought her action against defendant for divorce on the ground of extreme cruelty. The complaint was filed August 27, 1910, and duly served on the same day, and on September 8, 1910, the interlocutory decree of divorce was duly made and entered, reciting, among other things, that on said last-mentioned day the cause came on regularly for trial, "upon plaintiff's complaint herein taken as confessed by the defendant, whose default for not answering had been duly entered, and upon proof taken herein from which it appears that all the allegations of the complaint are true, \* \* \* and that said defendant was duly and regularly served, at San Francisco, Cal., with the summons issued in the action," etc. The grounds of the motion as therein stated were: "That said default and said judgment were entered herein against defendant by mistake, inadvertence, surprise, and excusable neglect of defendant." The points urged are: (1) That the court erred, under the showing made, in not making an order vacating the default judgment. (2) That the court had no jurisdiction to enter default and judgment. Upon the first point appellant relies on the facts alleged in his affidavit, used in support of the motion, to the effect that at the time he was served with summons he was led to believe, from what was then told him by the persons present, including his wife and her attorney, that he had 30 days in which to answer or appear; that he was called away to a neighboring state and returned on September 10th, within the 30 days, and then for the first time learned that the case had been tried and an interlocutory decree entered against him; that he was unable to communicate with the attorney he had intended employing until October 4th, and when he met him the advice given by his attorney was "not satisfactory," and later he employed his present attorney, who, on December 16, 1910, made the motion. Suffice it to say that counter affidavits of the persons said to have been present when the summons was served contradicted defendant in the material statements made by him.

As to the second proposition, appellant's contention is "that at the time of entering default judgment, to wit, September 8, 1910, there was no proof of service of summons on appellant and the court had no jurisdiction. The only proof of service before the court, on September 8, 1910, was an affidavit of service subscribed and sworn to September 27, 1910, 19 days after the entry of default and judgment. There must be an affidavit of service of summons"—citing section 410, C. C. P.; *Lyons v. Cunningham*, 66 Cal. 43, 4 Pac. 938; *Barney v. Vigoreaux*, 75 Cal. 377, 17 Pac. 433.

[1] The jurat to the affidavit of service is

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dated September 27, 1910, and the document is marked "filed Sept. 8, 1910." The decree recites that "default for not answering had been duly entered." The certificate of the clerk, attached to the complaint, shows that default was "duly entered herein according to law. In open court. Attest this 8th day of September, 1910." So far as can be seen from the record before us, the evidence of service of summons, the certificate of the clerk to the default, and all the papers were before the court on September 8, 1910, when it entered the decree. No suggestion is made that any change has been made in any of the dates, or that any of the documents have been tampered with. The service of summons was made on August 27th, and it is altogether probable that the affidavit of service was made on that day, and not on September 27th, as shown by the jurat, and that the mistake was made by the notary. The court had this affidavit before it, and defendant states, in his testimony given on the motion, that he was served with summons on August 27th. Appellant says: "This mistake in the affidavit of service may be considered trivial; but it is submitted that where one party secures a legal advantage over another, and in that proceeding makes a mistake, the law ought not to protect the party making the mistake." It is true that, where the only evidence before the court that summons was served is the affidavit of the person making the service, the affidavit must show the facts required by the statute and, of course, must have been sworn to before being used by the court as evidence of service. *Lyons v. Cunningham*, supra. The affidavit being the only evidence of service, the court acquires no jurisdiction unless it is made as required by law.

[2] If, however, the summons was in fact duly and regularly served, and defendant admits the fact in his application to vacate the default, it seems to us that he is in no position to object to defects in the affidavit. By his own admission the summons has served its purpose. He has failed to support his alleged grounds for the motion, which were "mistake, inadvertence, surprise, and excusable neglect."

The order is affirmed.

We concur: HART, J.; BURNETT, J.

20 Cal. App. 137

PEOPLE v. LOUIE DENE. (Cr. 405.)  
(District Court of Appeal, First District,  
California. Oct. 16, 1912.)

1. CRIMINAL LAW (§ 1153\*)—REVIEW—DISCRETIONARY RULINGS.

Whether sufficient foundation has been laid for the admission of the testimony of an absent witness given on a preliminary examination is one of fact, and its determination rests largely in discretion of the trial court; and hence, if there is substantial evidence to support the

trial court's conclusion, its ruling will not be interfered with on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066; Dec. Dig. § 1153.\*]

2. CRIMINAL LAW (§ 543\*)—ADMISSIBILITY OF EVIDENCE GIVEN AT PRELIMINARY HEARING.

Where an officer, having a subpoena for a witness who testified at accused's preliminary examination, went to the address given by such witness on the examination several times, but was unable to find him, and was told that he had gone to another place, and an officer was sent to such other place with a subpoena, but was unable to find him, or find any one who knew him, the court did not abuse its discretion in permitting such witness' testimony given at the preliminary examination to be introduced in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1233, 1236; Dec. Dig. § 543.\*]

3. CRIMINAL LAW (§ 1169\*)—APPEAL—HARMLESS ERROR.

On a trial for homicide, the only dispute was as to the identity of the man who did the killing. An absent witness testified on the preliminary examination that he saw a man leaving the scene of the crime, that he was unable to identify defendant as the man, but testified that such man wore "American pants." It appeared that accused was so dressed when arrested, shortly after the homicide. Held that, in view of the well-known fact that it is the common custom of the Chinese in this state to so dress, the admission of this testimony given on preliminary examination, if erroneous, was not prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3137-3145; Dec. Dig. § 1169.\*]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Louie Dene was convicted of manslaughter, and he appeals. Affirmed.

R. Porter Ashe, of San Francisco, for appellant. U. S. Webb, Atty. Gen., for the People.

HALL, J. Defendant, a Chinaman, was convicted of the crime of manslaughter, for the killing of one Wong Che, also a Chinaman, and in due time appealed to this court from the judgment and the order of the court denying his motion for a new trial.

The only matter urged for a reversal is that the court erred in allowing the testimony, given at the preliminary examination of defendant by one Cornelius Loneragan, to be read in evidence over the objection of defendant, in that due diligence had not been shown by the people in an effort to procure the attendance at the trial of the witness.

[1] The determination of the question as to whether or not sufficient foundation has been laid for the reading of the testimony of a witness taken at the preliminary examination is a matter lying largely in the discretion of the trial court. It presents a question of fact, to be determined in the



first instance by the trial judge; and if there is substantial evidence in the record to support the conclusion of the trial court, this court will not interfere with the ruling allowing the testimony to be read. *People v. Lederer*, 17 Cal. App. 369, 119 Pac. 949; *People v. Lewandowski*, 143 Cal. 574, 77 Pac. 467; *People v. Nelson*, 85 Cal. 421, 24 Pac. 1006.

[2] The showing contained in the record before us is sufficient to justify the ruling of the trial court. At the preliminary examination the witness Lonergan gave his residence as at 272 Natoma street. The information was filed on the 6th day of January, 1912. The trial of defendant commenced on the 8th day of May, 1912. Upon this day a subpoena was placed in the hands of a police officer for service upon the absent witness. This officer went to 272 Natoma street, and found it to be a lodging house. Upon inquiry of the bookkeeper of the place, he was informed that the witness, Cornelius Lonergan, had formerly lived at the house, but had left upon May 3d, and had stated that he was going to Point Richmond. This officer made three other attempts before the offer of the deposition to find the witness at 272 Natoma street, but without success. Another officer was, however, sent to Point Richmond with a subpoena for service upon the absent witness. This officer's testimony was to the effect that in an effort to serve the subpoena upon the absent witness he went to Point Richmond and to the city of Richmond, and, upon inquiry at all the factories, restaurants, hotels, and saloons at those places, neither found the witness nor anybody that knew him. This was all done before the deposition was offered in evidence, which was upon May 15th. Upon this showing the court did not abuse its discretion in allowing the deposition to be read.

[3] Furthermore, the testimony of Lonergan was of but trifling importance. There was no dispute or real controversy about the shooting to death of the decedent, except as to the identity of the man who did the killing. Though Lonergan testified as to seeing a Chinaman hurrying away from the place of the shooting immediately upon the shots being fired, he was unable to identify defendant as that man, though he did testify that the man whom he had seen wore "American pants," and it appeared that the defendant, when arrested shortly afterward and a few blocks away from the place of the homicide, was so dressed. But it is a matter of common knowledge that in California such is the common custom of the Chinese. It is impossible to believe that the exclusion of the deposition of Lonergan would in any way have affected the result of the trial.

The judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

20 Cal. App. 91

**MADARY v. CITY OF FRESNO et al.**  
(Civ. 987.)

(District Court of Appeal, Third District, California. Oct. 15, 1912. Rehearing Denied by Supreme Court Dec. 13, 1912.)

**1. MUNICIPAL CORPORATIONS (§ 958\*)—TAXATION—FUNDS—STATUTORY PROVISIONS.**

It is not the intent and purpose of Act March 27, 1895 (St. 1895, p. 219), providing for the levy and collection of taxes, and requiring the board of trustees of any city, on a designated date annually, to fix the amount of money necessary to be raised by taxation for the city for the current fiscal year, provided that on or before a designated date the city has elected to have the duties of the city treasurer performed by the county treasurer, etc., to merge the city and county business, but in discharging the duties of city assessor, city tax collector, and city treasurer the respective county officers are ex officio officers of the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2023–2037; Dec. Dig. § 953.\*]

**2. MUNICIPAL CORPORATIONS (§ 972\*)—TAXATION—EQUALIZATION.**

Where a city has elected to come under Act March 27, 1895 (St. 1895, p. 219), authorizing a city to elect to have the duties of the city treasurer performed by the county treasurer, etc., and has not elected, as authorized by Pol. Code, § 3671, to take as a basis of its taxation the assessment as equalized by the state board, and a tax rate is fixed by the board of city trustees in the manner prescribed by the act, based on an equalized valuation fixed by the county board of supervisors acting as a board of equalization, a subsequent change in the valuation by the state board of equalization by increasing the valuation did not authorize the levy of taxation for city purposes on the basis of the valuation as fixed by the state board of equalization.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2075, 2078–2082; Dec. Dig. § 972.\*]

**3. MUNICIPAL CORPORATIONS (§ 974\*)—TAXATION—STATE BOARD OF EQUALIZATION—POWERS.**

The power of the state board of equalization in lowering or raising the assessment rolls does not apply to municipal taxation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2083–2086; Dec. Dig. § 974.\*]

**4. STATUTES (§ 181\*)—CONSTRUCTION — REASONABLE CONSTRUCTION.**

A statute should, if possible, be so interpreted as to make it compatible with the dictates of justice, and a statute should never be construed to work injustice if any other reasonable construction is possible.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.\*]

**5. TAXATION (§ 2\*)—"TAXES"—WHAT ARE.**

Taxes are enforced contributions levied for public needs, and are the property of the citizens demanded and taken by the government to enable it to discharge its functions, and the needs of the government constitute both the occasion and the limitation of the taxing power.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 2; Dec. Dig. § 2.\*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 6867–6886.]

**6. TAXATION (§ 450\*)—EQUALIZATION—POWERS OF STATE BOARD OF EQUALIZATION.**

The reference to an assessment made by the state board of equalization in Pol. Code,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

§ 3671, declaring that the assessment made by the county assessor and that of the state board of equalization, as apportioned by the boards of supervisors, shall be the only basis of taxation for the county or any subdivision thereof, etc., when considered in connection with section 3670, authorizing the collection of delinquent taxes on the property assessed by the state board of equalization, signifies and points to the assessment, by the state board, of railroads operated in more than one county, and does not contemplate an equalization of the value of the taxable property of the state.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 800-804; Dec. Dig. § 450.\*]

**7. MUNICIPAL CORPORATIONS (§ 977\*)—EXCESSIVE TAXES—PAYMENT—RECOVERY.**

Where a city collects taxes in excess of its needs as determined by its constituted authorities by reason of an error in levying taxes on a valuation fixed by the state board of equalization, instead of the equalized valuation made by the county board of supervisors, the taxpayers paying under protest are entitled to recover the excess.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2099-2103; Dec. Dig. § 977.\*]

**8. MUNICIPAL CORPORATIONS (§ 977\*)—RECOVERY OF EXCESSIVE TAXATION—PARTIES.**

An action for taxes collected by a city in excess of its needs as determined by its constituted authorities is properly brought against the city, and the county treasurer, acting as ex officio city treasurer and having the custody of the funds, is not a necessary party.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2099-2103; Dec. Dig. § 977.\*]

**9. PARTIES (§ 91\*)—MISJOINDER—PARTY ENTITLED TO COMPLAIN.**

A defendant against whom a cause of action is stated may not object that third persons having no interest in the subject-matter are made defendants, unless his interests are injuriously affected thereby.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. § 149; Dec. Dig. § 91.\*]

**10. ABATEMENT AND REVIVAL (§ 5\*)—PENDENCY OF ACTION—EFFECT.**

An action by mandamus to compel a county treasurer, acting as treasurer of a city, to pay to taxpayers taxes collected in excess of the needs of the city as determined by its constituted authorities, is no bar to an action against the city for the excessive taxes, since mandamus is not an available remedy.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 27-30; Dec. Dig. § 5.\*]

**11. MANDAMUS (§ 118\*)—COMPELLING CITY TREASURER TO REFUND TAXES IMPROPERLY COLLECTED—REMEDY.**

Since it is not the duty of a city treasurer to pay a claim not reduced to judgment and which has been rejected by the trustees of the city, and since he is a mere ministerial officer, mandamus does not lie to compel him to refund taxes illegally collected before the claims therefor have been reduced to judgment or have been allowed by the trustees of the city.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 250; Dec. Dig. § 118.\*]

**12. APPEAL AND ERROR (§ 880\*)—HARMLESS ERROR—ERRORS NOT AFFECTING PARTY COMPLAINING.**

Where the complaint stated a cause of action against defendant, but did not state a cause of action against codefendant, and the court rendered judgment against defendant for

plaintiff, but did not render judgment either for or against the codefendant, the error, if any, in the judgment arising from its failure to render judgment in favor of the codefendant for costs, was not prejudicial to defendant, and the error must be disregarded as required by Code Civ. Proc. § 475.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3584-3590; Dec. Dig. § 880.\*]

**13. MUNICIPAL CORPORATIONS (§ 1006\*)—CLAIMS—STATEMENTS—SUFFICIENCY.**

A statement of a claim against a city for excessive taxes paid by taxpayers, which contains a full statement of the basis of the claim, and which gives the names of the respective claimants and the sums in which they respectively claim they are entitled to reimbursement for excessive taxes, and which is signed by attorneys as attorneys for each of the taxpayers, and which is verified in proper form by the attorneys, complies with the charter of the city providing that every demand against the treasurer must be itemized, giving the amount of each item and the amount of the claim, and must be verified by the claimant or some one having knowledge thereof.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2178; Dec. Dig. § 1006.\*]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by M. R. Madary against the City of Fresno and another. From a judgment for plaintiff, defendant named appeals. Affirmed.

Frank Kauke, of Fresno, for appellant. M. K. Harris and Milton M. Dearing, both of Fresno, for respondent.

BURNETT, J. Upon the merits of the case we are in accord with the views of the Hon. George E. Church, the trial judge, as expressed in the following opinion, which we adopt:

"This action was brought by plaintiff to recover a certain sum or sums of money alleged to have been paid under protest by him and a large number of his assignors, taxpayers in the city of Fresno, illegally levied and collected as part of the taxes of 1909.

"The action is grounded upon the following facts, fully and particularly averred: That on January 18, 1909, the board of trustees of the city of Fresno passed an ordinance, approved the same day, whereby the city elected to avail itself of the services of the necessary county officers in the matter of the collection of its taxes, as provided by act of the Legislature approved March 27, 1895 [Laws 1895, p. 219]; that on August 16, 1909, the board estimated and determined by ordinance the necessary amount of money to be raised by taxation for the needs of the city for the fiscal year ending July 1, 1910, fixing the same at \$126,382.50; that on or before August 2, 1909, the county auditor certified to the trustees of the city the value of the taxable property within the city, as equalized and corrected by the board



of supervisors of the county, acting as a board of equalization, to be \$11,055,314.00; that on August 16, 1909, said board of trustees calculated and by ordinance established the rate of city taxes and levied the same, such rate being, of course, such per cent. of said taxable property as is necessary to raise the said estimated amount of tax; that thereafter, and after the necessary amount of taxes for the needs of the city had been determined, the rate fixed and levied upon said valuation of the city's taxable property as so finally determined by said board of supervisors sitting as a board of equalization, on, viz., the 8th of September, 1909, the state board of equalization by order increased the assessment roll or value of taxable property of the county of Fresno by 'adding 20 per centum' thereto, and, upon notification thereof, the county auditor added 20 per centum to the value of all the property assessed to each taxpayer, and entered upon the assessment books, as being due from the taxpayers of the city for city taxes, an aggregated sum one-fifth greater than the said amount fixed by the board of trustees as necessary for the city's needs for the said fiscal year. It is this so-called 20 per cent. excess, or so much thereof as was paid under protest by the plaintiff and his assignors, that this suit is brought to recover. It is alleged that it was illegally assessed and collected, and that it is now held by the defendant J. R. Hickman as ex officio treasurer of the city of Fresno, and illegally withheld by him from plaintiff after due demand.

[1] "By the act of the Legislature approved March 27, 1895, entitled 'An act to provide for the levy and collection of taxes,' etc., it is declared to be the duty of the board of trustees \* \* \* of any city in this state, except municipal corporations of the first class, *on the first Monday of August in each year*, to determine and fix by ordinance the amount of money necessary to be raised by taxation for the governmental needs of such city for the current fiscal year, provided that on or before the first Monday of February preceding the city had elected to have the duties of the city treasurer performed by the county treasurer. By this act also the county auditor must, on or before the second Monday of August, transmit to the city trustees a statement of the assessed valuation of all property in the city as equalized by the board of supervisors, and then, on the first Monday of September, the trustees, using this valuation as the basis, must compute the rate of taxation sufficient to raise the aforesaid sum estimated and required for city purposes, which rate must be immediately transmitted to the county auditor, and these acts are declared to constitute a valid assessment of such property and a valid levy of the rate so fixed.

"It is plain that it is not the intent and purpose of this act to merge and confound

city and county business. It is plain that in discharging the duties of city assessor, city tax collector, and city treasurer, the respective county officers become or are ex officio officers of the city.

"In the matter of the assessment and levy of state and county taxes, the proceeding is somewhat different. At the same time that the auditor of the county transmits to the city trustees the statement of the taxable property of the city as prepared by the assessor and equalized and corrected by the board of supervisors, acting as a board of equalization, and which statement serves as the basis of city taxation, he sends a duplicate thereof to the state board of equalization. When the statement, as changed and corrected by the state board, is returned to the auditor (which must be on or before the second Monday in September), the board of supervisors must, on the third Monday in September, fix the rate of county taxes, using this finally corrected assessment valuation as the basis of its computation. Having previously determined the amount of money necessary to be raised by taxation for county purposes, the fixing of the rate is merely a mathematical computation.

[2] "In the case before us, it is the contention of defendants that notwithstanding the fact that the rate of city taxes is and must be fixed before the action of the state board of equalization, and the further fact that in determining that rate the assessed valuation of city property, as equalized by the board of supervisors, must be taken as the basis of calculation, still, in determining the amount of taxes to be paid by the several taxpayers of the city for city purposes, that amount must be computed, not upon the assessed valuation upon which the city rate was determined, but upon the valuation as finally corrected and equalized by the state board of equalization. There would appear to be no good warrant for such contention. To say nothing of the inconsistencies and absurdities to which it would lead, we have already seen that, by the express declaration of the legislative act of March 27, 1895, the acts, first of the city trustees, in determining the needed amount of taxes for the fiscal year; second, of the assessor and board of supervisors in ascertaining and determining the assessed valuation of the city property; and, finally, of the city trustees in fixing the rate—constitute 'a valid assessment of such property and a valid levy of such rate so fixed.' It is difficult to see how there can be two valid assessments for the same purpose.

"It is conceded that, had the city not elected to make use of the county officers, but had its own assessor and tax collector assess and collect its taxes, their action would not be affected by the state board of equalization. Why, then, should it be affected when the work is done by its ex officio officers? The city has never elected (as un-

der section 3671, Pol. Code, it might have elected) to take as the basis of its taxation the assessment as equalized by the state board, and surely its ex officio officers have no power to make such election for it. It is the duty of the state board of equalization 'to equalize the valuation of the several counties of the state,' 'lowering or raising entire assessment rolls so as to make the assessments conform to the true value in money of the property assessed,' and 'to fix the rate of state taxation.' It is manifest that the primary object is to equalize throughout the *several counties* of the state the burden of state taxation. So far as county taxation is concerned, it is a matter of comparative indifference whether the assessed valuation of its taxable property as determined by the county assessor and board of supervisors, be raised or lowered by the state board of equalization, because the rate of taxation is not fixed by the supervisors until after the action of the state board. The amount of money to be taken from the pockets of the taxpayers of the county for county purposes is not thereby affected. But as to the city, in such case, any change in the assessed valuation by the state board must have one of two effects, equally intolerable; either to deprive the city government of necessary funds, or give it what it neither asks nor needs, thereby unjustly adding to the burdens of its citizens. A conclusion so obnoxious and damaging to the taxpayer could be justified only by the plainest provisions of the statute. And not only are there no such plain provisions, but the entire spirit of the law negatives such conclusion. There is nothing in the case of *Baldwin v. Ellis*, 68 Cal. 495, 9 Pac. 652, opposed to the view here taken. Indeed, the reasoning of the court in that case clearly sustains it.

[3] "The court holds that the power of the state board in lowering or raising the assessment roll applies both to state and county. Its declared object is to equalize county assessments. It is not concerned with municipal taxation and is nowhere given power or supervision over it.

"Considerations of a general character would seem to support strongly the view here taken.

[4] "It is a familiar rule of statutory construction that it be reasonable, especially that it do not tend to palpable injustice, contradiction, or absurdity. It is a cardinal rule that the language of a statute should be so interpreted as to make it compatible with common sense and the dictates of justice. If any other reasonable construction be possible, a statute should never be construed to work injustice. Justice is the aim of all legislation. The power of government to exact from the citizen a part of his property in way of taxation is indeed vast, but it is not unlimited. It may be exercised

only for the public good and for a public purpose.

[5] "Cooley's definition of taxes as 'enforced contributions levied for public needs' states concisely both the nature and limitation of taxes. Taxes are the property of the citizens demanded and taken by the government to enable it to discharge its functions. In his work on *Tax Titles*, Blackwell defines taxes as 'burdens imposed by the legislative power upon persons or property to raise money for public purposes.' The needs of the government constitute then both the occasion and limitation of the taxing power. To take from the citizen a dollar beyond the needs of government is not taxation; it is extortion."

[6] Appellant's counsel in his brief exhibits his usual aptitude and forcefulness, but he makes the mistake of assuming that the situation is governed by the following provisions of section 3671 of the Political Code: "The assessment made by the county assessor and that of the state board of equalization, as apportioned by the boards of supervisors to each city, town, township, school, road, or other district in their respective counties, or cities and counties, shall be the only basis of taxation for the county, or any subdivision thereof, except in incorporated cities and towns, and may also be taken as such basis in incorporated cities and towns when the proper authorities may so elect." From a consideration of the preceding section it is perfectly apparent that the reference in said section 3671 to the assessment made by the state board of equalization does not contemplate the equalization of the value of the taxable property of the state, but it signifies and points to the assessment, by said board, of railroads operated in more than one county. If we should construe it as contended for by appellant, we would be confronted with the embarrassing situation that the board of trustees of the city of Fresno is compelled to fix the rate of taxation upon a basis to be determined in the future. But it is clear from the record that the city authorities elected to take advantage of said act of 1895, and that act provides in unmistakable terms that the assessment made by the assessor and approved by the board of supervisors shall be the basis for taxation for city purposes. If it be conceded that said section 3671 provides a different basis, it is sufficient to say that the city authorities have not elected to be bound by it, and it is entirely immaterial that it has been amended since the passage of said act of 1895.

[7] It seems eminently just that this money, collected by the city in excess of its needs as determined by the constituted authorities, should be returned to those upon whom the unnecessary burden was imposed, and no merely technical objection should stand in the way of this consummation. Of this character we consider the other points



made by appellant, and it is believed that they are devoid of substantial merit.

To read the complaint is to be convinced that it states a cause of action against the city of Fresno. It sets forth the facts recited in the opinion of the trial judge, and, if we concede that some of them are imperfectly averred, it is entirely manifest that appellant suffered no prejudice.

[8] The cause of action is admittedly against appellant, and hence the treasurer was not a necessary party defendant. By virtue of his office he was and is the custodian of the funds, but they were collected for the benefit and credited to the account of appellant. The claim was against the city, and, like any other ordinary action for a debt due from the municipality, there is no apparent reason why any one except the debtor should have been sued.

[9] But it is hard to understand how the city has suffered any detriment or is in a position to complain by reason of the fact that the treasurer was joined as a party defendant. The rule is, undoubtedly, as stated in *Gardner v. Samuel*, 116 Cal. 84, 47 Pac. 935, 58 Am. St. Rep. 135, that "a defendant against whom there was a sufficient complaint cannot object that others who had no interest in the subject-matter of the suit were made defendants, unless it also appeared that his interests were affected thereby." If defendant Hickman had appealed and were urging the point, a different situation might be presented.

[10] In the beginning, no doubt, counsel for respondent were somewhat uncertain as to the form of proceeding that should be instituted, and a petition was filed against the treasurer for a writ of mandate to compel him to pay the claim of plaintiff. That action was numbered 14,156 and was based, probably, upon the theory that, the claim having been allowed by the board of supervisors, it was the ministerial duty of the treasurer to pay it on demand. Thereafter—we naturally infer—counsel concluded that it was not a case for mandate, but that plaintiff in an ordinary action must establish his unliquidated demand against the city, and hence this suit, No. 14,157, was brought. The foregoing circumstances have given rise to appellant's contention that another action was pending for the same cause. If the theory of plaintiff's case has been correctly stated—and it seems to be so conceded by appellant—then it is perfectly manifest that the former action was no bar to this.

[11] It is not the duty of the treasurer to pay a claim against the city, which has not been reduced to judgment and which has been rejected by the city trustees. He is a mere ministerial officer, and he exercises no judicial functions. It must be plain that his election to pay or refuse payment of such claim is no legal determination of its valid-

ity, nor would it be binding upon the city or the claimant. Under such circumstances, of course, no court would issue the writ of mandate, but would hold that the claimant must proceed against the city in the proper form to establish his right to the payment. The logic of appellant's position would compel the treasurer to pass upon every ordinary claim of indebtedness against the city, and thereby exercise a power far in excess of what has been conferred by the statute. No case involving the identical question has been cited, but we think none should be required. As pointed out by respondent, it has been held, in certain cases, that the pending of a civil action is not a bar to mandamus on the same general facts. *County of Calaveras v. Brockway*, 30 Cal. 325; *Oroville & V. R. Co. v. Supervisors*, 37 Cal. 354; *Barber v. Mulford*, 117 Cal. 360, 49 Pac. 206. And the converse would seem to be equally true. At least, the pendency of an action against one person upon a complaint failing to state a cause of action against said person cannot affect another suit based upon a cause of action stated against another person. The principles of law involved are familiar, and we deem the further citation of authority to the point unnecessary.

[12] The trial court's findings were against both defendants, but no judgment was rendered either for or against Hickman, and of this appellant complains. As before indicated, we view the treasurer as an unnecessary party and the complaint as not stating a cause of action against him. It would seem to follow that he was entitled to judgment for his costs. But the appellant has not been injured by the omission of the court in that regard. If there were a question of joint liability and the right of contribution, the situation, of course, would be different. But, as we view the case, appellant alone is liable, and it has no right to insist that a judgment be rendered against Hickman; and a judgment in his favor could not be invoked to mitigate the burden that the law imposes upon appellant. Hickman might complain, but it seems clear that the error, as far as appellant is concerned, is harmless and should be disregarded. Section 475, Code Civ. Proc.

It is not disputed that in an action against more than one defendant the court may render judgment against only one when a several judgment is proper. It is expressly so provided in the statute. Section 579, Code Civ. Proc.; *Kelly v. Bandini*, 50 Cal. 530; *Kelley v. Plover*, 103 Cal. 35, 36 Pac. 1020.

But, admitting in this case that Hickman was entitled to an adjudication on the issues raised by his answer, this is a matter of which his codefendant has no right to complain. *Golden Gate Mill & Mining Co. v. Hendy Machine Works*, 82 Cal. 184, 23 Pac. 45.

[13] The charter of the city of Fresno

provides that: "Every demand against the city treasurer \* \* \* must be itemized, specifying the goods furnished, the service performed, or other basis of the claim, giving the date and amount of each item, and by whom ordered, and the amount of the claim, and must be verified by the oath of the claimant or some one for him having knowledge thereof to the effect that such claim is justly and wholly due and unpaid, and that each item thereof has accrued within one year next before its presentation for payment." We are satisfied that there was a substantial compliance with this requirement. There seems to be no reason why the various claims could not be presented together, so long as the various facts demanded by the law were recited for the intelligent guidance of the trustees. The instrument in question here contained a very full statement of the "basis of the claim" and concluded as follows:

"The names of the respective claimants and the sums in which they respectively claim that they are entitled to reimbursement are as follows:

City of Fresno, Dr.				Am't Due for Which Reimbursement is Claimed.	
For 20% excess paid upon city taxes as follows:					
To:	Names.	1st Inst.	Date.	2nd Inst.	Date.
	James Porteous..	\$137.79	Nov. 6/09	\$132.88	Apr. 20/10
	M. R. Madary...	14.29	Nov. 29/09	12.06	Apr. 25/10
					\$45.11
					4.39

Then followed the other names with amounts and dates similarly arranged, and at the bottom of the list was signed, "M. K. Harris and Milton M. Dearing, Attorneys for Each of Said Claimants," and a verification in proper form by said attorneys was

attached. We think this should satisfy the most captious.

The judgment, in our opinion, should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

(20 Cal. App. 75)

CRIFE v. UNANGST, Judge. (Civ. 1,215.)  
(District Court of Appeal, Second District,  
California, Oct. 14, 1912.)

1. EXCEPTIONS, BILL OF (§ 12\*)—PREPARATION—REPORTER'S NOTES.

It is not necessary, in preparing a statement or bill of exceptions for use on appeal, to give the evidence in full, where the question presented is solely as to the sufficiency of conflicting evidence to sustain a particular finding; it being necessary only to set out a sufficient amount of the evidence bearing on the question to show a substantial conflict.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 13; Dec. Dig. § 12.\*]

## 2. EXCEPTIONS, BILL OF (§ 47\*)—PREPARATION—OMISSIONS—AMENDMENTS.

Where material evidence on which findings have been based is omitted from the proposed statement or bill of exceptions, all that is necessary in submitting the amendments is to give so much of the evidence of each of the witnesses, naming them, as is sufficient to show in substance all the evidence bearing on the questions presented by the findings.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 76; Dec. Dig. § 47.\*]

### 3. EXCEPTIONS, BILL OF (§ 47\*)—SKELETON BILL—AMENDMENTS.

Where an appellant presents a mere skeleton bill of exceptions, he cannot complain if the amendments presented are in general terms.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 76; Dec. Dig. § 47.\*]

#### 4. EXCEPTIONS, BILL OF (§ 51\*)—CONTENTS —REDUNDANT MATTER.

Under the Code provision directing the incorporation in the statement or bill of exceptions only of such evidence or other matter as is necessary to explain the statement, and that the exceptions may be presented as briefly as possible, it was an abuse of the trial court's discretion to refuse to settle any statement or bill of exceptions, other than a full transcript of the reporter's notes merely because it appeared that the proposed statement contained many omissions, and that because of the lapse of time the judge had forgotten many important matters that should be incorporated in the bill.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 78; Dec. Dig. § 51.\*]

Petition by Samuel Cripe for writ of mandate against E. P. Unangst, Judge of the Superior Court for San Luis Obispo County, to compel the settlement of a proposed bill of exceptions, not including a full transcript of the reporter's notes of the trial. Granted.

Hester, Merrill & Craig, of Los Angeles,  
for petitioner. Lamy & Putnam, of San  
Luis Obispo, for respondent.

ALLEN, P. J. Petition for mandate.

The affidavit in support of the application discloses that an action was tried before



the respondent judge wherein a judgment was rendered against the defendant for the sum of \$1,500; the action being one for damages alleged to have been occasioned by defendant's alienating the affections of plaintiff's husband. A copy of the findings are attached to the petition, from which it appears that the only issues presented, heard, or determined were as to the marriage of plaintiff and the enticing away of plaintiff's husband through malicious statements and by arts and persuasions, by reason of which the damage resulted; that defendant in due time served his notice of intention to move for a new trial upon the ground that the evidence did not justify the said decision in favor of plaintiff, and because of errors of law occurring at the trial and duly excepted to, which motion, it was stated therein, would be made upon a statement of the case thereafter to be prepared by the petitioner. Petitioner alleged that he duly prepared a statement on such motion which contained specifications of the particulars in which it was alleged the evidence was insufficient to justify the findings of the court, and also the particular errors in law occurring at the trial; that this proposed statement was served upon plaintiff's counsel, who within due time proposed amendments thereto, which amendments consisted simply of a motion to strike out all of the testimony contained in the proposed statement, and asking for an order that the evidence taken down by the court reporter, either by questions and answers or in narrative form, be substituted. Upon the date set for settling the statement petitioner's counsel objected to a consideration of the proposed amendments for the reason that the same were not such amendments as were authorized by our statute. The court, however, overruled such objection and made its order that said amendments as proposed by plaintiff should be allowed, and refused to settle any other bill. It is averred that the said transcription of the testimony and proceeding ordered by the court would cost in excess of \$375 and would embrace more than 700 pages of typewritten matter; that plaintiff is insolvent and cannot be compelled to pay any portion of such transcription fees. Respondent by his verified return alleges that the proposed statement contained only 27 pages of the evidence, and the same was incomplete, incorrect, and misleading; that it would be a practical impossibility to propose concrete and definite amendments to said alleged statement of defendant for the reason that the same was meager, confusing, misleading, and intermingled; that much of the testimony omitted from said proposed statement is material; that the contradictory testimony was entirely omitted; that the only way in which a statement intelligible in form can be presented is through a narrative report of the proceedings; that

such time has elapsed since the trial that respondent cannot from memory and recollection, without the aid of a transcript of the record, state the exact wording and form of such amendments as are necessary to fully and fairly present the record of said cause, and for that reason he has refused to settle any statement other than such as ordered.

[1] It has been determined by our Supreme Court in *People v. Getty*, 49 Cal. 581, that it was never intended that the reporter's notes should constitute a bill of exceptions, and that a judge would be justified in refusing to settle a bill presented in that form. *People v. Sprague*, 53 Cal. 422. In *Cohen v. Wallace*, 107 Cal. 140, 40 Pac. 101, it is determined that a party presenting an objectionable bill could be required by the judge to put it in proper shape, giving a reasonable time for such purpose. And in the later case of *Vatcher v. Wilbur*, 144 Cal. 538, 78 Pac. 14, it has been determined that amendments such as proposed in the case under consideration were not proper, and the order of the court requiring such amendments was not warranted; that "it is not necessary in preparing a statement or bill of exceptions for use in this court to give the evidence in full, where the question to be presented is solely as to the sufficiency of conflicting evidence to sustain a particular finding. All that is required is that a sufficient amount of the evidence be inserted bearing upon each side of the question to show a substantial conflict."

[2, 3] And further that where evidence is omitted, which is material and upon which findings are based, all that is necessary is to give so much of the evidence as to each of the witnesses, naming them, as would be sufficient to show in substance all of the evidence bearing upon the questions presented by the findings; that where an appellant presents a mere skeleton bill he cannot complain if the amendments are in general terms. It is not disputed in this case that the expense devolving upon the only solvent litigant in the preparation of the statement amounts to more than one-quarter of the entire judgment. It is obvious from the character of the issues presented upon the trial that the material evidence, or such of the evidence as is necessary to present the case, could be presented in less than 700 pages of typewritten matter.

[4] Aside from the question of expense to the litigants, our Code of Civil Procedure directs the striking out of all redundant matter, that only such of the evidence or other matter necessary to explain the statement, and no more, shall be incorporated, and that the exceptions may be presented as briefly as possible, all of which indicates that it was intended as well that a reviewing court should not be required to go through a mass of unimportant, redundant,

and unnecessary matter upon a review of the case. We are of the opinion that our Supreme Court, in *Vatcher v. Wilbur*, supra, has laid down a rule and guide to trial courts in proceedings of this nature which can be observed and should be observed. If, as alleged by respondent in his affidavit, he has forgotten by reason of the lapse of time many important matters, that difficulty can be obviated by having the reporter read to him the notes taken at the trial, from which the judge may intelligently and properly direct appellant as to the manner and character of the statement which should be prepared and which only he is willing to settle.

For the reasons assigned in *Vatcher v. Wilbur*, supra, and upon the authority of that case, "we think, therefore, under the circumstances of this case, it was not a proper exercise of the discretion vested in the respondent judge to require a transcription of the full reporter's notes as a condition for settling said statement, and, for that reason, a peremptory writ should issue requiring him to settle the same," and it is so ordered.

We concur: JAMES, J.; SHAW, J.

20 Cal. App. 142

THOMPSON v. SAN FRANCISCO GAS & ELECTRIC CO. (Civ. 1,072.)

(District Court of Appeal, First District, California. Oct. 17, 1912. Rehearing Denied by Supreme Court Dec. 16, 1912.)

1. ELECTRICITY (§ 11\*)—PENALTIES FOR FAILURE TO INSTALL—ACTIONS—ALLEGATIONS OF COMPLAINT.

Civ. Code, § 629, provides that upon application of the occupant of a building distant not more than 100 feet from any direct wire of an electric corporation, and "payment by the applicant of all money due by him," the corporation must supply gas or electricity for such building, and, if it refuses to do so for 10 days after the application, must pay applicant \$50 as liquidated damages and \$5 a day as such damages for every day the refusal continues thereafter. *Held*, that a complaint in an action for the statutory penalty is bad on demurrer for not alleging payment by plaintiff of all money due by him to the corporation.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 11.\*]

2. ELECTRICITY (§ 11\*)—PENAL STATUTES.

The statute is penal in its nature.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 11.\*]

3. STATUTES (§ 241\*)—PENAL STATUTES.

Penalties are not favored by the courts, and every presumption is indulged against one seeking to enforce a statutory penalty.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.\*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Henry Thompson against the San Francisco Gas & Electric Company.

From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

See, also, 121 Pac. 937.

Henry Thompson, of San Francisco, for appellant. Wm. B. Bosley, of San Francisco, for respondent.

ALL, J. This is an appeal from a judgment entered against plaintiff upon refusal of plaintiff to amend his complaint after an order sustaining defendant's general demurrer to plaintiff's complaint. The action was brought to recover a penalty, in the sum of \$1,055, under the provisions of section 629 of the Civil Code, which at the time of the demand set forth in the complaint read as follows: "Upon the application in writing of the owner or occupant of any building or premises distant not more than one hundred feet from any main, or direct or primary wire, of the corporation, and payment by the applicant of all money due from him, the corporation must supply gas or electricity as required for such building or premises.

\* \* \* If, for the space of ten days after such application, the corporation refuses or neglects to supply the gas or electricity required, it must pay to the applicant the sum of fifty dollars as liquidated damages, and five dollars per day as liquidated damages for every day such refusal or neglect continues thereafter." The complaint, among other things, sets forth the making of a demand in writing by plaintiff upon defendant to be supplied with electricity for domestic lighting purposes at apartments occupied by plaintiff (a copy of which demand is set forth in the complaint), and the refusal and neglect of defendant to supply the electricity demanded.

There is no allegation in the complaint concerning the payment of any money due from plaintiff to defendant, nor is there any allegation that no money was due. There is no allegation whatever in the complaint to meet the requirements of the law as to the condition precedent of "payment by the applicant of all money due from him."

[1] This omission is fatal to the complaint. This is true without regard to the question whether or not the Electric Company under the statutes is obliged, upon the demand, to make its service connection, install a meter, and commence the supply of electricity without prepayment for the expense of making the connection or the charge for the electricity to be supplied.

[2] The statute under which the action is brought is penal in its nature. *Baker v. San Francisco Gas & Electric Co.*, 141 Cal. 710, 75 Pac. 342; *Smith v. Capital Gas Co.*, 132 Cal. 209, 64 Pac. 258, 54 L. R. A. 769. The complaint in the present case, unlike the complaint in the case between the same parties, heretofore decided by this court (opinion fil-



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ed January 12, 1912, 121 Pac. 937), contains no allegation of actual damage, but seeks a recovery simply of the penalty prescribed by the statute. The cause of action in the present case can only be sustained, if at all, as one arising under the statute.

The statute requires as a condition precedent, to entitle the demandant to recover of the corporation, not only that he make the written demand, but that he pay all money due from him. For aught that appears plaintiff may have been indebted to defendant for gas previously supplied at the same premises, or for electricity supplied elsewhere. There is no allegation to the contrary, as was the case in *Fair v. Home Gas & Electric Co.*, 13 Cal. App. 589, 110 Pac. 347.

[3] Penalties are never favored either by courts of law or equity, "Every intendment and presumption is against the person seeking to enforce the penalty or forfeiture provided by such a statute." *Savings & Loan Society v. McKoon*, 120 Cal. 177, 52 Pac. 305; *Irvine v. McKeon*, 23 Cal. 472. So strictly must the plaintiff comply with the provisions of a penal statute that it was held, in *Baker v. San Francisco Gas, etc., Co.*, 141 Cal. 711, 75 Pac. 342, in an action under this same statute, that an offer to pay money due was not sufficient, but that if the offer was not accepted, the plaintiff, in order to comply with the requirement for payment, must make a deposit of the amount due in some bank as provided in section 1500 of the Civil Code. "No rule of pleading is better established than that the plaintiff must set forth all that is necessary to enable him to recover. It is therefore well established that, in declaring upon a penal statute, where there is an exception in the enacting clause, the plaintiff must show that the defendant is not within the exception." *Mills v. Kennedy*, 1 Bailey (S. C.) 17. "There can be no doubt that the plaintiff must in his declaration allege all the facts upon which the statute gives him a right of action." *Berry v. Stinson*, 23 Me. 140; *Ferrett v. Atwill*, 1 Blatchf. 151, Fed. Cas. No. 4,747. "And no intendment is allowed in favor of the party for whose benefit the suit is brought." *People v. Mutual Life Ins. Co.*, 72 Ill. App. 569; *People v. Fessler*, 145 Ill. 150, 34 N. E. 146; *Wright v. Wheeler*, 30 N. C. 184; *Greer v. Bumpass*, Mart. & Y. (8 Tenn.) 94.

We think it perfectly clear that, in omitting any allegation in reference to the payment of all money due from him, the plaintiff failed to state facts sufficient to entitle him to recover under the statute, and for this reason the court correctly sustained the demurrer to the complaint.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

# PEOPLE v. SILVA. (Cr. 186.)

(District Court of Appeal, Third District, California. Oct. 15, 1912. Rehearing Denied by Supreme Court Dec. 13, 1912.)

## 1. CRIMINAL LAW (§ 829\*)—INSTRUCTIONS—GOOD CHARACTER—REASONABLE DOUBT.

A requested instruction that proof of good character may be sufficient to create a reasonable doubt of guilt, although no such doubt would have existed but for such character, was properly denied, being fully covered by a given instruction that good character, when proven, in itself tends to establish innocence, and may not be put aside in order to ascertain if the other circumstances, by themselves, do not establish guilt beyond a reasonable doubt.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

## 2. CRIMINAL LAW (§ 1174\*)—APPEAL—HARMLESS ERROR—EVIDENCE.

Where, during a trial, a man arose and addressed the court to the effect that "they have got the wrong girl. I am the father of the girl, and it is not E. L."—the defendant was not prejudiced, where the court admonished the jury that the case must be decided upon evidence adduced upon the stand, and nothing else, that the statements just heard were not evidence at all, and that they should discard them from their minds, and act as though they had never heard them, since it must be presumed that the jurors were men of probity and fair intelligence, and that they heeded the admonition of the court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3170-3178; Dec. Dig. § 1174.\*]

## 3. WITNESSES (§ 361\*)—CROSS-EXAMINATION—CHARACTER.

On cross-examination, the state may question a witness to show acts of defendant inconsistent with the good character attributed to him by the witness.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1165, 1167-1175; Dec. Dig. § 361.\*]

## 4. CRIMINAL LAW (§ 1170½\*)—APPEAL—RIGHT TO ALLEGE ERROR.

Defendant cannot complain of questions the answers to which were favorable to him.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3129-3135; Dec. Dig. § 1170½.\*]

Appeal from Superior Court, Sacramento County; J. H. Hughes, Judge.

Frank Silva was convicted of crime, and he appeals. Affirmed.

J. M. Inman, of Sacramento, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, of Sacramento, for the People.

BURNETT, J. Appellant bases his claim for a reversal upon four grounds, but there is not sufficient merit in any of them to justify an interference with the verdict of the jury or the judgment of the lower court.

[1] 1. The court refused the following instruction, requested by appellant: "You are instructed that if the defendant be proved of good character as to truth, veracity, honesty, morality, and integrity such good character may be sufficient to create and generate a reasonable doubt of his guilt, although no such doubt would have existed

but for such good character." The principle was fully covered by the following instruction, given at defendant's request: "You are further instructed that good character is of importance to a person charged with crime, and you have a right to consider whether the person of good character would be less liable to be guilty of the crime than a person of bad habits and character. The good character of the defendant, when proven, is itself a fact in the case. It is a circumstance tending in a greater or lesser degree to establish his innocence; and it is not to be put aside by a jury in order to ascertain if the other facts and circumstances, considered by themselves, do not establish his guilt beyond a reasonable doubt."

[2] 2. While the trial was in progress, an unusual incident occurred, which appears in the transcript as follows: "Before the jurors left the jury box, a man standing at the left of the defendant addressed the court as follows: 'They have got the wrong girl. It is not Elsie Lopez at all.' The Court: 'Take your seat, sir.' The man standing at the left of the defendant: 'Well, I want to say they have got the wrong girl. I am the father of the girl, and it is not Elsie Lopez. The Court: 'Take this man from the courtroom, Mr. Sheriff.' The bailiff escorted the man from the courtroom." The man's conduct, of course, was reprehensible and explainable only upon the theory that he was drunk or insane. Such declarations in the presence of the jury might, under some circumstances, prejudice the substantial rights of a defendant; but we must presume that the jurors were men of probity and fair intelligence, and that they heeded the earnest admonition of the court: "The case must be decided upon lawful evidence adduced upon the witness stand, and nothing else, and statements which you have just heard from this man are no more evidence than nothing in the world. Discard them from your mind. Act as though you had never heard them." *People v. Prather*, 134 Cal. 439, 66 Pac. 589, 863; *People v. Ruef*, 14 Cal. App. 606, 114 Pac. 48, 54.

[3, 4] 3. A certain witness testified as to the good reputation of defendant, and, upon cross-examination, was asked certain questions, over the objection of appellant, tending to reflect upon the latter's moral character. The form of the questions was somewhat objectionable, but that was not called to the attention of the court. The purpose of the questions was to show acts of appellant inconsistent with the character attributed to him by the witness, and they were permissible under the rule laid down in *People v. Ah Lee Doon*, 97 Cal. 179, 31 Pac. 933; *People v. Mayes*, 113 Cal. 624, 45 Pac. 860; *People v. Moran*, 144 Cal. 62, 77 Pac. 1113; *People v. Perry*, 144 Cal. 750, 78 Pac. 284; *People v. Weber*, 149 Cal. 342, 86 Pac. 671. Be-

sides, the answers were favorable to appellant; and hence he is in no position to complain.

4. The proposed and refused instruction as to the presumption of innocence involved no principle of law that was not clearly and fully expressed in the following, given at the request of appellant: "The jury is instructed that the defendant at the outset of the trial is presumed to be innocent. He is not required to prove himself innocent, or to put in any evidence at all upon the subject. In considering the testimony in the case, you must look at all the testimony and view it in the light of that presumption; and it is a presumption that abides with him throughout the trial of the case until the evidence convinces you to the contrary beyond all reasonable doubt. It is your duty, if possible, to reconcile the evidence with this presumption."

We find no prejudicial error in the record, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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MILLS v. STUMP et al. (Civ. 986.)

(District Court of Appeal, Third District, California. Oct. 15, 1912.)

1. HOMESTEAD (§ 1\*)—DEFINITION—NATURE.

The homestead is the creation of statute created for the benevolent purpose of furnishing a home for the persons for whom the law awards it, and in its enjoyment is made a sanctuary against execution creditors and should be against any other form of hostile attack.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 1; Dec. Dig. § 1.\*]

2. PARTITION (§ 12\*)—HOMESTEAD—TENANCY IN COMMON.

Where a widow was given a homestead for life in 25 acres of a tract of 320 acres and also an undivided one-third of the whole, she held the homestead separate and distinct from her interest as a cotenant, and not as a "cotenant, joint tenant or tenant in common" within Code Civ. Proc. § 752, relating to partition, and the homestead cannot be partitioned without her consent, because possession cannot be taken from her, but she can compel a partition of the remaining 295 acres.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 38-51; Dec. Dig. § 12.\*]

3. PARTITION (§ 14\*) — NATURE — OBJECT — POSSESSION.

The object of partition is to enable cotenants to enjoy possession in severalty, but is not intended to try title to land, and hence where possession in severalty cannot be given as a result of a partition, there is no necessity for making it.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 37; Dec. Dig. § 14.\*]

4. PARTITION (§ 12\*) — HOMESTEAD — STATUTES.

Code Civ. Proc. § 752, was not intended to authorize the partition of the homestead interest during its enjoyment.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 38-51; Dec. Dig. § 12.\*]



Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by Aurelia C. Mills against Winnie Mills Stump and another. Decree for plaintiff and defendants appeal. Affirmed.

T. J. Geary, of Santa Rosa, for appellants. W. F. Cowan, of Santa Rosa, for respondent.

CHIPMAN, P. J. John Mills in his lifetime was the owner as his separate property of two parcels of adjoining land of 160 acres each. In the administration of his estate the court set apart to plaintiff, his surviving widow, 25 acres on the northerly end of the entire tract, including thereon the dwelling house and other improvements which had been used and occupied by the family in farming the land. By a decree of distribution the entire tract of 320 acres was distributed, in undivided shares of one-third each, to plaintiff and defendants, as tenants in common, subject to said homestead. Plaintiff entered into occupancy of the homestead, and ever since has been in the enjoyment thereof.

The complaint is for a partition of 295 acres, leaving the 25-acre homestead undisposed of. Defendants resisted, claiming that the entire tract should be partitioned in the action, and, if the homestead stood in the way as an impediment, the entire estate should either be sold and the proceeds divided, or, if partition of the whole cannot be made, the complaint should be dismissed or the consideration of the action postponed until such time as just and suitable partition can be made. The court entered its interlocutory decree as prayed for in the complaint.

The question in the case is thus stated by appellants: "Can one cotenant compel partition of a portion of a common holding against the wishes of his cotenant? If he can, then the judgment should be affirmed; otherwise, the decree herein should be reversed." Section 752 of the Code of Civil Procedure provides as follows: "When several cotenants hold and are in possession of real property as parceners, joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appears that a partition cannot be made without great prejudice to the owners." Section 759 provides that: "The rights of the several parties, plaintiff as well as defendant, may be put in issue, tried and determined in such action," etc. Section 764 provides that: "In making partition, the referees must divide the property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of

the parties as determined by the court, pursuant to the provisions of this chapter," etc.

[1] The homestead interest in land is the offspring of statute, created for the humane and benevolent purpose of furnishing what its designation indicates—a home for the persons for whom the law awards it, and in its enjoyment it is by law made a sanctuary against execution creditors and should be against every other form of hostile attack.

[2] In the present case the homestead having been carved out of the husband's separate estate was decreed to plaintiff for her sole use during her natural life. But plaintiff does not hold this interest as parcenary, joint tenant, or tenant in common. While it partakes of some of the attributes of a joint tenancy, it is not such an interest in strict legal sense nor in the sense the term is used in the statute. It is not by virtue of her homestead interest that plaintiff brings the action, but as a tenant in common of the land with defendants. Her homestead interest is of such character as of itself to be incapable of partition. "The purpose of a homestead is to secure a home to each and all those clothed with a homestead right—to each and all of them; and the power of a stranger to enter into possession of the land, and, as a tenant in common to interfere with its occupancy and control by the homestead claimants and have it partitioned, or sold, if division be impracticable, would be inconsistent with the very nature of a homestead and violative of the very purpose for which a homestead is created." *Moore v. Hoffman*, 125 Cal. 90, 57 Pac. 769, 73 Am. St. Rep. 27. The tenants in common of the land in question hold subject to the homestead right and have no right of possession and the court can give them no right of possession of the portion impressed with the homestead by virtue of their tenancy in common. It is held by plaintiff by title distinct from that held by her and her cotenants as tenants in common of the fee. "It is the prevailing rule that the widow is entitled to a homestead as well against the heirs as against the creditors of her deceased husband, and that during the continuance of her right of occupancy there can be no partition of the homestead at the suit of the heirs, and this though there are no creditors." *Am. & Eng. Ency. of Law*, p. 699; 29 *Am. & Eng. Ency. of Law*, p. 1162. "Lands occupied as a homestead may well be regarded as subject to a trust imposed by law which would necessarily be defeated by partition. It must therefore be denied, although the title is vested in two or more persons, as long as they or any of them remain entitled to occupy the property as a homestead." 30 Cyc. 187. Mr. Freeman states the rule as follows: "The homestead cannot be partitioned against the objection of the surviving wife, on the application of the other heirs, and after the decease of the hus-

band. She has the right, at least as long as she resides on the premises with her family, or with any minor children of the family, to occupy and enjoy the whole homestead. The heirs cannot curtail this right by compelling her to submit to a partition of the premises, and to confine her subsequent enjoyment to the portion assigned to her." *Freeman on Cotenancy and Partition*, § 60.

[3] The Supreme Court said in *Gates v. Solomon*, 35 Cal. 593 (95 Am. Dec. 139): "The whole scope and tenor of the provisions of the act relating to partition show that the intention was to make the one judgment of partition final and conclusive on all persons interested in the property or any part of it of whom the court could acquire jurisdiction and not permit the matter to be taken up in piecemeal, and accordingly provision is made for bringing in not only joint tenants and tenants in common in the whole or any part of the property, but those having future rights or estates for life or years and those holding liens by mortgage, judgment or otherwise, and power is given to the court to try and determine the rights of all the parties to the action." See, also, *Sutter v. San Francisco*, 36 Cal. 112, 116. While this is the general rule, and must be applied in all cases where compulsory partition may properly be ordered, it is not an inflexible rule governing all cases, nor do we think it should be applied in a case such as is here presented. The object of partition is to enable the cotenants to enjoy the possession in severalty, and not to be compelled to submit to joint possession. Partition does not try, nor is it intended to try, title to land. Hence, where possession cannot be effected as a result of the partition, there is no necessity for making it. Indeed, it might result in injustice and wrong to compel it, where the land is subject as here to a homestead. The value of the land thus held might greatly change before the termination of the life estate. Suppose the entire 320 acres in the present case were so divided that the 25-acre tract should form a part of one of the three allotted shares on some basis of the present worth of the homestead estate. There are valuable improvements on this land now which might in the ensuing years be destroyed by fire or other calamity. Or, if the homestead continued for a considerable time, improvements might greatly depreciate in value. The life tenant would not be under any obligation to make good any loss by fire or by deterioration. It would inevitably fall upon the cotenant to whom this particular portion had fallen. Suppose, in a division now made, it should be determined that this 25-acre tract with its improvements has a value equal to an undivided one-half of the remaining 295 acres; that a fair and just partition at this time would be to allot this 25-acre tract as equivalent to one-third of the whole and the remaining

295 acres to be equally divided between the other two cotenants. It can readily be seen that the cotenant to whom the 25-acre tract should happen to be allotted would stand to suffer by any loss or depreciation in the improvements. We can see no way by which the court could in its decree provide against such a possible contingency, for the widow has an absolute right to the possession and unobstructed and unlimited use of the homestead property during her life, independent of her right as a cotenant. Allotting the portion of the entire tract of which this 25-acre tract might be found to be only a part would not meet the objection since in the matter of partition she has the same rights as the other cotenants, and her right by virtue of the homestead is as separate and distinct as if held by another person.

The power to sell, given by the statute and under the general rule, cannot be invoked to solve the difficulties, for the homestead is of such a nature and was instituted for such a purpose as to forbid its compulsory sale. Once a homestead, always a homestead until it is destroyed in a way authorized by statute, or by its voluntary surrender by the person entitled to it, such person being competent so to do.

It is a general rule prevailing in England without exception, and also throughout the majority of the United States, says Mr. Freeman, that no person has the right to demand any court to enforce a compulsory partition unless he has an estate in possession—one by virtue of which he is entitled to enjoy the present rents or the possession of the property as one of the cotenants thereof. *Freeman on Cotenancy and Partition*, § 446. Hence, the grantee of a deed in which the grantor reserves the right to remain in possession during his natural life cannot maintain a suit for a compulsory partition. *Nichols v. Nichols*, 28 Vt. 230, 67 Am. Dec. 699. In that case Dewey Nichols conveyed to the petitioner an undivided half of the farm of which the premises in question were a parcel, and that the other undivided half was, by a separate conveyance, conveyed to the petitionees, reserving, however, in Dewey Nichols the use and occupancy of that portion of the farm during his own life, and that of his wife and daughters; and it appeared that Dewey Nichols and his daughters were still living. The court said: "The effect of these several conveyances was to vest in the petitionees a title in fee as tenants in common to one half of the farm, with the right of its present and immediate possession, and to give to Dewey Nichols a life estate in the other half, with the right of possession during the lives of the persons for whose benefit that reservation was made. \* \* \* The petitioners, under the deed, have no right to the possession, use, or occupancy of the moiety conveyed to them until the determination of the particular es-



tate which the grantor reserves in himself. They have neither the possession nor the right of possession to any portion of the premises during the life of either of the persons for whose benefit the reservation was made. \* \* \* During the life of Dewey Nichols the petitioners cannot be regarded as having a present estate as tenants in common with the petitionees. There is no unity of possession between them, nor can there be, so long as the petitioners have no right of possession. That relation may exist on the decease of Dewey Nichols, and those for whom that reservation was made, but not until then." Numerous cases are cited in support of the principle on which the decision rested. An application of this doctrine is found in the case of remaindermen and reversioners by which they are prevented from enforcing partition. Speaking of the remaindermen, in *Sullivan v. Sullivan*, 66 N. Y. 37, the court said: "Any partition which might be made at his instance, although equal when made, might be very unequal when his estate should vest in possession. So, too, if actual partition could not be made, and a sale became necessary, the tenant having a less estate than a fee might be deprived of the substantial benefit of his terms." In *Culver v. Culver*, 2 Root (Conn.) 278, where a widow was seised of a life estate, with a remainder to those persons who were parties to the proceeding in partition, the court said: "It will be time enough for them to have partition of the lands when they shall have the possession and the title."

[4] Section 752 of the Code of Civil Procedure was not intended to authorize the partition of the homestead interest during its enjoyment.

It is not contended that the 295 acres may not be equitably partitioned at this time, so far as any physical difficulties stand in the way. The evidence was, and the court found, that it is capable of being equally divided among the cotenants. Defendants introduced no evidence, and nothing appears in the case to show that the exclusion of the 25-acre tract would work any injury to the parties. There was no evidence addressed to this question. All the evidence was addressed to the single question bearing upon the practicability of dividing the 295 acres. If the situation was such that the partition of the 295 acres could not be made separately from the remaining portion of the tract without great injustice and wrong to the parties or one of them, a different question might have arisen, but the fact should have been made to so appear by the opposing cotenants. No such showing was made or attempted to be made, defendants relying entirely on the general rule that, where partition is sought, it must be of the entire tract of land held in common.

If anything further be needed to confirm the views already expressed, it may be found in an analogy drawn from the right of the wife to dower. Says Mr. Freeman: "When a widow is entitled to dower by virtue of her late husband having had a sole seisin in the premises, her right, as we have before stated, is generally regarded as paramount to the right of the heirs to compel a partition. This is equally true whether a division or a sale be sought. Courts have no authority, unless it is expressly conferred by statute, to compel a widow to accept a certain sum of money in lieu of her dower. She cannot be divested of her dower except by her own act." Freeman on Cotenancy and Partition, §§ 472 and 476. When the character and object of the homestead are considered, the rule is wise, humane, and just, and should have full application.

The decree is affirmed.

We concur: HART, J.; BURNETT, J.

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PEOPLE v. HENNINGER. (Cr. 397.)

(District Court of Appeal, First District, California. Oct. 15, 1912. Rehearing Denied by Supreme Court Dec. 13, 1912.)

#### 1. INDICTMENT AND INFORMATION (§ 34\*)—INDORSEMENT.

An indictment indorsed a true bill with the name of the foreman of the grand jury sufficiently complies with Pen. Code, § 940, providing the manner in which an indictment shall be found and indorsed.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 138-143; Dec. Dig. § 34.\*]

#### 2. FALSE PRETENSES (§ 32\*)—INDICTMENT—VALUE.

An indictment for false pretenses alleging that defendant sold prosecutor a certain real estate mortgage by falsely representing that it was a first lien, etc., was not defective because it contained no allegations with reference to the note or the indebtedness secured by the mortgage and that the mortgage without the note was of no value; it not being essential to the commission of the offense of false pretenses denounced by Pen. Code, § 532, that the pretenses shall be made concerning some property or thing of value.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 42-44; Dec. Dig. § 32.\*]

#### 3. FALSE PRETENSES (§ 30\*)—INDICTMENT—SALE OF MORTGAGE.

An indictment for false pretenses, charging that defendant represented he was the owner and holder of a first mortgage on certain real property, and that it was the only lien on the property, and that by reason of such representations, which were false, prosecutor was induced to pay defendant \$1,000 for the assignment of the mortgage, etc., sufficiently stated the offense of false pretenses denounced by Pen. Code, § 532.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 37; Dec. Dig. § 30.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2662-2668; vol. 8, p. 7661.]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

#### 4. FALSE PRETENSES (§ 30\*)—INDICTMENT—DUTY TO INVESTIGATE.

An indictment for false pretenses, alleging that complainant was induced to purchase a mortgage from defendant by reason of the defendant's false representations that the mortgage was a first lien on the real estate described, was not defective because based on a statement regarding a public record with which complainant had as good an opportunity to be familiar as defendant; complainant being under no obligation to examine the record.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 37; Dec. Dig. § 30.\*]

#### 5. FALSE PRETENSES (§ 30\*)—ELEMENTS OF OFFENSE—CREDULITY OF PERSON DEFRAUDED.

An indictment for false pretenses need not show that complainant acted as an ordinarily prudent business man; it not being essential to a conviction that the pretenses be such as would probably deceive a person of ordinary understanding.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 37; Dec. Dig. § 30.\*]

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

J. G. Henninger was convicted of obtaining money by false pretenses, and he appeals. Affirmed.

Welles Whitmore and G. G. Kennedy, both of Oakland, for appellant. U. S. Webb, Atty. Gen., for the People.

**KERRIGAN, J.** The defendant was found guilty of obtaining money by false representations and pretenses. He was sentenced to imprisonment for the term of three years in the state prison. The appeal is from the judgment and from orders denying defendant's motions in arrest of judgment and for a new trial.

The indictment charges the defendant with having obtained \$1,000 in money from Domenico Lavagetto on the 2d day of March, 1910, by falsely representing that he was the owner and holder of a certain mortgage on real property, which mortgage he unlawfully and feloniously "pretended and represented to said Domenico Lavagetto \* \* \* constituted then and there a first lien and a first incumbrance on the real property \* \* \* described, and was then and there the only lien and the only incumbrance on said property." The indictment then proceeds to set forth three respects in which those representations as to the condition of the property in respect of incumbrances were false. There were several prior liens on the property, but Domenico Lavagetto, says the indictment, believed the representations, and, depending upon them, purchased the mortgage from the defendant and paid him therefor the sum of \$1,000.

The defendant moved to dismiss the indictment on the following grounds: "First, that the indictment was not found or indorsed as provided by the Penal Code; second, that the names of the witnesses examined by the grand jury are not inserted at the foot of the indictment; third, a person and

persons were permitted to be present during the session of the grand jury when the charge embraced in the indictment was under consideration, other than persons permitted by section 925 of the Penal Code,"—and assigns as error the court's refusal to do so.

[1] Taking up these grounds of the motion to dismiss in their order, there is no merit in the first one. The indictment was indorsed: "A true bill. Henry N. McDonald, Foreman of the Grand Jury." This indorsement was in accord with section 940 of the Penal Code, which provides the manner in which an indictment must be found and indorsed. *People v. Lawrence*, 21 Cal. 368, 370.

The second and third grounds under the assignment are equally without merit. The names of the witnesses examined before the grand jury were in fact inserted at the foot of the indictment, and the record fails to show that any persons other than those permitted by law were present while the charge was under consideration by the grand jury.

Defendant next asserts that the indictment fails to state a public offense, for the reason that, while it charges him with having sold a certain mortgage, it nowhere refers or speaks of the note or indebtedness secured by the mortgage. Defendant argues that the mortgage without the obligation it secures is of no value, and that therefore any representation with regard to the mortgage or its value was immaterial.

[2] But it is not essential to the commission of the crime defined by section 532 of the Penal Code that the false pretense should be made concerning some property or thing of value. Doubtless the offense is often committed by making false representations concerning matters having no relation to the value of property. In the case at bar the four ingredients necessary to constitute the crime are present. It is alleged that the defendant made false representations concerning the mortgage with intent to defraud the complaining witness, who, as a result of those representations, paid to the defendant \$1,000. There was thus a concurrence of all the elements necessary to constitute the crime charged. *People v. Wasservogle*, 77 Cal. 173, 175, 19 Pac. 270.

In the case of *People v. Martin*, 102 Cal. 558, 36 Pac. 952, the complaining witness having been led to believe by the false representations of the defendant that a judgment for a large sum had been obtained against her in the state of New York, she, at his suggestion, transferred to him a certain piece of property. No such judgment had in fact been rendered. The representation then concerned nothing of value; still the indictment was held to have stated a public offense.

In the case of *People v. Howard*, 135 Cal. 266, 67 Pac. 148, it was contended by the



defendant that the order under which he had attempted to collect a bounty for squirrels killed was void, and that, therefore, he could not be guilty of attempting to obtain money by false pretenses, because the board of supervisors had no authority to allow the claim. The court in that case held that every element of the crime charged was present, and sustained the judgment of conviction. The court said: "The essence of the crime lies in obtaining the money or property by false pretenses, with intent to defraud, and hence it is that the fact of the illegality of the ordinance is immaterial, since it was the false pretenses used with intent to defraud the county, and not the imperfection of the ordinance, that constituted the crime." See, also, *State v. Bourne*, 86 Minn. 432, 90 N. W. 1108.

[3] The defendant represented that the mortgage which he sold the prosecuting witness was a first mortgage on the property designated therein, and that it was the only lien thereon, both of which representations were false, and constitute the crime denounced by section 532 of the Penal Code.

[4] Defendant also asserts that the indictment is based on a statement regarding a public record with which the complaining witness had as good an opportunity of being familiar as he; and the argument is made that the indictment therefore fails to state a public offense. There is no merit in this point. The complaining witness' right to maintain even a civil action based upon defendant's fraud would not be prejudiced by a failure to examine the records. "Where the fact represented is one which is peculiarly within the vendor's knowledge and of which the purchaser is ignorant, it is generally held that, although the real fact appears on the public records, the purchaser is under no obligation to examine the records, and his failure to do so does not affect his right of action." 20 Cyc. p. 57.

[5] The indictment need not show that the complaining witness acted as a prudent business man, or, as was stated in the case of *People v. Cummings*, 123 Cal. 269, 272, 55 Pac. 898, 899: "It is not essential to a conviction that the pretenses must have been such as would probably deceive a person of ordinary understanding. The guilt of the accused does not depend upon the degree of folly or credulity of the party defrauded." The indictment alleges facts sufficiently traversing the representation by the defendant that the mortgage sold to the complaining witness was a first mortgage on the property.

The evidence sustains the verdict, and there were no errors in the admission or rejection of evidence.

The judgment and orders appealed from are affirmed.

V. concur: LENNON, P. J.; HALL, J.

suit and to strike testimony, if properly presented by the record, are reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3451, 3487-3512; Dec. Dig. § 870.\*]

**4. APPEAL AND ERROR (§ 1001\*)—CONCLUSIVENESS OF VERDICT—CONFLICTING EVIDENCE.**

A verdict must be sustained on appeal if there is sufficient evidence to sustain it, regardless of the evidence tending to a contrary conclusion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

**5. CORPORATIONS (§ 400\*)—GENERAL MANAGER—APPARENT AUTHORITY.**

Where a fruit concern had a manager in charge of its business at a certain place who was apparently clothed with authority to buy for his principal, third persons acting in good faith, and without notice or reason to suspect any limitation on his authority, were entitled to rely thereon.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1587, 1590, 1591; Dec. Dig. § 400.\*]

**6. CORPORATIONS (§ 432\*)—GENERAL MANAGER—EVIDENCE OF AUTHORITY.**

Evidence, in an action for the price of fruit sold, defended on the ground that defendant's general manager was without authority to purchase it, held sufficient to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1718, 1724, 1726-1737, 1743, 1762; Dec. Dig. § 432.\*]

**7. PRINCIPAL AND AGENT (§ 116\*)—POWERS OF AGENT—UNDISCLOSED LIMITATION OF AUTHORITY.**

An undisclosed limitation upon an agent's authority is not binding on a third person, relying upon the agent's apparent general authority, provided he has exercised reasonable prudence, and the terms and price fixed for goods sold are not so unusual or unreasonable as to fairly put a prudent man on his guard.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 377, 377½; Dec. Dig. § 116.\*]

**8. FRAUDS, STATUTE OF (§ 89\*)—SALES—ACCEPTANCE OF GOODS.**

Under Civ. Code, § 1624, subd. 4, which provides that an agreement for the sale of goods for a price more than \$200 must be in writing unless the buyer receives part of such goods, an acceptance by the buyer's authorized agent is a sufficient acceptance.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 165-173; Dec. Dig. § 89.\*]

Department 1. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by J. B. T. Leavens against Pinkham & McKEVITT, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Kuster, Loeb & Loeb, of Los Angeles, for appellant. F. B. Daley, of San Bernardino, for respondent.

ANGELLOTTI, J. This action was brought to recover money claimed to be due plaintiff upon: (1) An alleged contract of sale by plaintiff to defendant of a crop of oranges belonging to plaintiff; (2) a similar

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**LEAVENS v. PINKHAM & McKEVITT.**  
(L. A. 2,989.)

(Supreme Court of California. Nov. 27, 1912.)

**1. APPEAL AND ERROR (§ 105\*)—DECISIONS REVIEWABLE—MOTION FOR NONSUIT.**

A decision on a motion for a nonsuit is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 717-723; Dec. Dig. § 105.\*]

**2. APPEAL AND ERROR (§ 104\*)—DECISIONS REVIEWABLE—MOTION TO STRIKE TESTIMONY.**

A decision on a motion to strike testimony is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 711-716; Dec. Dig. § 104.\*]

**3. APPEAL AND ERROR (§ 870\*)—SCOPE—APPEAL FROM FINAL JUDGMENT.**

On appeal from a final judgment, the action of the trial court upon motions for non-



alleged contract between one B. Maes and defendant for Maes' oranges; and (3) similar alleged contracts between plaintiff's father, J. M. Leavens, and defendant, with respect to oranges, lemons, and grape fruit, the claims of Maes and J. M. Leavens having been assigned to plaintiff. Defendant denied that it ever entered into any of the alleged contracts, claiming that it received all fruit asserted to have been delivered under the same, on consignment to be packed, shipped, marketed, and sold for the benefit of the consignors, and the net proceeds thereof only to be paid to plaintiff and his assignors. These net proceeds did not exceed \$775, for which sum defendant offered to allow plaintiff to take judgment. The case was tried with a jury, which, in addition to answering certain special issues submitted, found a general verdict in favor of plaintiff for \$1,072.22 on plaintiff's own contract, for \$1,039.36 on the Maes contract, and for \$16.26 on the J. M. Leavens contract, an aggregate of \$2,127.84. Judgment was entered in favor of plaintiff on such verdict. This is an appeal by defendant from such judgment.

[1, 2] There are also attempted appeals from an order denying defendant's motion for a nonsuit, and two rulings made in the course of the trial refusing to strike out certain testimony, but none of these orders or rulings was an appealable order.

[3] If the trial court erred in any of these matters, its action may be reviewed on the appeal from the judgment, if properly presented by the record.

The only point made by the briefs on this appeal is as to the sufficiency of the evidence to sustain the verdict of the jury, and it is only in one respect, a matter essential to any recovery on the theory of a sale, that this claim is made. It is not questioned that the evidence is sufficient to sustain the conclusion that one H. G. Hand, an agent of defendant for certain purposes at least, entered into the alleged contracts with plaintiff and his assignors, purporting to do so on behalf of defendant corporation, that he received the oranges, lemons, and grape fruit, for which compensation is here sought, under said contracts, and that the amount awarded plaintiff by the verdict is correct if such contracts are legally binding on defendant. It may be conceded, too, that the evidence shows without conflict that Hand did not have actual authority from defendant to purchase any of the oranges or lemons, and that his authority to purchase grape fruit limited him to a price not exceeding \$3 per 100 pounds, while by his contract with J. M. Leavens he agreed to pay \$3.50 per 100 pounds. Plaintiff's theory is that Hand had the ostensible authority to make these contracts of purchase on behalf of defendant, the authority defined by section 2317, Civil Code, as being "such as a principal, inten-

tionally or by want of ordinary care, causes or allows a third person to believe the agent to possess," and that defendant is therefore bound by such contracts. Section 2334, Civil Code, provides that "a principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof," and it is claimed that the evidence was such as to sustain a conclusion that plaintiff and each of his assignors entered into said contracts with Hand, as the agent of defendant, and delivered their property to him as such agent thereunder, in good faith and without want of ordinary care. The answers of the jury to special issues submitted to them on this branch of the case were all in favor of plaintiff's theory, being substantially that either intentionally or by want of ordinary care an appearance was allowed by defendant to exist and be known to plaintiff and each of his assignors that Hand was authorized to enter into and execute such contracts, and that each of them in dealing with Hand as defendant's agent acted in good faith and without want of ordinary care.

[4] It would serve no useful purpose to discuss in this opinion at great length the evidence given on the trial. Bearing in mind the well-settled rules that all conflicts in the evidence were for the jury to determine, and that the verdict must be sustained by an appellate court if there is sufficient evidence, considered in connection with such inferences as may reasonably be drawn therefrom, to sustain it, regardless of the evidence tending to a contrary conclusion, we shall briefly state such of the evidence as, in our judgment, sufficiently supports the verdict.

Defendant corporation, with its principal place of business in Southern California at Los Angeles, has for several years operated packing houses in various portions of the state, at which it received citrus fruits for packing and shipping to market. The evidence warrants the conclusion that while very frequently it did this as agent of the persons from whom it received the fruit, accounting to them only for the net proceeds, it also very frequently bought the fruit outright from the growers. One of its packing houses was at Patton, near the city of San Bernardino, in and about which plaintiff and his assignors resided. In the spring of 1908 Hand was installed as manager of this packing house, and continued in that capacity throughout the transactions involved in this action. He was the sole representative of defendant in that locality, and although Mr. Pinkham, the president of defendant corporation, at times visited Patton and in company with him inspected growing crops in that vicinity, he personally transacted all the business done by defendant at that place. He had an automobile, on which was printed

in large letters, "H. G. Hand, Manager for Pinkham & McKevitt," and the evidence was sufficient to warrant the conclusion that Mr. Pinkham, who rode with Hand therein, had full knowledge of this. He had in his possession printed forms of contract for the purchase by defendant of citrus fruits, defendant's name being printed thereon, which forms were furnished him by defendant, and which he used in making his contracts of purchase. During the spring of the year 1908 Hand purchased oranges for and in the name of defendant from plaintiff and from each of his two assignors, Maes and J. M. Leavens, and his contracts in this behalf were recognized as binding by defendant, and the vendors were subsequently paid therefor with checks signed by defendant. During the same time, he purchased in the same way for defendant the oranges of numerous other growers in that vicinity. In fact, the great bulk of the very considerable business done by him for defendant in that locality consisted of the absolute purchase of the fruit, as distinguished from the taking of it on consignment for sale. No question was ever raised by defendant as to his authority to buy as he did during that season. In fact, it is admitted that he did not exceed the authority given him in a single case during the season, and that he had been expressly directed to buy oranges to the extent which he did purchase and authorized to pay the prices he had agreed to pay. By such directions he was expressly authorized to purchase from such persons as he saw fit to purchase from, being limited only as to the amount and price. Two or three of the persons with whom he contracted communicated with defendant at its office in Los Angeles as to his authority to make the contracts proposed, and the testimony as to the response given was such as to warrant a conclusion on the part of the inquirer that whatever Hand assumed to do was all right. Everybody who sold to him received without question from defendant the full amount of the agreed price, and there is no pretense that any one was ever expressly advised by any act or word of defendant that there was any limitation on the power of Hand to bind defendant by such contracts of purchase as he saw fit to make. During the spring of 1909 he made many similar purchases as agent for and in the name of defendant, including those here involved. According to the brief of counsel for defendant, upwards of \$20,000 of these were unauthorized, and Hand did not report the same to defendant, but designated the fruit so obtained in his "manifests or car reports" as "consigned fruit"; that is, fruit which was being handled for the account of the grower. Included among these unauthorized purchases were those here involved, with the single exception of the grape fruit purchased from J. M. Leavens. Hand was authorized to purchase

that, but his secret instructions limited him to 3 cents a pound, while he agreed to pay 3½ cents a pound. When the market weakened and prices dropped during that season, defendant found itself confronted with the claims of those who had entered into such contracts of sale with Hand, and after investigation paid most of them in full, paid some with a slight discount, and rejected only the claims in controversy in this action.

We are of the opinion that there can be no question that the situation disclosed by the evidence we have stated was such as to reasonably support a conclusion that defendant by want of ordinary care allowed Hand to appear to the growers in and about Patton as having the authority to enter into, on its behalf, such contracts of purchase of fruits as he made. Defendant was engaged in the business in and about Patton not only of taking citrus fruits on consignment for the growers, but also in the business of buying outright such fruit. Hand was admittedly its agent and was apparently in charge of its business in that locality, acting as its sole representative in all that it did—its general manager at that place. He was apparently acting within the scope of a general employment to represent defendant in its business at that place, and such business included not only the taking of fruit on consignment, but also the purchase of fruit. Absolutely nothing was done by defendant to indicate to those with whom he was known to be transacting business that there was any limitation whatever imposed on him. During the whole of the previous season his contracts of the character of those involved in this action were accepted without question by defendant as binding upon it. When inquiry was made as to his authority in two or three cases, the responses were such, construing the evidence in the light most favorable to defendant, as to indicate that whatever he did in such matters was acceptable to defendant.

[5] It will not be questioned, we assume, that, where an agent is by his principal put in charge of a business in a certain locality as the manager thereof, he is clothed with apparent authority to do all things that are essential to the ordinary conduct of the business at that place. If the business consists in large part of the buying of fruit, as we must assume under the evidence it did in this case, he is apparently clothed with authority to buy for his principal. Such acts are within the apparent scope of his employment, and third persons acting in good faith and without notice of or reasons to suspect any limitation on his authority are entitled to rely on such appearances. See Clark & Skyles on Agency, §§ 200, 208, 261.

[6] That the evidence was such as to warrant the jury in concluding that this was the situation in so far as plaintiff and his



assignor J. M. Leavens were concerned, we have no doubt. Each of them had sold fruit to Hand as the agent of the defendant during the previous season, and had received the purchase price from defendant. They also had knowledge of the other facts warranting a conclusion that he was invested with full authority in the matter of such purchases. Certain testimony of plaintiff himself given on cross-examination, which is relied on by appellant, is not of such a nature as to compel a conclusion that he had any intimation or suspicion that Hand was limited to such purchases as he was specially directed to make. Nor was there anything in the testimony given in regard to a conversation with Mr. Pinkham relative to Hand not having been authorized to purchase certain lemons, when such testimony is viewed in the light most favorable to respondent, which compels such a conclusion. We have considered all the points made by learned counsel for appellant in support of the claim that neither of the Leavens can be held to have acted in good faith and with ordinary care in their dealing with Hand, and are satisfied that it must be held that the verdict of the jury on these matters has sufficient legal support in the evidence.

[7] As to the grape fruit sold by J. M. Leavens to Hand for defendant, it will be remembered that Hand was authorized to buy, and that the only excess of authority was in agreeing to pay  $3\frac{1}{2}$  cents per pound, when he was limited by secret instructions to 3 cents per pound. It is well settled that such a limitation is not binding on a third person who has acted in good faith, relying upon an apparent general authority of the agent, provided he has exercised reasonable prudence, and the terms and price fixed were not so unusual or unreasonable as to fairly put a prudent man on his guard. See Clark & Skyles on Agency, § 206, c; Mechem on Agency, § 362.

As to plaintiff's assignor Maes, the evidence in the record is not as clear and explicit as in regard to the Leavens on the question of knowledge of the matters held sufficient to show ostensible authority, and the exercise of ordinary care by the vendor in dealing with Hand as the fully authorized agent of defendant. There is undoubtedly enough in the evidence to show his good faith in so dealing. Maes had lived in the neighborhood for 18 years. He had sold his sweet oranges to Hand for defendant in 1908, and received his money therefor from defendant without question. He delivered the oranges so sold at defendant's packing house at Patton, where Hand was in charge as manager. He, of course, knew that Hand continued so in charge of defendant's business up to and including his sale to him in 1909, which transaction was entered into at the packing house. There was nothing to

require a conclusion that he had notice of anything tending to indicate any limitation on his authority to act generally in such business as defendant was conducting in that locality, and it is fairly inferable from the evidence as to the extent to which that business included the absolute purchase of fruit that Maes had knowledge thereof. On the whole, we do not feel that we would be warranted in holding that the findings in regard to Maes are not sufficiently sustained by the evidence.

[8] There is nothing in the point that the contract with Maes is unenforceable because not in writing. If as to him Hand was authorized to enter into a contract binding on defendant for the purchase of the fruit, his acceptance of such fruit was a sufficient acceptance by defendant to obviate any objection based on the statute of frauds. Civ. Code, subd. 4, sec. 1624. What we have said also sufficiently disposes of all the points made in regard to the denial of the motion for a nonsuit and the motions to strike out certain testimony.

The judgment appealed from is affirmed.

We concur: SLOSS, J.; SHAW, J.

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MONTGOMERY & MULLEN LUMBER CO.  
v. QUIMBY. (L. A. 2,999.)

(Supreme Court of California. Nov. 29, 1912.)

1. APPEAL AND ERROR (§ 900\*)—REVIEW—PRESUMPTIONS.

Where, on the trial of an action to quiet title, the original claim of defendant was abandoned, and the cause presented and determined without objection, upon a claim set up in a supplementary complaint, which was filed without objection, and which stated the cause of action actually adjudicated, it will be presumed on review that the cause was commenced on the date of the filing of the supplementary complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3667-3669; Dec. Dig. § 900.\*]

2. ADVERSE POSSESSION (§ 57\*)—EVIDENCE.

In an action to quiet title, evidence held to establish adverse possession for the period of limitations.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 277, 278, 687; Dec. Dig. § 57.\*]

3. ADVERSE POSSESSION (§ 84\*)—SUFFICIENCY TO ESTABLISH TITLE—KNOWLEDGE OF DEFECT IN PAPER TITLE.

The mere fact that a person seeking to establish a title by adverse possession had knowledge of a defect in the conveyance of the property to him would not destroy the adverse character of the possession and render it ineffectual as a basis for title by prescription.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 488-500; Dec. Dig. § 84.\*]

4. ADVERSE POSSESSION (§ 46\*)—CONTINUITY—CHANGE OF USE.

Under Code Civ. Proc. § 323, subd. 3, which provides that using land, though not inclosed, for the supply of fuel, fencing timber

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

for the purpose of husbandry, pasturage, or for the ordinary use of the occupant, will constitute adverse possession, and subdivision 4, which provides that, where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated, where a person in possession of land and using it for a lumber yard ceased to use it as a lumber yard and removed therefrom a fence and the lumber, but not a building and shed built thereon, and afterwards rented it to a tenant without any disturbance of its possession, and with no intention to abandon possession and claim of title, the vacancy would not be effective to destroy the continuity of the possession so as to render it insufficient to support a title by prescription.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 232-254; Dec. Dig. § 46.\*]

**5. ADVERSE POSSESSION (§ 52\*)—CONTINUITY—ACKNOWLEDGMENT OF ANOTHER'S TITLE.**

A mere offer of a person holding land adversely to buy in a claim of another in order to clear its title is not such an acknowledgment of title as would break the continuity of the running of limitations.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 259, 262-265; Dec. Dig. § 52.\*]

**6. ADVERSE POSSESSION (§ 109\*)—CONTINUITY—ACKNOWLEDGMENT OF ANOTHER'S TITLE—TIME OF MAKING.**

And such an acknowledgment would not break the running of a statute where not made until after the adverse holder's possession had continued for more than five years.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 629-635; Dec. Dig. § 109.\*]

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Montgomery & Mullen Lumber Company against Ella E. Quimby. From a judgment for plaintiff, and on order denying a motion for new trial, defendant appeals. Affirmed.

Waldo M. York and Denis Evarts Bowman, both of Los Angeles, for appellant. Sheldon Borden and George H. Moore, both of Los Angeles, for respondent.

SHAW, J. The defendant appeals from the judgment and from an order denying a new trial. This action was begun on June 12, 1906. The complaint states, in the usual form, a cause of action to quiet title to a town lot. The defendant answered on March 1, 1910. Thereupon leave was granted by the court to the plaintiff to file a supplemental complaint, and on March 11, 1910, such supplemental complaint was filed. It alleged that ever since the 19th day of November, 1903, it had been in the open, exclusive, and uninterrupted adverse possession of the lot, claiming title and right of possession against defendant and all others, and had paid all taxes assessed thereon; its claim being founded on a deed from C. R. Davis and

wife executed on November 18, 1903, purporting to convey said lot to the plaintiff. Issue was joined on these allegations. The court found that the plaintiff was, and had been ever since November 20, 1908, which was five years after its alleged adverse possession began, the owner in fee of the lot, that defendant had no right or title thereto, and had had none since the last-mentioned date, and that the facts alleged in the supplemental complaint were true. The only point urged is that the finding that plaintiff had gained title by adverse possession is not sustained by sufficient evidence. The original claim of plaintiff that it was the owner of the lot on June 12, 1906, as alleged in its original complaint, appears to have been abandoned by it at the trial, and it relied wholly on the title by adverse possession as alleged in the supplemental complaint.

[1] No objection appears to have been made to the filing of this supplemental complaint or to the presentation and determination of plaintiff's cause of action as therein stated. The appeal must therefore be considered as if the action had been begun on March 11, 1910, and the supplemental complaint states the cause of action adjudicated.

[2] It was admitted at the trial that the defendant in 1888 owned the property subject to a mortgage, the amount of which is not shown; that said mortgage was afterwards foreclosed and the lot sold on foreclosure sale; that the defendant was not served with summons in said foreclosure suit and did not appear therein; that on November 18, 1903, Davis, the successor of the purchaser at the foreclosure sale, executed a grant deed to the plaintiff, purporting to convey to it the said lot; and that plaintiff immediately took possession thereof and has paid all taxes thereon regularly ever since. Mullen, the vice president of the plaintiff, appears to have had charge of the business on behalf of plaintiff. He testified that immediately after taking possession in 1903 plaintiff inclosed the lot with a fence and erected an office building and a small shed on it, and used the lot as a lumber yard for four years; that ever since 1903 it had held possession of the lot either by itself or its tenants; and that he always believed that plaintiff owned the lot and never recognized any other ownership in it. The defendant had not seen the property or paid any taxes thereon since about the year 1900. This evidence is sufficient to establish adverse possession for the period from November 19, 1903, until March 11, 1910, the date of the filing of the supplemental complaint. The plaintiff's title therefore became complete on November 19, 1908.

[3] Mullen testified that at the time of the conveyance from Davis he knew there was a flaw in the title but did not know what it was. It appeared that in January, 1906,



plaintiff was informed of the fact that the title of Davis, its grantor, was founded on a sheriff's deed on the foreclosure sale aforesaid, and that the judgment therein was rendered without service of summons on Mrs. Quimby, the original owner. It is claimed that knowledge of this defect in the title renders the adverse possession subordinate to the title of the real owner and ineffectual to gain title by prescription. The testimony of Mullen that he always believed that plaintiff owned the lot and recognized no other title is sufficient to establish the good faith necessary to gain title where the adverse possession is under color of title. The mere knowledge of a defect in the title is not sufficient to destroy the adverse character of the possession. *Wilson v. Atkinson*, 77 Cal. 492, 20 Pac. 66, 11 Am. St. Rep. 299; *Silvarer v. Hansen*, 77 Cal. 582, 20 Pac. 136; *Kockemann v. Bickel*, 92 Cal. 667, 28 Pac. 686; *Millett v. Lagomarsino*, 107 Cal. 106, 40 Pac. 25.

[4] Another objection is that the possession was not continuous. In December, 1907, more than four years after taking the possession, the plaintiff ceased to use the lot as a lumber yard and removed therefrom the fence and the lumber, but not the building and shed. Mullen testified: "I don't recall how long it remained vacant after that time until our tenant took possession. I don't know. Immediately afterward we rented it." He also said that it remained vacant "quite a long time." During this time there was no intrusion by any other person, or any re-entry by Mrs. Quimby, or any disturbance whatever of the plaintiff's possession of the lot. There was no intention by plaintiff to abandon possession and claim of title, or to discontinue possession. These facts do not destroy the continuity of the possession. It is not essential to such continuity, in every case, that there shall be a continuous personal presence on the lot of some person holding for the adverse claimant. It is enough, under the Code, that it is devoted to "the ordinary use of the occupant" where the possession is under color of title as it is here. Code Civ. Proc. § 323, subds. 3, 4. "A man does not discontinue his possession by locking his house in town or suspending his cultivation in the country, provided he do not suffer the building in the one case, or the fields in the other, to be thrown open; but he is bound to continue a positive appearance of ownership by treating the property as his own and holding it within his exclusive control." *Stephens v. Leach*, 19 Pa. 265. The ordinary use of a lot of this character with buildings which the plaintiff does not use for his personal use is to let it to others. The plaintiff had erected the buildings, and, when its own use ceased, it let the lot to a tenant who permitted it to remain unoccupied for some time. The buildings were there as a visible sign of its

claim and evidence of its continued possession, and there is no evidence that it was ever without the control of the plaintiff. Constant occupancy and use is not always required. It depends on the character of the property and the use to which it is adapted. One who owns a house for rental does not abandon or lose his possession every time it remains vacant during intervals between tenancies. It has been held that one may be in adverse possession of lands suitable only for grazing, although his only occupancy is by pasturing the lands during the grazing season, which included only a part of each year; the land being vacant for several months. *Webber v. Clarke*, 74 Cal. 17, 15 Pac. 431. See, also, *Marshall v. Beysser*, 75 Cal. 547, 17 Pac. 644; *Hesperia, etc., Co. v. Rogers*, 83 Cal. 11, 23 Pac. 196, 17 Am. St. Rep. 209; *Jones v. Hodges*, 146 Cal. 164, 79 Pac. 869; *Webb v. Richardson*, 42 Vt. 473; *Ewing v. Burnet*, 11 Pet. (36 U. S.) 53, 9 L. Ed. 624. Under these decisions, the continuity of the possession was sufficiently established.

[5, 6] Appellant also claims that the continuity was broken by an acknowledgment of her title. It is sufficient to say in answer to this contention that, viewing the evidence most favorably to the plaintiff as we must in support of the finding, the plaintiff merely offered to buy in the defendant's claim in order to clear its title, and that this was after its possession had continued for more than five years. This does not bring the case within the rule invoked. *Furlong v. Cooney*, 72 Cal. 328, 14 Pac. 12; *Frick v. Sinon*, 75 Cal. 341, 17 Pac. 439, 7 Am. St. Rep. 177; *Cannon v. Stockmon*, 36 Cal. 535, 95 Am. Dec. 205.

These comprise the points urged by the appellants. None of them appear sufficient to justify a reversal of the judgment or order.

The judgment and order are affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

164 Cal. 260

PACIFIC IMPROVEMENT CO. v. JONES.  
(L. A. 2,981.)

(Supreme Court of California. Nov. 30, 1912.)

# 1. EVIDENCE (§ 459\*)—PAROL EVIDENCE—WRITTEN CONTRACTS.

The fact of a contract, purporting to be that of a corporation, but signed by an individual, not mentioned by it, being signed by him for and on behalf of it and by its authority, may be shown by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1722, 1906-1910, 2109-2114; Dec. Dig. 459.\*]

# 2. LANDLORD AND TENANT (§ 22\*)—LEASES.

An instrument, while in form a proposal by plaintiff to lease to defendant, being signed by both, will be considered as intended as a lease, the right to possession and entry, as well as the time from which rent was to be paid, commencing on the day the instrument was dated and executed; it being described as "this

lease," defendant being referred to as "said lessee," it providing for re-entry by the "lessor" if "said lessee shall fail to comply with any of the covenants herein, or shall not make said payments as herein provided," the premises being occupied by defendant as contemplated, and he having paid several months' rent, and this though the parties contemplated substitution for it of a more formal lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 55-59; Dec. Dig. § 22.\*]

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by the Pacific Improvement Company against Roy Jones. From a judgment for plaintiff, and from an order denying motion for new trial, defendant appealed to the Court of Appeals, which transferred the cause to the Supreme Court. Affirmed.

Ben S. Hunter, of Santa Monica, and C. C. Towner, of Los Angeles, for appellant. O'Melveny, Stevens & Milliken, of Los Angeles, and Platt & Bayne, of San Francisco, for respondent.

PER CURIAM. The justices of the district court of appeal of the Second district, in which this cause was pending on appeal, were unable to concur in a judgment, and, they having given their several opinions in writing therein and forwarded to this court copies thereof, the cause was transferred to this court for determination. The opinion of Mr. Justice Shaw of said district court of appeal, concurred in by Mr. Justice James, in our opinion sufficiently and correctly disposes of all points made by counsel for appellant in their briefs, and we adopt the same as the opinion of this court. The following is a copy of such opinion:

"Action to recover a balance of \$1,250 rent claimed to be due from defendant to plaintiff under an alleged lease of property for the term of one year. Judgment went for plaintiff, a corporation, from which, and an order of court denying his motion for a new trial, defendant appeals.

"The verified complaint, after alleging that on January 21, 1907, plaintiff leased to defendant the property therein described for the term of one year from said date, at the term rental of \$3,000, payable in monthly installments of \$250 each, further alleged: 'That said defendant has paid upon said rental the sum of \$1,750, and no more, and there is now due and unpaid on said rental the sum of \$1,250.' The answer denied the making of the lease, or that there was due and unpaid from defendant to plaintiff the sum of \$1,250 thereon, but did not deny the payment by defendant to plaintiff of the sum of \$1,750 rental reserved therein. In support of its contention that it had leased the property to defendant, as alleged in the complaint, plaintiff offered in evidence a document as follows: 'Santa Monica, Cal., Jan-

uary 21, 1907. Mr. Roy Jones, Santa Monica, Cal.—Dear Sir: The Pacific Improvement Company will lease to you for school purposes the property known as the Hotel Arcadia, located at Santa Monica, California, for the term of one year, beginning January 21st, 1907, consisting of the hotel building, the grounds adjoining and belonging to the hotel, dressing rooms for surf bathers, barracks or servants' quarters, at an annual rental of three thousand (\$3,000) dollars, payable on the first day of each and every month in monthly payments of two hundred and fifty (\$250) dollars each. You agreeing to lease said property at said rental, and make payments as above mentioned. We will agree to include all furniture, linen, crockery and tableware, now in and belonging to said hotel necessary to accommodate fifty people, an inventory of said property being taken and made a part of this lease. You to pay for all repairs, renewals and improvements of every character in connection with said leased property, and shall maintain said property, including the grounds, plant and other property in good condition, reasonable wear and tear excepted, and at the termination of said lease as herein provided restore all of said property to said lessor in the same condition as when received, reasonable wear and tear excepted, and you will not make any alterations or additions to said property except after first obtaining the written consent of the undersigned, and if any said personal property shall be destroyed or broken, the same shall be restored of the same quality as the property so destroyed or broken, and the undersigned, or its agents, shall be authorized to enter upon said premises at any time for the purpose of examining the same or of ascertaining whether the terms of this lease are complied with by said lessee, and if said lessee shall fail to comply with any of the covenants herein, or shall not make said payments as herein provided, the lessor may re-enter and take possession of said premises upon demand, and said lease shall at the option of said lessor thereupon terminate; said lessee shall not assign this lease or let or sublet said premises or any portion thereof without first obtaining the written consent of said lessor, and a violation of this provision shall entitle said lessor to re-enter and take possession of said premises and terminate this lease. Should the building at any time be damaged by fire or earthquake or elements to render it untenable, then the lease shall terminate. Yours truly, [Signed] A. D. Shepard. [Signed] Roy Jones.'

"To the introduction of this instrument in evidence, defendant objected upon the grounds: First, that it did not appear to have been signed by said plaintiff, or by any person representing the plaintiff having authority to sign the same, as shown upon the face of the instrument itself; and, second,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



that the same did not constitute nor purport to be a lease between plaintiff and defendant. Defendant's objection was overruled and this objection, based upon these two grounds, constitute the chief reason upon which he bases his claim to a reversal of the case.

[1] "The instrument on its face purports to be the act of the Pacific Improvement Company, but is signed, not by the corporation, but by A. D. Shepard, a stranger to the contract. Under these circumstances, the question as to whether the contract was that of the Pacific Improvement Company depended upon a fact not disclosed by the instrument, namely, that the signing by Shepard was for and on behalf of the corporation pursuant to authority so to do. It was competent, since the distinction between sealed and unsealed instruments is abolished in this state, to establish the fact, as to which the contract was silent, by parol testimony. See *S. P. Co. v. Von Schmidt Dredge Co.*, 118 Cal. 371, 50 Pac. 650, and authorities there reviewed. An examination of the cases cited by appellant, contra, discloses that the question of agency of the party signing for the lessor was not involved therein, and no evidence offered thereon. *Galewski v. Appelbaum*, 32 Misc. Rep. 203, 65 N. Y. Supp. 694; *Whitford v. Laidler*, 25 Hun, 136; *Roff v. Duane*, 27 Cal. 565. The uncontradicted evidence shows that defendant conducted negotiations with Horace G. Platt and A. D. Shepard for the lease of the property; that the former was attorney and acting president of the corporation, and Shepard the general manager thereof, which fact was at said times known to defendant; that as a result of these negotiations Platt, at the office of defendant, dictated the document to a stenographer who transcribed the same; that Shepard, under Platt's instruction and for and on behalf of the Pacific Improvement Company, signed it; and that defendant paid to plaintiff the rent reserved therein covering seven months of said period of one year. The circumstances and evidence thus conclusively show that Shepard, in attaching his signature to the paper, did so for and on behalf of the corporation, whose general manager he was, and that defendant was fully cognizant that he so acted. The document was shown to be that of the corporation.

[2] "The next point made by appellant is that the instrument is not a lease, but a mere executory agreement to make a lease. The question is one of intent of the parties, and this must be determined by a construction of the instrument taken as a whole. *Tiffany on Real Property*, vol. 1, § 37; *Taylor's Landlord and Tenant*, § 38. Thus considered, we find no difficulty in reaching the con-

clusion that both parties intended the document to constitute a present demise of the premises for a definite term, commencing on January 21, 1907, the date of the execution of the instrument. While in form the document appears to be a proposal addressed to defendant, nevertheless the fair import of the language is that, when signed by the respective parties thereto, it should constitute a lease. The right to possession and entry, as well as the commencement of the time from which rent was to be paid, was contemporaneous with the date of the instrument. There is much in the document that shows that it was regarded as a present demise of the premises. For instance, it is described as 'this lease,' and defendant referred to as 'said lessee,' and it is provided therein that, 'if said lessee shall fail to comply with any of the covenants herein, or shall not make said payments as herein provided, the lessor may re-enter and take possession of said premises upon demand,' and further that 'said lessee shall not assign this lease.' Moreover, while the testimony tends to prove that the parties contemplated substituting for this instrument a more formal lease, nevertheless the execution of the document, as shown by the uncontradicted testimony of Platt, was intended to conclude the lease between the parties, so that Mr. Jones could take immediate possession of the property; the contemplated execution of the formal lease being deemed a matter of mere convenience. The property was leased for school purposes, and the evidence shows that it was occupied by the military school as contemplated by the parties. No other lease was ever executed. Furthermore, defendant by answer admits that he paid seven months' rent upon the lease—a fact wholly inconsistent with the theory that such sum was paid by him and received by plaintiff merely upon an executory contract that at some future time plaintiff would lease to him the property for one year from January 21, 1907. The occupation and use of the premises was for the purposes specified in the contract, viz., 'the military school Mr. Jones was speaking of,' and, as said in *Cheney v. Newberry*, 67 Cal. 125, 7 Pac. 444, 'payment and receipt of the rent was only consistent with a recognition by lessor as well as lessee that the lease was in force.' Actual entry by defendant under the contract would be a circumstance merely tending to establish the fact that the instrument was a lease, but conceding, as claimed by appellant, that the evidence fails to show entry, nevertheless he had the right to enter, which right was recognized by plaintiff in accepting the rental."

For the reasons stated, the judgment and order appealed from are affirmed.

(104 Cal. 265)

SEWELL v. PRICE et al. (L. A. 2,995.)

(Supreme Court of California. Nov. 30, 1912.)

**1. FRAUDULENT CONVEYANCES (§ 241\*)—ACTIONS TO SET ASIDE—CONDITIONS PRECEDENT.**

Although, under Civ. Code, § 3439, providing that transfers with intent to defraud creditors are void against creditors, and section 3441, providing that a creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcement by legal process of his right to take the property transferred, a creditor not having a specific lien on the property cannot attack a fraudulent transfer until the recovery of judgment, it is not necessary that such judgment should have become final by affirmance on appeal, or by the lapse of the time within which to appeal; and the actual taking of an appeal does not prevent the bringing of the action, unless an undertaking to stay execution is given.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 694, 696-726; Dec. Dig. § 241.\*]

**2. JUDGMENT (§ 910\*)—ADMISSIBILITY IN EVIDENCE.**

As a general rule, until a judgment becomes final by affirmance, or by the lapse of the time within which to appeal, it is not admissible in evidence, and cannot be relied on as the foundation of rights declared in it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1732-1737; Dec. Dig. § 910.\*]

**3. FRAUDULENT CONVEYANCES (§ 237\*)—ACTIONS TO SET ASIDE—NATURE OF REMEDY.**

A judgment creditor's bill to subject to the payment of his judgment property fraudulently transferred by the judgment debtor is not an action on the judgment, but is one for equitable relief against an obstruction preventing him from satisfying his claim by execution.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 674-680, 684-686; Dec. Dig. § 237.\*]

**4. APPEAL AND ERROR (§ 1071\*)—REVIEW—HARMLESS ERROR.**

The trial court's failure to find on an issue was not reversible error, unless a finding in appellant's favor would have entitled him to a more favorable judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.\*]

**5. APPEAL AND ERROR (§ 909\*)—PRESUMPTIONS TO SUPPORT JUDGMENTS.**

In an action to set aside a fraudulent conveyance from a husband to a wife, in which the court found a fraudulent transfer only of a one-half interest, and in which the wife claimed that she was prejudiced by the court's failure to find as to the title or ownership of the other one-half, because of the rule that a homestead cannot be claimed in lands owned jointly or in common, it would be presumed, in support of the judgment, that the joint or common tenancy was that of husband and wife, especially where the judgment expressly adjudicated the validity of her claim of homestead.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3675; Dec. Dig. § 909.\*]

**6. HOMESTEAD (§ 84\*)—PROPERTY CONSTITUTING—PROPERTY OWNED JOINTLY OR IN COMMON.**

The rule that a homestead cannot be claimed in land owned by the claimant as a tenant in common or joint tenant does not apply

where the joint or common tenancy is that of husband and wife.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 121, 122; Dec. Dig. § 84.\*]

**7. APPEAL AND ERROR (§ 1033\*)—HARMLESS ERROR—ERROR FAVORABLE TO APPELLANT.**

A party cannot attack a judgment in his favor, on appeal, because founded upon insufficient premises.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.\*]

**8. FRAUDULENT CONVEYANCES (§§ 263, 308, 310\*)—ACTIONS TO SET ASIDE—FRAUDULENT INTENT.**

In an action to set aside a conveyance in fraud of creditors, the question of fraudulent intent is one of fact; and such fact must be alleged and found.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 771-774, 776-779, 781, 923-940, 959-961; Dec. Dig. §§ 263, 308, 310.\*]

**9. FRAUDULENT CONVEYANCES (§ 310\*)—ACTIONS TO SET ASIDE—FINDINGS.**

A finding that a judgment debtor, with the purpose of concealing his property and defrauding his creditors, and particularly the plaintiff, without any consideration, transferred property to his wife was a sufficient finding of fraudulent intent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 959-961; Dec. Dig. § 310.\*]

**10. FRAUDULENT CONVEYANCES (§ 310\*)—ACTIONS TO SET ASIDE—FINDINGS.**

Where a complaint, in an action to set aside a fraudulent conveyance, alleged a fraudulent transfer by the defendant to a person not a party to the action, merely for the purpose of showing why such property was not first resorted to, a finding that such property was fraudulently transferred was not necessary.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 959-961; Dec. Dig. § 310.\*]

**11. EVIDENCE (§ 43\*)—JUDICIAL NOTICE—JUDICIAL PROCEEDINGS.**

In an action to set aside a fraudulent transfer, the Supreme Court will not take judicial notice of the reversal by it of the judgment upon which plaintiff bases his right to maintain such action, since, while the court will take judicial notice of their own records in the same case, they will not take judicial notice of their records in a different case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 62-65; Dec. Dig. § 43.\*]

Department 1. Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by J. M. Sewell against Mary L. Price and others. From the judgment, defendants appeal. Affirmed.

John E. Daly, of Long Beach, for appellants. Wm. J. Variel and J. Vincent Hanon, both of Los Angeles, and F. A. Knight, of Long Beach, for respondent.

SLOSS, J. This action was brought to set aside certain conveyances and transfers of real and personal property claimed to have been made by the defendant W. R. Price to Mary L. Price, his wife, for the purpose of defrauding his creditors. From a



judgment in favor of plaintiff, defendants appeal on the judgment roll alone.

The complaint was in four counts; each applying to a different item of property. Common to all four counts are the allegations that the defendants W. R. and Mary L. Price are husband and wife; that on November 4, 1909, a judgment was duly rendered and entered in the superior court of Los Angeles county in favor of the plaintiff and against the defendant W. R. Price for \$7,728.18, and costs amounting to \$101.70; that said judgment is still in full force and effect and entirely unpaid, except to the extent of \$5.55, realized by the levy of an execution issued upon said judgment against the property of W. R. Price and returned by the sheriff unsatisfied, except in said sum of \$5.55. It is alleged that W. R. Price has no property, other than set out in the complaint, out of which plaintiff's execution could be satisfied, with the exception of 1,400 shares of the stock of the "Building Association of the Society of the New or Practical Psychology," standing in the name of one Clinton Johnson; that this stock, as plaintiff alleges on information and belief, was put in Johnson's name for the purpose of defrauding creditors of said defendant W. R. Price; and that, unless the property described in the respective counts of the complaint can be applied to the payment of the judgment, the same must remain unpaid.

In addition, the first count alleges that "after perpetrating the fraud upon the plaintiff herein, which was the basis of the action upon which plaintiff recovered judgment, as aforesaid, to wit, on or about the 20th day of January, 1909, and for the purpose of concealing his property and defrauding his creditors, and particularly the plaintiff herein, the said W. R. Price, without any consideration, assigned to Mary L. Price, his wife, two hundred forty-five (245) shares of the capital stock of the 'Building Association of the Society of the New or Practical Psychology,' which belongs to him, and the said stock still stands in the name of the said Mary L. Price, and she falsely pretends that she is the owner of said property as her separate property; that the reasonable market value of said shares is the sum of \$2,-450."

It is further alleged in said first count that Mary L. Price has threatened to transfer said capital stock, and will transfer it, unless restrained by an order of the court.

The second count alleges, in terms similar to those contained in the first, an assignment by W. R. Price to his said wife of all his interest in and to a deposit in the Citizens' Savings Bank of Long Beach. The judgment, however, gives no relief with reference to this deposit, and this count, therefore, requires no further notice.

The third count alleges a similar transfer by W. R. Price to his wife of lot 17 of the

Holloway tract, situated in the city of Long Beach.

The fourth count sets forth a like transfer of the north 50 feet of lot 4 and the east 75 feet of the south 100 feet of said lot in block 5 of the city of Long Beach. With reference to the last-described property, it is further alleged that after the transfer to her the defendant Mary L. Price, "for the further purpose of deceiving the creditors of W. R. Price, \* \* \* executed a mortgage of said property to the defendant Hannah Cushing to secure the payment of a promissory note for \$7,000," payable five years after date. It is alleged that said mortgage was without consideration, and was given for the purpose of delaying and defrauding the creditors of W. R. Price.

The defendants answered separately, denying the material allegations of the complaint. In addition, the answer of Mary L. Price alleges that on the 4th day of December, 1908, three days after the date upon which the property described in the fourth count is alleged to have been transferred to her, she filed a homestead on said property in due form, which homestead was duly recorded, "and that the same is now a perfect, valid homestead on said property," subject to the mortgage of Hannah Cushing.

The findings were in favor of the plaintiff, and followed the allegations of his complaint, except, as already indicated, with reference to the second count, and except, further, that the court found that the mortgage executed by Mary L. Price to Hannah Cushing was not made without consideration, and was not made for the purpose of delaying and defrauding the creditors of W. R. Price. It should also be noted that, while the complaint alleges the transfer by W. R. Price to his wife of the north 50 feet of lot 4 and the east 75 feet of the south 100 feet of said lot in block 5 of the city of Long Beach (this being the property described in the fourth count), the court finds that the transfer was of a one-half interest in said property. It also found that on the 4th day of November, 1908, the defendant Mary L. Price filed a homestead on the last above described property, which homestead was recorded as alleged in her answer.

The judgment is that the 245 shares of the capital stock of the Building Association of the Society of the New or Practical Psychology be declared to be the property of W. R. Price, and the transfer of the same to Mary L. Price is adjudged to have been fraudulent and void. A like adjudication is made regarding lot 17 of the Holloway tract. With reference to the property in lot 4 of block 5, described in the fourth count, it is adjudged that the transfer of a one-half interest therein be declared fraudulent and void, and that Price be declared the owner of said property, "subject to the homestead rights filed on the same by Mary L. Price,"

and subject to the Cushing mortgage. It is further ordered and adjudged that the defendant Mary L. Price be enjoined and restrained from transferring or conveying the 245 shares of the capital stock of the building association.

[1, 2] The first point made by the appellants is that the complaint and the findings are insufficient to sustain the judgment in favor of the plaintiff, for the reason that they do not show that the judgment for \$7,728.18 and costs recovered by the plaintiff against Price is a final judgment. It was not necessary to allege or prove this fact. The general rule undoubtedly is that until a judgment becomes final by affirmance on appeal, or by the lapse of the time within which an appeal might be taken, such judgment is not admissible in evidence, and cannot be relied upon as the foundation of rights declared in it. *Feehey v. Hinckley*, 134 Cal. 467, 66 Pac. 580, 86 Am. St. Rep. 290, and cases cited. But the rule has no application to the case at bar. The present action is of the kind commonly known as a creditor's bill. Its purpose is to apply to the satisfaction of the creditor's demand property of the debtor, which was transferred by such debtor with intent "to delay or defraud any creditor or other person of his demands." Civ. Code, § 3439. Section 3441 of the Civil Code provides that "a creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcement, by legal process, of his right to take the property affected by the transfer or obligation." Consequently it is universally held that a creditor is not in a position to attack a transfer for fraud, unless he has a specific lien upon the property transferred, or has reduced his claim against the debtor to judgment. The rule is thus stated in *Brown v. Campbell*, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314, quoting from *Bump on Fraudulent Conveyances* (2d Ed.) p. 522: "A creditor cannot be said to be delayed, hindered, or defrauded by any conveyance until some property out of which he has a specific right to be satisfied is withdrawn from his reach by a fraudulent conveyance. Such specific right does not exist until he has bound the property by judgment, or by judgment and execution, as the case may be, and has shown that he is defrauded by the conveyance in consequence of not being able to procure satisfaction of his debt in a due course of law."

[3] The bill maintained by a judgment creditor to subject to the payment of his demand property fraudulently transferred by the debtor is not, strictly speaking, an action upon his judgment. It is really an action for equitable relief against the obstruction caused by a transfer, which hinders him in satisfying his claim by the ordinary process of law; that is to say, by an execution. If, then, he has put himself in a position to levy

execution, he has done everything necessary to enable him to attack the transfer which hinders his enjoyment of his right. The fact that the time for appeal has not expired does not prevent the issuance or the levy of execution under a money judgment; nor is the right to have execution affected by the fact that an appeal is actually taken, unless an undertaking to stay execution has been given. It must accordingly be held that, in the absence of such undertaking, a plaintiff who has recovered judgment may maintain a creditor's bill, notwithstanding the fact that the time for an appeal has not expired, or an appeal has actually been taken and is pending. Such was the ruling of the District Court of Appeal for the First Appellate District, in *Jenner v. Murphy*, 6 Cal. App. 435, 92 Pac. 405, and we are cited to no authority holding to the contrary.

[4] The further objection is made that the court failed to find upon the title or ownership of one-half of the property described in the fourth count. It is true that the complaint alleges a transfer of the entire property, and that the finding refers only to a one-half interest. But we cannot see that the appellants are in any way injured by the fact that only one half of the property described in the fourth count is declared to be subject to the plaintiff's demand, or that a finding regarding the other half interest, even though it had been in favor of appellants, would have authorized a judgment more favorable to them. If the further finding would not have had this effect, its absence affords no ground for reversal. *Windhaus v. Bootz*, 92 Cal. 617, 28 Pac. 557.

[5-7] The appellants argue that, since, under our decisions, a homestead cannot be selected or claimed on lands owned by the claimant as a tenant in common or joint tenant (*Schoonover v. Birnbaum*, 143 Cal. 548, 83 Pac. 999), the effect of setting aside the transfer of an undivided one-half of the property from W. R. Price to his wife is to invalidate the homestead claimed by her. But the rule does not apply where the joint or common tenancy is that of husband and wife (*Swan v. Walden*, 156 Cal. 195, 103 Pac. 931, 134 Am. St. Rep. 118, 20 Ann. Cas. 194), which, in the absence of anything to the contrary, we must, in support of the judgment, presume to be the condition here. And, beyond all this, the judgment expressly makes the title of W. R. Price subject to the homestead filed by his wife. Here is an express adjudication of the validity of the homestead. The plaintiff is not appealing, and the defendant Mary L. Price may therefore rest with security upon the adjudication that her homestead is valid. In this respect the judgment is in her favor, and she is not in a position to attack it because, in her opinion, the court founded its conclusion upon insufficient premises.

[8, 9] The contention that the court did



not make any finding of intent to defraud on the part of W. R. Price is not sustained by the record. We have already quoted the allegations of the complaint, and these allegations are, as to each count, carried into the findings. Thus, taking the first count as an example, it is alleged and found that on or about the 20th day of January, 1909, "and with the purpose of concealing his property and defrauding his creditors, and particularly the plaintiff herein, the said W. R. Price, without any consideration, assigned to Mary L. Price, his wife, 245 shares of the capital stock of the building association," etc. It is true that in cases arising under section 3429 of the Civil Code the question of fraudulent intent is one of fact and not of law (*Bull v. Bray*, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576), and the fact must accordingly be alleged and found. But here is a finding which declares in terms that the transfer was made for the purpose of concealing the debtor's property and defrauding his creditors. Nothing more is required.

[10] It is suggested that the findings are not sufficient to show that the 1,400 shares of stock put in the name of Clinton Johnson were fraudulently transferred to him. He was not a party to the action. The only purpose of mentioning the stock in his name was to show that the judgment debtor did not have property, other than that involved in the suit, out of which plaintiff's execution might be satisfied. If that stock had been fraudulently transferred to Johnson, the plaintiff was prevented from effectually seizing it by execution; and the fact that the stock remained liable for Price's debts was no obstacle to plaintiff's pursuing the property involved in this action. On the other hand, if the transfer to Johnson was bona fide and vested the title to the stock in him, the plaintiff could not, under any circumstances, pursue such stock, and was for that reason in a proper position to attack the transfers made by Price to his wife. In any event Johnson, not being a party to this action, could not, of course, be affected by any judgment rendered herein, even if the court had undertaken to make an adjudication regarding the stock held by him. But this, as we have seen, it did not do. The judgment contains nothing which concludes anybody with reference to this stock.

[11] Upon the oral argument herein, and by supplemental brief filed after the hearing, the appellants suggest that since the taking of this appeal the judgment recovered by the plaintiff, Sewell, against W. R. Price for \$7,728.18, upon which the execution mentioned in the complaint herein was issued, has been reversed by this court (*Sewell v. Christie and Price*, 124 Pac. 713), and it is claimed that by such reversal the foundation of this action has been destroyed. But, in the absence of anything in the record to show such reversal, or to show that the

judgment so reversed was the one set up in the complaint in this action, we cannot take notice of the alleged fact. The appellants cite *Hollenbach v. Schnabel*, 101 Cal. 312, 35 Pac. 872, 40 Am. St. Rep. 57, and similar cases, as establishing the doctrine that courts will take judicial notice of their own records. But the rule is limited to proceedings in the same case. It is well settled that courts cannot in one case take judicial notice of their records in another and different case. 16 Cyc. 918; *People v. De La Guerra*, 24 Cal. 73; *Lake Merced W. Co. v. Cowles*, 31 Cal. 214; *Ralphs v. Hensler*, 97 Cal. 296, 32 Pac. 243.

It might seem, at first sight, that the refusal to here consider the reversal of the money judgment recovered by plaintiff will work an irremediable injury to the appellants. But this is not so. In the first place, the judgment in this case does not direct any seizure or sale of the property involved. It declares that property to be owned by W. R. Price, and thus makes it possible to levy upon it an execution directed against the property of W. R. Price. But, if the judgment against Price has been reversed, no execution can issue thereunder. Furthermore, if the judgment in this action is now affirmed, notwithstanding the present existence of facts which make it inequitable that the judgment should stand, and the failure to make those facts appear is due to no fault of the appellants, it is not to be doubted that adequate relief might be had by an independent action in equity to restrain the plaintiff from taking advantage of the judgment now under review. 23 Cyc. 991.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

164 Cal. 274

ARCHER v. HARVEY et al. (L. A. 3,002.)  
(Supreme Court of California. Nov. 30, 1912.)

1. APPEAL AND ERROR (§ 694\*)—REVIEW—SUFFICIENCY OF EVIDENCE.

The evidence not being before the court on an appeal on the judgment roll alone, its sufficiency to support the findings cannot be questioned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2910; Dec. Dig. § 694.\*]

2. LIMITATION OF ACTIONS (§ 24\*)—LIMITATION APPLICABLE.

A party to an action, in consideration of her attorney's agreement to perform the necessary professional services on the trial thereof and on appeal, agreed in writing to transfer to him one-half of the water rights recovered by her in that action. Pending the litigation, she died. Held, that an action against her heir to compel the transfer of such water rights to the attorney was one for the specific performance of a contract in writing, and hence subject to Code Civ. Proc. § 337, limiting the time within which to bring actions founded on instruments in writing, executed in this state.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 112-117; Dec. Dig. § 24.\*]

### 3. LIMITATION OF ACTIONS (§ 106\*)—ACCRUAL OF CAUSE OF ACTION.

An action for specific performance of a client's agreement to transfer one-half of the water rights recovered by her in an action to her attorney in consideration of his services on the trial of the action and on appeal was properly brought within four years from the judgment on appeal in the prior action, since until such judgment the attorney had not fully performed the contract on his part and was not entitled to demand a conveyance.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 516; Dec. Dig. § 106.\*]

### 4. LIMITATION OF ACTIONS (§ 182\*)—NECESSITY OF PLEADING STATUTE.

A party waived her right to rely on a particular statutory limitation where she failed to plead it.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 676-682, 695, 705; Dec. Dig. § 182.\*]

### 5. EXECUTORS AND ADMINISTRATORS (§ 315\*)—JUDICIAL SETTLEMENT—OPERATION AND EFFECT.

Under Code Civ. Proc. § 1666, providing that the order or decree of final settlement of a decedent's estate is conclusive as to the rights of heirs, legatees, or devisees, such decree is conclusive against heirs, legatees, or devisees only in their capacity as such, and is not conclusive against a grantee from the heirs by an instrument executed after the decedent's death and before the decree, nor against third parties claiming an interest adverse to that of the testator or intestate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.\*]

### 6. EXECUTORS AND ADMINISTRATORS (§ 315\*)—JUDICIAL SETTLEMENT—OPERATION AND EFFECT.

A party to an action agreed to transfer one-half of any water rights recovered by her in such action to her attorney in consideration of the performance by him of professional services. Pending the litigation, she died, and the attorney thereafter performed the contract with the knowledge and co-operation of her heirs. Held, that a decree of final settlement of her estate did not prevent the attorney from compelling the specific performance of such contract by her heirs, whether he was treated as an equitable owner of the water rights or as having no interest until by performance he became entitled to a conveyance.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.\*]

Department 1. Appeal from Superior Court, San Bernardino County; F. F. Oster, Judge.

Action by T. E. Archer against Katie Harvey and another. Judgment for plaintiff, and defendants appeal. Affirmed.

R. E. Bledsoe, of San Bernardino, for appellants. T. R. Archer, of Los Angeles, for respondent.

SLOSS, J. The defendants appeal from a judgment in favor of plaintiff. The appeal is taken on the judgment roll alone. The complaint alleges that on November 21, 1898, Hannah S. Skinner, the predecessor in interest of the defendants entered into a written

agreement with the plaintiff, Archer. By the terms of the writing, which is set forth at length in the complaint, Mrs. Skinner, in consideration of services performed for her by Archer as attorney and counsel in a cause entitled B. W. Cave et al. v. George W. Tyler et al., and of further services to be performed "in appealing said cause to the Supreme Court" and presenting it in said court, and the payment of one-half of the costs and court fees of such appeal, agreed to give to Archer one-half part of such water and water rights in a certain cienega as might be awarded to Mrs. Skinner in the aforesaid cause. Archer agreed to faithfully perform the services mentioned and to pay one-half of the costs of appeal in consideration of the one-half part of all said water and water rights. The complaint goes on to allege the performance by plaintiff of all the obligations on his part. It is alleged that plaintiff conducted the litigation in the action of Cave v. Tyler through two trials in the superior court, and two appeals to the Supreme Court; the final decision in said cause having been rendered on the 5th day of August, 1905. By that decision it was finally determined that the interest of Hannah S. Skinner in the waters described in the contract was and is "two inches of water, continuous flow, measured under a four-inch pressure of and from the waters of said cienega." There are further allegations as follows: Pending said litigation, in January, 1901, Hannah S. Skinner died intestate, the owner of said two inches of water, and leaving her surviving two heirs at law, the defendant Katie Harvey, her daughter, and Robert Powell, her son. L. A. Harvey, one of the defendants, is the husband of Katie Harvey. The daughter became administratrix of her mother's estate. During the administration, the defendants acquired the interest of the son, Robert Powell, in said two inches of water, and, upon distribution of the estate of Hannah S. Skinner, the entire estate, including said two inches of water, was distributed to the defendant Katie Harvey. The defendants have ever since owned and held said two inches by such title. The defendant Katie Harvey, as administratrix, was in 1901 substituted in her mother's place in said action of Cave v. Tyler, and thereafter said litigation was conducted by plaintiff under said contract for defendants at their request and with their knowledge and co-operation. Each of the defendants has at all times had knowledge of the contract and of its performance on plaintiff's part. It is alleged that the contract was and is fair and just to said Hannah S. Skinner and the defendants, and that the consideration to be received and actually received for the transfer of the water right was and is reasonable and adequate. No part of said



water right has been conveyed to plaintiff, and defendants, notwithstanding a demand by plaintiff, refuse to convey it to him. The prayer is that defendants be required to specifically perform the contract by conveying to plaintiff one inch of said two inches of water. The answer denies many of the foregoing allegations, and in addition pleads that the action is barred by the provisions of sections 336, 337, 338, and 339 of the Code of Civil Procedure. On all these issues the findings were in favor of plaintiff, and a judgment was entered directing a conveyance as prayed.

[1] But two points are made by the appellants: First. It is urged that the court erred in holding that the plaintiff's claim was not barred by the statute of limitations. It is difficult to see how this contention can be advanced on an appeal on the judgment roll, in view of the fact that there is a finding that the action is not barred. On such appeal the evidence is not before us, and its sufficiency to support the findings is, of course, not to be questioned.

[2, 3] But, apart from the finding on the statute of limitations, the other facts appearing would not have justified a conclusion that the action was barred. The complaint was filed on the 29th day of July, 1909. The decision of this court, finally adjudicating Mrs. Skinner's water rights, was filed on August 5, 1905, less than four years theretofore. The action was one for the specific performance of a contract in writing, executed in this state. The plaintiff's obligation to appeal the case of *Cave v. Tyler* and present it in the appellate court was not fully performed until final judgment in that court. Even after the filing of the opinion in August, 1905, a rehearing might have been granted, and plaintiff might have been called upon to render further services. Until complete performance on his part, he was not entitled to demand a conveyance. *Bartlett v. Odd Fellows' Sav. Bk.*, 79 Cal. 218, 21 Pac. 743, 12 Am. St. Rep. 139; *Thurber v. Meves*, 119 Cal. 35, 38, 50 Pac. 1063, 51 Pac. 536. Under section 337, the only statutory provision of those pleaded by defendant which has any relevancy to the case, the plaintiff had four years within which to bring his action. This period, as we have seen, had not expired.

*Norton v. Bassett*, 154 Cal. 411, 97 Pac. 894, 129 Am. St. Rep. 162, cited by appellants, has no application to the facts of this case. That was an action to have a trust declared and for an accounting. The defendants were involuntary trustees, having succeeded to the legal title upon the death of a voluntary trustee. It was held that the cause of action accrued and the statute began to run as soon as the title descended to the defendants. The present action was not, like the one in the case cited, brought against

the defendants as "dry, involuntary, legal trustees." It was brought to compel the specific enforcement of an agreement to convey real property. Since the defendants were not purchasers or incumbrancers in good faith and for value, the obligation was enforceable against them "in like manner" as it could have been enforced against Mrs. Skinner if she had been alive when the cause of action accrued. Civ. Code, § 3395. That the action was so regarded by defendants is shown by the fact that they pleaded section 337 of the Code of Civil Procedure—a section properly applicable to a suit to enforce a written agreement.

[4] But even if the complaint could be viewed as one to enforce an involuntary trust, the appellants, by failing to plead section 342, the section applicable in cases like *Norton v. Bassett*, have waived their right to rely on this provision of the statute. *Bank v. Wickersham*, 99 Cal. 655, 34 Pac. 444.

[5, 6] Second. The contention is made that plaintiff was bound to present his demand for adjudication to the court in which the administration of Hannah S. Skinner's estate was pending, and that he is barred by the decree distributing the water right of the decedent to the defendants. Notwithstanding some uncertainty in earlier rulings, the later decisions of this court are clear to the effect that a decree of distribution has no such effect. The decree under section 1666 of the Code of Civil Procedure "is conclusive as to the rights of heirs, legatees or devisees, but it is conclusive against them only as heirs, legatees or devisees, only so far as they claim in such capacities. \* \* \* It merely declares the title which accrued under the law of descents or under the provisions of the will." *Chever v. Ching Hong Poy*, 82 Cal. 68, 22 Pac. 1081; *Martinovich v. Marsicano*, 137 Cal. 359, 70 Pac. 459; *Cooley v. Miller & Lux*, 156 Cal. 510, 105 Pac. 981. A decree distributing to the heirs is therefore not conclusive against one claiming as grantee from such heirs by an instrument executed after the death of the ancestor and before the decree. *Chever v. Ching Hong Poy*, supra; *Cooley v. Miller & Lux*, supra. Nor does it bind third parties who claim an interest adverse to that of the testator or intestate. *Theller v. Such*, 57 Cal. 447; *Bath v. Valdez*, 70 Cal. 350, 11 Pac. 724; *Barnard v. Wilson*, 74 Cal. 512, 16 Pac. 307. It is immaterial, therefore, whether we say that, at Mrs. Skinner's death, the plaintiff owned an equitable interest in the water right (*Howell v. Budd*, 91 Cal. 342, 351, 27 Pac. 747), or that no interest vested in him until, by performance, he became entitled to conveyance. In the first alternative, he claimed adversely to the estate; in the second, his right was acquired, after the intestate's death, against the heirs. In neither view was his claim affected by the fact that the court,

sitting in probate, undertook to distribute the property to the heirs.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

164 Cal. 255

TODD v. TODD. (L. A. 2,968.)

(Supreme Court of California. Nov. 30, 1912.)

1. MORTGAGES (§ 37\*)—DEED AND MORTGAGE—PAROL EVIDENCE.

An instrument, in form a deed, may be shown by parol to have been intended as a mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 97-107; Dec. Dig. § 37.\*]

2. MORTGAGES (§ 32\*)—DEED AS MORTGAGE.

An instrument, though in form an absolute deed, having been intended merely as security for payment of a debt, is a mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 60-66, 84-94; Dec. Dig. § 32.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4596-4606; vol. 8, p. 7725.]

3. MORTGAGES (§ 38\*)—DEED AS MORTGAGE—EVIDENCE.

Evidence, in an action to have an instrument, in form of a deed, declared a mortgage, and released on payment of amount due, held to show it was intended as security for a debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 108-111; Dec. Dig. § 38.\*]

4. MORTGAGES (§ 32\*)—OBLIGATION—FORM.

The obligation essential to a mortgage need not be in form of a note, but may be an implied promise of the mortgagor to repay money loaned to him by the mortgagee.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 60-66, 84-94; Dec. Dig. § 32.\*]

5. MORTGAGES (§ 608½\*)—REDEMPTION—ACTION—COMPLAINT.

As regards plaintiff's indebtedness being due and payable, it is enough that the complaint, to have a deed declared a mortgage and released, avers plaintiff agreed to repay on a certain past day the sum borrowed, and that only a certain part of it has been paid, from which the legal conclusion that the balance is due and payable necessarily follows.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1815; Dec. Dig. § 608½.\*]

6. MORTGAGES (§ 608½\*)—REDEMPTION—LACHES.

As regards laches, in delaying action to have a deed declared a mortgage and released, it is sufficient excuse that defendant has repeatedly excused and exonerated plaintiff from obligation to make payment on the indebtedness and requested him not to make further payments.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1815; Dec. Dig. § 608½.\*]

7. MORTGAGES (§ 608½\*)—REDEMPTION—ESTOPPEL.

One who has given a mortgage of lots, in the form of a deed, does not, by assenting to the mortgagee selling one of the lots, estop himself from maintaining an action to have the deed declared a mortgage, and to have the other lots redeemed; nothing being claimed as to the lot sold, except credit for the actual price received by the defendant.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1815; Dec. Dig. § 608½.\*]

Department 1. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Baxter Todd against Mary L. V. Todd. Judgment for plaintiff. Defendant appeals. Affirmed.

George Beebe, of Los Angeles, for appellant. Carter, Kirby & Henderson, of Los Angeles, for respondent.

SLOSS, J. The parties are husband and wife. On June 5, 1895, the plaintiff executed an instrument, in form a grant, bargain, and sale deed, purporting to convey to the defendant a lot in the Victor Heights Tract, in the city of Los Angeles, and 12½ other lots situate in a tract near said city. The complaint in this action alleges that the instrument so executed, although absolute in form, was intended by the parties to be a mortgage to secure the payment of \$1,600, loaned by defendant to plaintiff. The agreement of the parties, as the complaint avers, was that said sum of \$1,600 was to be repaid on June 5, 1896, with interest at the rate of 7 per cent. per annum, payable semiannually, and if not so paid to be compounded. It is further alleged that on March 1, 1898, the defendant, with plaintiff's consent, sold and conveyed the lot in the Victor Heights Tract to one Deakin for the consideration of \$1,000, which was retained by defendant as a payment on the indebtedness above mentioned; that no other payments have been made on said indebtedness. The complaint sets up an offer by plaintiff to pay the balance due, a demand for reconveyance, the defendant's refusal to reconvey, and plaintiff's continued ability and willingness to pay upon receiving such reconveyance. The prayer is for an accounting of the amount due, that the instrument be declared a mortgage, and that defendant be required to reconvey or release upon payment of the amount adjudged to be due. The answer denies the making of any loan, or that the instrument in question was intended to be a mortgage. The defendant alleges that she purchased the property of plaintiff for \$1,600, and that the deed executed to her was an absolute conveyance, as it purported to be. She avers that the Victor Heights lot, sold by her, was her separate property. She also sets up the payment by her of certain taxes levied upon the property. The findings were in favor of the plaintiff on the issues regarding the making of the loan and the purpose with which the deed was delivered and accepted. The court found that the defendant sold the Victor Heights lot for \$1,000, and retained said sum as a payment on the indebtedness. It is found that the unpaid balance of the indebtedness, with interest, amounts to \$2,243.67, and that the defendant paid taxes which, with interest, amount to \$196.75. The total sum due from plaintiff to defendant is \$2,440.42, and the judgment decrees that on payment of this sum the defendant execute and deliver to plaintiff a satisfaction of the instrument



of June 5, 1895, which is adjudged to be a mortgage. The defendant appeals from the judgment, bringing up the evidence by means of a bill of exceptions.

[1-3] The appellant's principal contention is that the evidence is insufficient to justify the finding that the instrument executed by plaintiff and defendant was a mortgage. That a deed absolute in form may, by parol testimony, be shown to have been intended to be a mortgage, is not questioned as, of course, it could not be, in view of the many authorities so holding. A few citations will suffice. Civ. Code, § 2924; *Montgomery v. Spect*, 55 Cal. 352; *Malone v. Roy*, 94 Cal. 341, 29 Pac. 712; *Woods v. Jensen*, 130 Cal. 200, 62 Pac. 473; *Holmes v. Warren*, 145 Cal. 457, 78 Pac. 954; *Couts v. Winston*, 153 Cal. 688, 96 Pac. 357. If the deed was intended merely as security for the payment of a debt, it is a mortgage, "no matter how strong the language of the deed or any instrument accompanying it might be." *Woods v. Jensen*, supra. Although it has often been said that the character of an absolute deed cannot be changed to that of a mortgage except "upon clear and convincing evidence," the rule is well settled that, where there is a substantial conflict, it is primarily for the trial court to determine whether the evidence in favor of the claim of mortgage is clear and convincing. *Couts v. Winston*, supra, and cases cited. But here we need not resort to this rule to uphold the finding, since the evidence that the deed was given for security for the debt is not only clear and direct, but, in truth, it is without substantial contradiction. The transaction was finally consummated between the plaintiff and one Griffin, the agent of defendant. At Griffin's suggestion, plaintiff executed a deed absolute, and took a paper, signed by defendant, purporting to give to him an option to purchase the lots, within one year, for \$1,600, with interest at the rate of 7 per cent. per annum. Prior to that time the plaintiff had asked the defendant to lend him \$1,600, and had offered to give her the lots as security, and she had, after some consideration, agreed to comply with his wishes, and referred him to Griffin for the consummation of the deal. There had been no mention of a sale, or of anything but a loan. On these points the testimony of the defendant agreed with that of the plaintiff. Griffin, too, testified that his instructions from Mrs. Todd were to loan the money on the security of the land, and that nothing was said to him about buying the property. In letters written by Mrs. Todd through a series of 10 or 12 years, she repeatedly spoke of the property as being "mortgaged" or "incumbered" to her, and said that she had "loaned" the money to plaintiff. Other testimony, too, confirmed the correctness of plaintiff's contention. Opposed to it is nothing but the statement of Griffin that, at the time of the transaction, he had been of the *opinion* that the delivery

of the deed would have the effect of a conveyance, if the option should not be acted upon within the year.

[4] The existence of an obligation is, of course, essential to a mortgage. But it is not necessary that the obligation be evidenced in writing, if in fact there was a debt. *Hushon v. Hushon*, 71 Cal. 407, 12 Pac. 410; *Locke v. Moulton*, 96 Cal. 21, 30 Pac. 957; *Montgomery v. Spect*, supra. The money having been loaned to the plaintiff, his promise to repay was implied, and was quite as effectual as would have been a promissory note executed by him. *Couts v. Winston*, supra.

[5] The appellant contends that the complaint is defective in that it does not allege that the plaintiff's indebtedness is due and payable. But the complaint does state that plaintiff agreed to repay the sum borrowed on the 5th day of June, 1896, and that no part of it, with the exception of \$1,000 realized from the sale of a lot, had been paid. This was an averment of facts from which the legal conclusion that the balance was due and payable necessarily followed. In *Ganceart v. Henry*, 98 Cal. 281, 33 Pac. 92, relied on by appellant, the complaint contained no allegation that the money was agreed to be repaid at a time prior to the commencement of the action.

[6] It is urged that the plaintiff was guilty of laches in delaying his action for over 13 years after the expiration of the time for which the loan had been made. But the complaint states a sufficient excuse for the delay in paying or in seeking to enforce redemption by the averment that the defendant "repeatedly excused and exonerated plaintiff from the obligation to make further payments on said indebtedness, and requested him not to make further payments." The finding in support of this allegation is fully supported by the evidence, which also furnishes other grounds justifying the delay.

[7] We cannot agree with appellant's contention that plaintiff is estopped from maintaining this action by his assent to defendant's sale of the Victor Heights lot to Deakin. Undoubtedly he would be estopped to deny Deakin's title, as is, in effect, held in *Wamsley v. Crook*, 3 Neb. 344, cited by appellant. But, since he claims nothing with respect to this lot except credit for the actual purchase price received by defendant, we see no reason why his rights in the lots which have not been sold should be held to be impaired. The sale to Deakin was, in legal effect, a sale made with the consent of both mortgagor and mortgagee. It conveyed a good title to the purchaser, and released the mortgage, pro tanto. The authorities cited by appellant are not in conflict with this view.

No other points are presented.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

20 Cal. App. 151

**PEOPLE v. PETER. (Cr. 414.)**

(District Court of Appeal, First District, California, Oct. 18, 1912.)

**1. CRIMINAL LAW (§ 1144\*)—APPEAL—PRESUMPTIONS—CONTINUANCE.**

Where the record fails to show that accused objected to a continuance, it will be presumed on appeal that he consented, so that, though the continuances amounted to more than 60 days, he is not entitled to a dismissal of the prosecution under Pen. Code, § 1382, providing that a prosecution must be dismissed when accused is not brought to trial within 60 days after the finding of the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2781, 2901, 3016-3037; Dec. Dig. § 1144.\*]

**2. CRIMINAL LAW (§ 576\*)—DISMISSAL FOR DELAY—CONTINUANCES—CONSENT.**

Where continuances for 78 days were granted to the prosecution, accused's consent to continuances for 35 days will bar his right to dismissal under Pen. Code, § 1382, authorizing that remedy in case a defendant is not brought to trial within 60 days after indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1297-1304; Dec. Dig. § 576.\*]

**3. CRIMINAL LAW (§ 1043\*)—APPEAL—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW.**

Where an accused failed to object to evidence as not proper in rebuttal, he cannot urge that point on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. § 1043.\*]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

John Peter was convicted of an assault with intent to commit murder, and he appeals. Affirmed.

S. L. Mash, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

**KERRIGAN, J.** The defendant was charged with and convicted of the crime of assault with intent to commit murder. The appeal is from the judgment and from an order denying his motion for a new trial.

[1] The defendant asserts that the trial court erred in not granting his motion to dismiss the case, on the ground that the defendant was not brought to trial within the time prescribed by section 1382 of the Penal Code. The information was filed on April 12, 1912, and various continuances were had up to June 29th, when the motion to dismiss was made. As to some of such continuances the minutes of the court fail to show that defendant objected to them, or that they were ordered without his consent; they will therefore be presumed on appeal to have been consented to by him. *People v. Douglass*, 100 Cal. 1, 34 Pac. 490; *People v. Ebanks*, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269.

[2] Even if this were not true, defendant's

point would still be without merit, for the record shows that he consented to all of the continuances commencing with May 17th; in other words, he consented to 35 days out of the 78 days' delay.

It clearly appears that the court had not lost jurisdiction of the case, and properly refused to dismiss the same. *People v. Benc*, 130 Cal. 159, 62 Pac. 404.

[3] Defendant assigns the admission of certain evidence as error on the ground that it was not proper rebuttal evidence. We think it was correctly admitted as such; but, even if it were not, the defendant having failed to object to it upon that ground at the time it was offered, he cannot now be heard to complain.

The evidence was amply sufficient to sustain the verdict, and we find nothing in the court's charge to the jury warranting defendant's claim that the law was erroneously laid down therein.

The judgment and order are affirmed.

We concur: **LENNON, P. J.; HALL, J.**

20 Cal. App. 164

**McDOUGALL v. EATON et al. (Civ. 1,191.)**

(District Court of Appeal, Second District, California, Oct. 21, 1912. Rehearing Denied by Supreme Court Dec. 20, 1912.)

**1. APPEAL AND ERROR (§ 1040\*)—PLEADING (§ 406\*)—HARMLESS ERROR—RULING ON DEMURRER.**

A defendant, who, after the transfer of the cause to the county of his residence, elected to answer to the merits and to proceed to trial without having the issue raised by his demurrer to the complaint determined, thereby waived his demurrer, and was not prejudiced by the unauthorized act of the court in which the action was brought, overruling the demurrer after ordering the transfer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040;\* Pleading, Dec. Dig. § 406.\*]

**2. APPEAL AND ERROR (§ 1011\*)—FINDINGS—CONCLUSIVENESS.**

A finding on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

**3. APPEAL AND ERROR (§ 1050\*)—JOINT OBLIGORS—EVIDENCE—ADMISSIBILITY.**

Where the evidence showed that defendant, codefendant, and a third person were jointly interested in the preparation of plans for the construction of a building, and that the codefendant had been expressly authorized as the agent to employ an architect to prepare plans, it was not error prejudicial to defendant to permit codefendant, in an action by the architect for services, to testify that he and defendant and the third person were partners in the enterprise.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.\*]

Appeal from Superior Court, Kings County; John G. Covert, Judge.

Action by Benjamin G. McDougall against George R. Eaton and others. From an or-



der denying a motion for new trial, defendant L. E. Hall appeals. Affirmed.

J. C. C. Russell, of Hanford, for appellant. Stratton & Kaufman and Stratton, Kaufman & Torchiana, of San Francisco (C. A. S. Frost, of San Francisco, of counsel), for respondent.

ALLEN, P. J. Appeal by defendant L. E. Hall from an order denying his motion for a new trial. The action was originally commenced in San Francisco county by plaintiff, an architect, against George R. Eaton, L. E. Hall, and W. D. Trewhitt to recover the expenses incurred in the preparation of certain plans and specifications for the construction of a building, alleged to have been ordered by said defendants under a promise upon their part to pay for the same. The complaint was filed on May 21, 1909. On September 10th following defendant Hall filed a demurrer to such complaint, and at the same time filed an affidavit for change of venue, setting forth the fact that neither affiant nor any of his codefendants were residents of the city and county of San Francisco, but that, on the contrary, both affiant and Trewhitt were residents of Kings county; and at the same time Hall filed proper affidavits of merits, together with a demand for change of place of trial, notice of the hearing of which demand was duly given on the date of filing. Thereafter, on October 25, 1909, service of process in the meantime having been had upon defendant Trewhitt, and he having made default, the superior court of San Francisco county entered judgment against said Trewhitt by default. Subsequently, on November 15, 1909, the superior court of San Francisco county made its order changing the place of trial of the action to Kings county, notwithstanding which order the superior court of San Francisco county, on March 15, 1910, proceeded to hear the demurrer of Hall to the original complaint, and made its order overruling the same, and giving defendant Hall 10 days to answer. Subsequently the papers were transmitted to the superior court of Kings county, and on April 1, 1910, Hall served and filed his answer, denying generally and specifically the allegations of the complaint; and on the 4th day of January, 1911, the action came on for trial in the superior court of Kings county, which court made its findings adverse to defendant Hall, and rendered judgment against him for the unpaid amount due plaintiff. In due time defendant Hall moved for a new trial, which was denied, from which order denying a new trial, he appeals upon a bill of exceptions.

[1] The principal contention of appellant is that the superior court of San Francisco county was without jurisdiction to enter the default of Trewhitt, or to consider and pass upon the demurrer theretofore filed by Hall, and for that reason the order appealed from

should be reversed. It may be conceded that, the action being a personal one, and the uncontradicted evidence being that San Francisco was not the proper place for trial, it was the duty of the superior court of San Francisco county to immediately grant the motion for a change of place of trial, upon the granting of which jurisdiction ceased, and that any subsequent action was without jurisdiction and void. But, assuming all of this, appellant made no effort to have the superior court of Kings county pass upon his demurrer on file, and which, notwithstanding the order of the court of San Francisco county overruling it, was still pending for hearing, but elected to answer and proceeded to trial without any determination of the issues of law thus presented by the demurrer. In doing this he must be taken as having waived his demurrer, and cannot be said to have been prejudiced by the unauthorized act of the superior court of San Francisco county; neither does any prejudice appear, so far as defendant Hall is concerned, by reason of the rendition of judgment against Trewhitt.

[2] Appellant further contends that there is no evidence in the record supporting the finding that defendant Hall authorized the preparation of the plans and specifications, or agreed to pay for the same, or any portion thereof. We do find in the record evidence of the fact that the three defendants were engaged in a joint enterprise; that in furtherance thereof all three of the parties agreed that Trewhitt should go ahead and order the plans made. It is true the evidence was conflicting upon this point, but with that we have nothing to do.

It is further contended that under the contract for the preparation of the plans it was agreed that the same should be prepared in a manner so as to permit the construction of a building to cost not to exceed \$80,000, and that the plans as prepared contemplated an expenditure exceeding \$120,000. Here, again, the evidence is conflicting. There is evidence in the record to the effect that no stipulation was had as to the cost of the structure when the plans were ordered.

[3] Witness Trewhitt was permitted by the court to testify that he and his codefendants were partners in the enterprise. We see no prejudicial error in permitting such evidence, in view of the fact that it was shown that they were jointly interested in the enterprise and expressly authorized Trewhitt, as their agent, to make the contract. The agency of Trewhitt was thus established, and the joint and several liability of the defendants therefor.

An examination of the record discloses no prejudicial error warranting a reversal of the order denying the motion for a new trial; and the same is affirmed.

We concur: JAMES, J.; SHAW, J.

20 Cal. App. 156

## PEOPLE v. WHITE. (Cr. 391.)

(District Court of Appeal, First District, California, Oct. 18, 1912.)

## 1. CRIMINAL LAW (§ 806\*)—TRIAL—INSTRUCTIONS.

The trial court was not required to repeat and explain the essentials of law applicable to the facts in every individual instruction, but the charge was sufficient, where, as a whole, it clearly, correctly, and without conflict stated the law of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1973, 1991; Dec. Dig. § 806.\*]

## 2. CRIMINAL LAW (§ 1035\*)—JURY—VIEW OF PREMISES—WAIVER OF OBJECTION.

Where, at defendant's request, the jury, in a proper manner, viewed the premises, and the defendant made no objection at any time that neither he nor the trial court was present when the view was had, he waived his right to such objection.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2633, 2634, 2636-2638, 2643, 2644; Dec. Dig. § 1035.\*]

## 3. CRIMINAL LAW (§ 636\*)—JURY—VIEW OF PREMISES.

A request of defendant to be present when the jury views the premises cannot be denied him without committing a serious irregularity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1465-1482; Dec. Dig. § 636.\*]

Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

John White was convicted of murder in the first degree, and he appeals. Affirmed.

Charles M. Shortridge and James P. Sex, both of San Jose, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, of San Francisco, for the People.

LENNON, P. J. The defendant in this case was informed against for the crime of murder. Upon his trial he was found guilty of murder in the first degree, and his punishment was fixed by the jury at imprisonment in the state prison for life. Judgment was rendered and entered accordingly, from which and an order denying a new trial defendant has appealed.

No claim is made that the verdict and judgment are not supported by the evidence. The evidence on the contrary shows the defendant to have been justly convicted, and therefore the verdict and judgment must stand unless it shall affirmatively appear from the record before us that the defendant was substantially damaged in his defense by some error or irregularity committed upon the trial in the lower court.

The only points relied upon for a reversal involve the correctness of isolated portions of the trial court's charge to the jury, and the failure of the trial judge and the defendant to accompany the jury upon an inspection of the premises on which it was claimed the homicide was committed.

[1] The attack made upon certain of the instructions of the trial court upon the law

of self-defense is hypercritical; but, even if that was not so, the correctness as a whole of the charge to the jury is never to be tested by singling out and assailing, as is done here, individual instructions which, when detached and isolated from the charge in its entirety, may not contain every qualification, exception, or contingency which may possibly arise under the facts of the particular case on trial. The trial court is not required to repeat, qualify, and explain the essentials of the law applicable to the facts of the case in every individual instruction of its charge to the jury; and that charge will ordinarily be held good and sufficient if, as in the present case, it as a whole clearly, correctly and without conflict states the law of the case.

[2] With reference to the jury's view of the premises, the record shows that, after the argument of the case was concluded in the lower court, counsel for defendant requested that the jury be permitted and directed to visit and view the scene of the crime, in order that they might have a more accurate understanding of the distances designated and delineated upon a map or diagram of the premises which was used in evidence during the trial. The district attorney protested against this procedure upon the ground that it was irregular, in this: That its effect would be the introduction of evidence upon the issues involved after the argument of the case to the jury had been completed. The trial court nevertheless granted the request, and thereupon ordered that the jury be conducted in a body in the custody of the sheriff to the scene of the homicide. With the consent of the defendant Detective Ray Starbird was appointed to show the premises to the jury. A deputy sheriff was sworn to take charge of the jury. In his sole custody, and accompanied only by the person appointed to show them the premises, the jury visited and viewed the scene of the crime. It is an undisputed fact, as shown by the record on the motion for a new trial, that neither the trial judge nor the defendant was present with the jury on this occasion. That record further shows that during the short interval of the jury's absence the trial judge and the attorneys for the defendant remained in the courtroom, and that the defendant at his own request was taken to the county jail for the purpose of procuring tobacco, where he remained until the jury returned to the courtroom. The minutes of the trial court show that upon the jury's return further hearing of the case was continued to the following day, when the trial court, without further evidence or argument, proceeded to give its instructions upon the law of the case, and then submitted the same to the jury. The record on the hearing of the motion for a new trial shows further and affirmatively that counsel for the defendant



made no request that the trial judge or the defendant be present with the jury upon the view of the premises. No objection was made, either before or after the view, to the failure of the judge and defendant to accompany the jury. From all that was said and done at the time of and subsequent to the making of the order for the view of the premises, the inference is irresistible that all parties understood that neither the trial judge nor the defendant was to be present. At all events, it clearly appears that counsel for the defendant knew that the trial judge and the defendant did not leave the courtroom with the jury, and, if counsel were as watchful of the defendant's interests then as they were after he was convicted, they must have understood that the trial judge neither understood nor intended that either he or the defendant should be present with the jury during the time they were viewing the premises. Upon the return of the jury no objection was taken to the manner in which the view was had; and it was not then claimed nor afterwards shown upon the hearing of the motion for a new trial that the absence of the trial judge resulted in prejudice to the defendant's case. On the contrary, it was affirmatively shown that in all matters the view of the premises was taken in the usual way and in an orderly manner, and that it was as effective and free from outside interference as if the trial judge had been present in person.

Under these circumstances, it must be held that the defendant waived both his right and the trial judge's duty to be present at such view.

[3] It is the law of this state that, in viewing the place at which an offense is charged to have been committed, the jury is receiving evidence; and the right of the defendant to be present, if he demands it, cannot be denied him without committing a serious irregularity. The defendant, however, may waive his right to be present with the jury upon a view of the premises; and, if it can be fairly said that he did waive such right in the lower court, he will not be heard to complain here that he was wrongfully deprived of that privilege. *People v. Tarm Poi*, 86 Cal. 225, 24 Pac. 998; *People v. Tarbox*, 115 Cal. 57, 46 Pac. 896; *People v. Bird*, 132 Cal. 261, 64 Pac. 259; *People v. Fitzgerald*, 137 Cal. 546, 70 Pac. 554; *People v. Mathews*, 139 Cal. 527, 73 Pac. 416; *People v. White*, 5 Cal. App. 329, 90 Pac. 471; *State v. Louie Moon*, 20 Idaho, 202, 117 Pac. 757; *State v. Hartley*, 22 Nev. 342, 40 Pac. 372, 28 L. R. A. 33; *State v. Lee Doon*, 7 Wash. 308, 34 Pac. 1103; *State v. Ah Lee*, 8 Or. 214; *State v. Mortensen*, 26 Utah, 312, 73 Pac. 562, 633. The trial judge as a matter of course is an essential part of the court. Obviously there can be no court without the judge; and it is the sworn duty of the trial judge to be present at every stage of the

trial, including a view of the premises. It has been held, however, in this and in other jurisdictions, that the duty of the trial judge to be present at a view of the premises may be waived by the defendant. *State v. Louie Moon*, supra; *People v. White*, supra; *Elias v. Territory*, 9 Ariz. 1, 76 Pac. 605, 11 Ann. Cas. 1153. While that is no doubt the case, yet it is apparent that such duty can never be omitted, even with the consent of the defendant, without the likelihood of substantial harm resulting to the defendant, and thereby necessitating the reversal of any judgment which may be rendered against him. Fortunately, in the present case, nothing occurred during the view of the premises which in any wise tended to injure the defendant, and a reading of the whole record discloses that he was fairly tried and justly convicted.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; HALL, J.

20 Cal. App. 139

ROOT v. GREADWOHL. (Civ. 1,086)

(District Court of Appeal, First District, California. Oct. 17, 1912.)

1. BROKERS (§ 64\*)—RIGHT TO COMMISSION.

Where an owner deeded property to a purchaser procured by a broker, and accepted part of the purchase price and a note secured by a mortgage on the premises for the balance, he was liable for the broker's commission, though the purchaser failed to make further payments.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 97; Dec. Dig. § 64.\*]

2. APPEAL AND ERROR (§ 1002\*)—VERDICT—CONFLICTING EVIDENCE.

Where, in a broker's action on commission notes, the evidence was conflicting upon every material issue raised by the defendant, a verdict for plaintiff could not be disturbed on review.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by M. A. Root against Mary Greadwohl. From a judgment for plaintiff and denial of a new trial, defendant appeals. Affirmed.

A. M. Drew and W. P. Thompson, both of Fresno, for appellant. Guy E. Dyar, of Fresno, for respondent.

LENNON, P. J. This is an appeal from a judgment and from an order denying a new trial in an action upon a promissory note, wherein the plaintiff was awarded a judgment against the defendant in the sum of \$400.

The note in suit was executed by the defendant to plaintiff's assignors in payment of a broker's commission for the sale of

certain real estate belonging to the defendant. As a defense to the action the defendant in her answer alleged in substance that she never contracted to give the note sued on; that she never agreed to pay the money at the time, in the manner, or in the amount specified in the note; that the note did not express the terms and conditions of the real contract between plaintiff's assignors and defendant; that the note was signed by the defendant through mistake and under a misapprehension as to its contents, and, finally, that the consideration for the note had wholly failed before it became due.

The court found generally and specifically that all of the allegations of the plaintiff's complaint were true, and that all of the denials and defenses of the defendant's answer were untrue.

[1] There is no merit in the defendant's contention that the trial court should have found in favor of the defense of a failure of consideration merely because the evidence adduced at the trial showed that the purchaser procured by plaintiff's assignors for defendant's property failed to pay the full purchase price thereof as agreed. The sale of the defendant's property to the purchaser procured by plaintiff's assignors was completed, and the broker's commission earned, when the defendant, after receiving one thousand dollars in cash on account of the sale, gave the purchaser a deed to the property and took his note, secured by a mortgage upon the land sold, for \$4,500, the balance of the purchase price. The services of a realty broker are fully performed and his commission fully earned when the sale of the property is completed or when he has procured a purchaser ready and willing to enter into a valid contract of sale upon the terms fixed by the owner. *Dolan v. Scanlan*, 57 Cal. 261; *Gunn v. Bank of California*, 99 Cal. 349, 33 Pac. 1105; *Brown v. Mason*, 155 Cal. 155, 99 Pac. 867, 12 L. R. A. (N. S.) 328. The fact that the purchaser in the present case subsequently defaulted in his payments of the purchase price of the land sold was no concern of the plaintiff's assignors. That fact could not operate to deprive them of the commissions due for their services rendered in procuring a purchaser for the defendant's land, who was willing and at the time was able to buy the property, and who did actually enter into a valid contract of sale at the price and upon the terms specified by the defendant. After a sale of real property has been completed, the default or insolvency of the purchaser procured by the broker will not defeat the recovery of the latter's commission. *Shainwald v. Cady*, 92 Cal. 83, 28 Pac. 101; *Bendict v. Wilson*, 10 Cal. App. 719, 103 Pac. 350.

[2] Upon the issue of the making and execution of the note in suit, the defendant

was permitted without objection to give testimony which tended in some degree to show that plaintiff's assignors had orally agreed at the time of the execution of the note to accept \$100 in cash on account of their commissions for making the sale of defendant's land, and to wait for the \$400 balance due them until such time as the purchaser should make a second payment of \$1,000. This testimony was offered and received apparently upon the theory that because of the alleged ignorance, misapprehension, and mistake of the defendant in executing the note, parol evidence was admissible to vary the terms thereof. Counsel for the defendant now insists that the evidence upon this phase of the case is without conflict, and, if this be so, the findings of the court are contrary to the evidence. Counsel for the plaintiff, on the other hand, insist that the evidence upon this, and upon every other issue in the case, is in substantial conflict, and that in any event a judgment for the defendant could not have been rendered solely upon evidence which tended to show the existence of a contemporaneous oral agreement which was totally at variance with the written agreement of the parties as finally expressed in the note.

It will not be necessary for us to follow counsel in their discussion of the rule relating to the admission of oral evidence to vary or contradict the terms of a written instrument, because, in our opinion, the evidence upon the whole case is in substantial conflict upon all of the material issues. The trial court found against the defendant upon the issue as to whether or not the defendant executed the note in suit; and the evidence upon this phase of the case in effect covered the issue as to whether or not defendant knew that she was signing a promissory note rather than another and totally different contract. In the presence of a substantial conflict upon these and all of the issues in the case the findings of the trial court are conclusive upon us and cannot be disturbed.

This we think disposes of all of the points made by appellant that are worthy of serious consideration.

The judgment and order appealed from are affirmed.

We concur: HALL, J.; KERRIGAN, J.

20 Cal. App. 153

STEVENS v. KOBAYSHI et al. (Civ. 1,075.)  
(District Court of Appeal, First District, California. Oct. 18, 1912.)

1. LIBEL AND SLANDER (§ 85\*)—ACTIONS—PLEADING.

Where a libel was published in Japanese and Chinese, a complaint which sets forth the translation thereof is sufficient because Const. art. 4, § 24, provides that judicial proceedings shall be conducted in English, and Code Civ. Proc. § 426, subd. 2, requires the complaint to



contain a statement of the cause of action in ordinary and concise language.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 201-204; Dec. Dig. § 85.\*]

## 2. LIBEL AND SLANDER (§ 100\*)—PLEADING—VARIANCE.

In an action for libel which was published in a foreign language, where the complaint used the word "concubine," evidence of a translation which used the word "mistress" did not constitute a variance, where the foreign term might have been translated as either word.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 246-272; Dec. Dig. § 100.\*]

## 3. LIBEL AND SLANDER (§ 100\*)—PLEADING AND PROOF.

In an action for libel, it is not necessary that plaintiff prove all of the libelous words alleged; proof of enough to establish her cause of action being sufficient.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 246-272; Dec. Dig. § 100.\*]

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Lulu G. Stevens against T. Kobayshi and S. Takeshita. From a judgment for plaintiff, and an order denying their motion for new trial, defendants appeal. Affirmed.

Carl E. Lindsay, of San Francisco, for appellants. Fitzgerald & Abbott, of San Francisco, and Charles A. Beardsley, of Oakland, for respondent.

KERRIGAN, J. This is an action for libel. Judgment went for plaintiff. The appeal is from the judgment and from an order denying defendants' motion for a new trial.

The defendants were the publishers of a daily newspaper called "The Japanese-American News." The complaint alleges that "on the 28th day of January, 1910, said defendants published a certain libel of and concerning the plaintiff, which publication was in Japanese and Chinese figures and characters, and when translated into English reads as follows: '*Now this woman used to be on Harrison street, a Chinese doctor's concubine*'; by no means get Miss Stevens to advise; Miss Stevens surely is no good or worthy of teaching; she is not decent; don't wait to see her; keep away; you will make a mistake to go there; do not let Miss Stevens fool you; there is still more to be found out.'" Two points are presented for our consideration.

[1] The article was not set forth in the complaint in the language in which it was alleged to have been published; and defendants' first point is that their demurrer, based upon that ground, should have been sustained. There is no merit in this position. "Judicial proceedings shall be conducted and preserved \* \* \* in no other than the English language." Const. art. 4, § 24. Subdivision 2 of section 426 of the Code of Civil Procedure requires that a "complaint must contain

a statement of the facts constituting the cause of action in ordinary and concise language." The Japanese or Chinese language is not ordinary language within the meaning of that provision. See, also, section 950, Pen. Code; *People v. Ah Sum*, 92 Cal. 648, 28 Pac. 680; 31 Cyc. 78. In 1 Abbott's Trial Brief, p. 460, the author states the law as follows: "An instrument in a foreign language may be pleaded by using, instead of a copy of the original, a correct translation, alleging it to be such." In *Christenson v. Gorsch*, 5 Iowa, 374, it is said: "The pleadings in courts should be in the English language; and in declaring upon a contract in German it is not necessary to attach a copy in such foreign language." While it may not, according to *Lambert v. Blackman*, 1 Blackf. (Ind.) 59, satisfy the practice requiring a literal copy, it is still equivalent to pleading the legal effect. In *Butts v. Long*, 94 Mo. App. 687, 68 S. W. 754, it is held that it is sufficient to recite the English meaning of the foreign language alleged to be slanderous.

[2] The translation admitted in evidence differed in some respects from the translation of the published matter alleged in the complaint; and defendants assert that their objection based on that difference should have been sustained. The only portion of the published article relied upon by the plaintiff was the part in italics, and the only difference between this portion and the corresponding portion of the translation admitted in evidence was that in the one case the word "mistress" was used, and in the other the word "concubine" was employed; but as the evidence further disclosed that this difference arose from the translation of the Japanese word "mekake" which might be rendered in either manner, the point cannot be held well taken.

[3] It was not necessary for the plaintiff to prove all the words alleged. She proved enough to establish her cause of action, and that is sufficient. 25 Cyc. 444, 447; *Townsend on Libel and Slander* (4th Ed.) § 365; *Fleet v. Tichenor*, 156 Cal. 343-345, 104 Pac. 458, 34 L. R. A. (N. S.) 323; *Carpenter v. Ashley*, 16 Cal. App. 302, 116 Pac. 983.

The judgment and order are affirmed.

We concur: LENNON, P. J.; HALL, J.

20 Cal. App. 146

PEOPLE v. SINGH et al. (Cr. 386.)

(District Court of Appeal, First District, California. Oct. 18, 1912.)

## 1. WITNESSES (§ 389\*) — IMPEACHMENT — FOUNDATION.

While a witness cannot be impeached by evidence of previous contradictory statements which he does not deny having made, that rule does not apply where the witness refuses to distinctly admit that he made the statements attributed to him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1243-1245; Dec. Dig. § 389.\*]

## 2. WITNESSES (§ 388\*) — IMPEACHMENT — INCONSISTENT STATEMENTS — FOUNDATION.

Under Code Civ. Proc. § 2052, providing that a witness may be impeached by previous inconsistent statements, but the statements must first be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, questions whether the witness made inconsistent statements in the presence of a number of deputy sheriffs, naming two of them, is a sufficient foundation for the admission of inconsistent statements made in a conversation with a sheriff.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1233-1242; Dec. Dig. § 388.\*]

## 3. CRIMINAL LAW (§ 798\*) — INSTRUCTIONS — REASONABLE DOUBT.

A request to charge that accused is entitled to the individual opinion of each juror, and that if any juror entertains a reasonable doubt of his guilt he should not vote for a verdict of guilty because a majority of the jurors believe accused to be guilty, correctly states the law.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1940, 1941, 1943; Dec. Dig. § 798.\*]

## 4. CRIMINAL LAW (§ 1173\*) — APPEAL — HARMLESS ERROR.

The refusal of a request which correctly states the law is not reversible error, where it does not appear from the whole case that a miscarriage of justice resulted; the request being only a cautionary charge, which was substantially embodied in the oath administered to the jurors.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3164-3168; Dec. Dig. § 1173.\*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Hajara Singh and Kaesar Singh were convicted of robbery, and from a judgment and an order denying their motion for new trial, they appeal. Affirmed.

Lewis H. Smith, of Fresno, for appellants.  
U. S. Webb, Atty. Gen., for the People.

LENNON, P. J. The defendants in this case were convicted of the crime of robbery, and have appealed to this court from the judgment, and from an order denying them a new trial.

The alleged error of the trial court in the admission of evidence, and the refusal to give certain requested instructions, are the only points presented and discussed in support of the appeal.

[1] The defendant Hajara Singh was called and testified as a witness in his own behalf. Upon direct examination he testified that he was at the place where the robbery occurred on the day that it was charged to have been committed. Upon cross-examination he was asked if he did not state, in the presence of several deputy sheriffs, on the day that he was arrested and brought into the sheriff's office, that he was not at the place of the robbery on the day of its commission. The defendant failed to give a direct answer to the question. The question was substantially repeated several times, but

upon each occasion the defendant to all appearances willfully evaded giving a direct answer. Thereupon the district attorney asked the general question, "Well, did a conversation of that kind occur down there in the jail?" Again the defendant dodged the question, and finally he was asked if he did not, "in the presence of a number of deputy sheriffs, Mr. Thorwaldson and Mr. Bartoff and others," say, in effect, that he was not at the scene of the crime at all on the day of its commission. To this question the defendant answered, "I did not say anything like that." At this point the defendants rested their case; and the prosecution called Walter S. McSwain, sheriff of Fresno county, who, when sworn as a witness, was asked if the defendant had said when he was arrested, in the presence of the sheriff and a number of deputy sheriffs, that "he was not out to the Truxwa place, or out where Kaesar Singh and Inder Singh and Ishar Singh was, on Christmas day." To this question counsel for defendants objected, among other things, that no proper foundation had been laid for it. The trial court overruled the objection, and permitted the witness to answer "for the purpose of impeachment, and not for any other purpose," that the witness had made the statement indicated in the question.

It is now insisted upon behalf of the defendants that no proper foundation was laid for the impeaching testimony, because the impeaching question put to the assailed witness made no reference to any conversation occurring in the presence of Sheriff McSwain, and also because the assailed witness neither affirmed nor denied that he had said the things imputed to him by the impeaching question.

It is true generally, as asserted by counsel for the defendants, that a witness cannot be impeached by evidence of previous contradictory statements which he does not deny having made; but this rule is subject to the qualification that such evidence is admissible if the witness does not distinctly admit that he made the statements attributed to him. *Jones on Evidence*, § 845; *Stephen on Evidence*, art. 131; *Stewart v. State*, 42 Fla. 591, 28 South. 815.

[2] In the present case the evidently evasive answers of the assailed witness to several of the questions put to him were tantamount to a refusal to admit the statements therein imputed to him; and this in itself was sufficient to warrant the people in showing, if they could, that he did make those statements. But, however that may be, his answer to the final question of the district attorney, that "he didn't say anything like that," relieves the situation of all doubt, and clearly made the impeaching evidence of Sheriff McSwain admissible, if the foundation question was otherwise sufficient. It



is a settled rule of evidence that before contradictory statements of a witness can be properly admitted in evidence for impeachment purposes the proper foundation therefor must be laid. The essentials of a sufficient foundation for the introduction of such evidence are to be found in section 2052 of the Code of Civil Procedure, which provides: "A witness may \* \* \* be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places and persons present; and he must be asked whether he made such statements, and, if so, allowed to explain them."

The rule requiring such foundation was designed for the purpose of fully informing the assailed witness of the particulars of the alleged contradictory statement, together with the circumstances of the time and place of its making, and the persons present, in order that the witness, in justice to himself and the party in whose behalf he was called, might fairly and intelligently deny, affirm, or explain the statements attributed to him. Accordingly the requirements of the rule under discussion are sufficiently complied with when it is made to appear, as was done in the case at bar, that the assailed witness understood the nature and purport of the contradictory statements imputed to him, and was fully informed of the time and place of their utterance, and knew generally who was present on the occasion referred to. In short, minor defects in the foundation question should not be seriously considered; and it will generally suffice in a foundation question to designate merely the name of the person to whom the statement was made, without naming all of the other persons who may have been present, if it is otherwise clear that the attention of the witness is called to the conversation in such a manner that it can with reasonable certainty be identified by him.

In the present case all of the several foundation questions put to the assailed witness specifically referred to the time and place of the alleged contradictory statements; and one, at least, of those questions called the witness' attention to a conversation claimed to have been had "in the presence of a number of deputy sheriffs, Mr. Thorwaldson and Mr. Bartoff and others." This, we are satisfied, constituted a sufficient foundation, within the spirit and purpose of the rule, for the subsequent introduction of the impeaching testimony given by the witness Sheriff McSwain. *Ludtke v. Hertzog*, 72 Fed. 142, 18 C. C. A. 487; *State v. Bartmess*, 33 Or. 110, 54 Pac. 167.

[3] The trial court refused to give certain requested instructions, which were to the effect that the defendant was entitled to the

individual opinion of each member of the jury, and that if any juror entertained a reasonable doubt of the guilt of the defendant he should not vote for a verdict of guilty, merely because a majority of the jurors believed the defendant to be guilty. These instructions were framed and requested in the very language of instructions similarly refused in the case of *People v. Dole*, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50. In that case the Supreme Court said that such instructions contained a correct statement of the law, and should have been given. This admonition was subsequently repeated in the concurring opinion of Mr. Chief Justice Beatty, in the case of *People v. Howard*, 143 Cal. 316, 323, 76 Pac. 1116; and in the case of *People v. Wong Loug*, 159 Cal. 520, 114 Pac. 829, the Supreme Court reiterated the propriety and justice of giving the same or a similar instruction in every criminal case. The verdict and judgment in each of the three cases just cited were reversed, but not because of the refusal to give the requested instructions. A reversal was ordered in each instance for other errors occurring at the trial which, apparently, affected the substantial rights of the defendant.

[4] While the opinion of the Supreme Court, as expressed in those cases, is binding upon us, and should have controlled the trial court in its application of the law to the facts of the present case, nevertheless we are satisfied that the mere failure to charge the jury as requested was not, in and of itself, an error of sufficient gravity to warrant a reversal. The subject-matter of the requested instructions was substantially embodied in the oath administered to the jurors "that they and *each* of them" would "well and truly try the matter at issue \* \* \* and a true verdict render according to the evidence." The requested instructions were, in effect, simply admonitory and cautionary of the sworn duty of the jurors, and merely told them to do what they should do without any instruction upon the subject. We apprehend that if the refusal to give such an instruction was the only point involved in the case of *People v. Dole*, supra, and the other cases following it, the judgment in those cases would not have been reversed. If that be so, then it must be held here that, although the refusal to give similar instructions in the present case was error, it was not an error which, standing alone, requires a reversal of the judgment. Moreover, we are unable to say, after an examination of the entire case, including the evidence, that the error complained of resulted in a miscarriage of justice.

No other error appearing in the trial of this case, it is ordered that the judgment and order appealed from be affirmed.

We concur: HALL, J.; KERRIGAN, J.

20 Cal. App. 184

**BREIDENBACH et al. v. M. McCORMICK CO. et al. (Civ. 976.)**

(District Court of Appeal, Third District, California. Oct. 22, 1912. Rehearing Denied by Supreme Court Dec. 20, 1912.)

**1. APPEAL AND ERROR (§ 356\*)—TIME—DISMISSAL.**

An appeal from the judgment taken more than six months after entry thereof will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1926, 1927; Dec. Dig. § 356.\*]

**2. MUNICIPAL CORPORATIONS (§ 706\*)—USE OF STREETS—RUNAWAY HORSE—NEGLIGENCE.**

When a horse runs away unattended in the streets of a city, and in its course injures a person without his fault, a prima facie case of negligence is shown.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

**3. MUNICIPAL CORPORATIONS (§ 706\*)—USE OF STREETS—RUNAWAY HORSE—EVIDENCE OF NEGLIGENCE.**

In an action for personal injuries caused by a runaway horse, evidence of negligence held to render a nonsuit error.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

**4. APPEAL AND ERROR (§ 241\*)—MOTIONS—REVIEW.**

On appeal from a nonsuit granted on the sole ground that plaintiff had proved no negligence, the court cannot review a question of variance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1413-1416; Dec. Dig. § 241.\*]

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by Joseph Breidenbach and another against the M. McCormick Company and another. Judgment for defendants, and plaintiffs appeal. Reversed.

Webster, Webster & Blewett, of Stockton, for appellants. Clary & Louttit, of Stockton, for respondents.

**CHIPMAN, P. J.** Plaintiffs alleged in their complaint that on the 13th day of September, 1909, plaintiff, Nellie Breidenbach, was driving along the streets of the city of Stockton in a carriage drawn by one horse; that defendants were then the owners of a horse and wagon which were in the control and possession of defendants; "that the said horse belonging to the defendants was an unruly, fractious, and vicious horse and well known to the defendants to be such an unruly, fractious, and vicious horse; that the defendants carelessly and negligently left said horse and wagon without a driver upon the public highway of the said city of Stockton, and that, by reason of said carelessness and negligence on the part of the defendants, the said horse then being attached to the said wagon ran away, and struck the carriage in which the plaintiff, Nellie Breiden-

bach, was driving along the highway, and overthrew the same, and threw the plaintiff, Nellie Breidenbach, out of the carriage upon the ground, whereby the plaintiff, Nellie Breidenbach, was bruised, wounded, and lacerated, and was for about 15 days confined to her bed, and is still suffering as a result of said bruising, wounding and lacerating, to the damage of plaintiffs in the sum of \$1,000." Defendants, in their answer, admit ownership of the horse and wagon, and that they were in the possession and control of their employé, O'Dell, at the times mentioned in the complaint. But they deny each and all the material averments of the complaint imputing negligence. The cause was tried by the court sitting without a jury, and at the conclusion of plaintiffs' evidence the court granted defendant's motion for a nonsuit on the ground stated in the motion, to wit, "that no negligence whatever has been proven against the defendants." A motion for a new trial was denied, and defendants had judgment. Plaintiffs appeal from the judgment and order denying their motion for a new trial.

[1] The judgment was entered on April 1, 1911, and notice of appeal was served and filed on March 1, 1912. The appeal from the judgment, having been taken more than six months after entry of judgment, may be dismissed. *Brownlee v. Reiner*, 147 Cal. 641, 82 Pac. 324; *Sheakley v. Nelson*, 13 Cal. App. 379, 109 Pac. 891; Code Civ. Proc. § 939. The only points available to appellants are that there was sufficient evidence on the question of defendants' negligence to go to the jury; that it was error to grant the nonsuit; and that errors of law were committed in the rulings of the court in the omission or rejection of evidence which would warrant a reversal of the order refusing to grant a new trial.

The evidence on which appellants rely as tending to show negligence of defendants is found in the testimony of the plaintiff, Mrs. Breidenbach, and witness Charles Turner. As there is not much of it, we will set out all that is found in the record. Mrs. Breidenbach was riding in a buggy with her mother along Center street, in Stockton. She testified: "A. Near the center of Center street, and there was several buggies tied to the right of the street, and naturally I had to turn out of their way, and I don't know, I saw—there was some collision in the street. I saw Mr. Turner waving his hands, and several people screaming, but I did not just understand what they was saying, and I said there was something wrong, speaking to Mother. She looked back, and at the same time I glanced back, and I said 'My goodness.' There was a runaway coming behind us; right behind us, and we were to our right, and my idea was—I told Mother 'just



be careful, don't touch the lines'— \* \* \* Q. Just go ahead and tell what happened, Mrs. Breidenbach. A. As I said, I told my mother to leave me alone; and I thought I could get out of the way of it, but I had to be very careful on account of the car tracks, not overturn our buggy. And I thought I could get out and beat the horse. But the next thing I realized was I saw that black mare alongside of us. I saw my mother thrown into the street. I did not think I was going to be thrown out at the time. I did not realize what was happening. In the next minute I was lying in the street. \* \* \* Q. Now, at that time, or when you looked back at this runaway, did you see whether or not there was a driver on the wagon? A. There was no driver on the wagon. I am positive of that."

Witness Turner also testified to this latter fact. He testified that he was working in defendants' stable at the time, was familiar with their horses, and had helped hitch them up, and of this particular horse he said he had "hitched it up lots of times." He was asked to tell what he saw of the accident, and answered: "I was washing the wagon. I saw the horse. I came to the front of the door, on the east side; that is, in front of the barn on the east side. I looked down and saw the horse coming from Weber avenue. I seen the horse coming running. That was about I guess 300 or 400 feet down, and Mrs. Breidenbach and her mother \* \* \* were driving in front of the barber shop across the street. This was about 150 yards coming to them on the full tilt. I hollered to them 'Drive on,' ran out on the street, and hollered to them 'Drive on.'" He testified that, shortly after seeing Mrs. Breidenbach, the wagon drawn by the running horse struck her buggy, and she and her mother were thrown out. Witness followed up the running horse to the point not far away where "they caught her down there, and I went and got her. I led her—she was out of the harness almost. \* \* \* Q. When you got her, did she have a halter on? A. No; she didn't have a halter. When I used to send the horse out, I most generally always sent one of these little ropes with her, to tie with. Sometimes it was in the wagon and sometimes it was on her neck. Q. When you found her that day did she have a halter? A. Had a little rope around its neck, and I led her back. Q. Was that rope complete? A. The rope was tied up on the hames. Q. It was not dragging, or anything of that kind? A. No, sir; nothing but the lines dragging, that is all I seen was dragging. \* \* \* Q. Were you acquainted with the character of that horse, the kind of horse it was? A. Well, it was a mare not all the time liable to be trusted, I will say that." He was asked again to tell what kind of a horse that was. "A. Well, she

was a mare that sometimes you could go in the stall with her, sometimes you could not, just according to how she felt or anything. She was liable to pull back on you sometimes, or anything else. Q. I will ask you whether or not you know of your own knowledge whether that horse had ever run away before this particular runaway? A. Not before this particular runaway, I don't think so." He was asked if she ran away after that, but his answer was not responsive to the question and was stricken out.

From the testimony, and we have stated all that had any immediate or remote bearing upon the question of negligence, plaintiffs present the matter in the following concrete form: "The conditions governing the case at bar are that the horse and wagon belonging to the defendant was running away unattended and the hitching strap was not loose and dragging, but was fast to the hames. Such was the testimony of the witness Turner. Everything, therefore, indicated negligence on the part of the defendants or their employé, and we maintain the burden was thrown upon the defendants to show that the horse was attended or was properly secured, or that his running away was wholly without fault of the defendants or their employé."

Just what significance should be attached to the fact that the hitching strap was not dragging when the horse was found, but was made fast to the harness, is not easy to determine. The inference appellants would draw is that the condition of the hitching strap indicated that the horse was not tied or secured in any way by it when the horse ran away or the hitching strap would have been dragging, which in the latter case might indicate that the horse had been tied and had broken loose.

[2] However, the point principally relied on is that when a horse runs away unattended in the streets of a city, and in its course injures a person without his fault, a prima facie case of negligence on the part of the owner of the horse is shown. An examination of the authorities and our own conception of what the law ought to be convince us that appellants' position is the correct one, and that the court erred in granting the nonsuit.

The responsibility of the owner of a horse for an injury committed by it begins at the moment the owner takes the horse from its stall. He is presumed to know how he handled the horse, what he did with it, and when and how it escaped from him, if it runs away. These are facts not within the knowledge of the injured person who first sees the horse as it is about to run over him. It may be that the only witness to the cause of the runaway was the owner or driver. The horse may have started because left unhitched; or it may have taken fright

from some defect in hitching it to the wagon, or from the wagon itself, or from some part of the harness giving way, or from some object at the roadside, or from careless driving, or from some other of the numerous causes of runaways. It would be an exceptional case of a runaway in which the driver or owner could not explain the cause. But the plaintiff ought not to be put to the risk of resting his recovery upon the testimony of the guilty party. The rule laid down in *Judson v. Giant Powder Co.*, 107 Cal. 556, 40 Pac. 1021, 29 L. R. A. 718, 48 Am. St. Rep. 146, was as follows: "When a thing which causes the injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from the want of care."

Defendants admit ownership and possession of the horse on the day of the accident. They admit that the horse was in the custody and control of their servant, O'Dell. O'Dell's deposition was taken by plaintiffs and offered in evidence but, on objection of defendants, the court properly, we think, denied its admission. It was admitted, however, that the deposition was regularly taken before a notary public and transcribed by the stenographer, but, before it had been read over and signed by the witness, he committed suicide. The deposition is not included in the bill of exceptions. If any inference could be indulged from this circumstance, it would be that probably the witness who could explain the cause of the runaway had made an explanation unfavorable to defendants, and hence the objection to its admission. We are not permitted to speculate as to the purport of this deposition. But this untoward event lends some support to the view we entertain that, in such case as this, the plaintiffs should not be forced to prove that the runaway was caused in its inception by defendants.

Recurring to the rule in the *Giant Powder Company Case*, supra, we have here a horse and wagon that were concededly under the "management" of the defendants' driver. We do not understand that this management must be shown to have existed at the moment of the accident. The accident was "such as in the ordinary course of things does not happen if those who have the management use the proper care." (Horses do not in the ordinary course of things run away. If they did, their use would have to be prohibited.) It seems to us the rule alluded to should apply here.

It was held by the Supreme Court in *Rowe v. Such*, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760, that the rule in the *Giant Powder Company Case*, supra, did not apply to the

facts in the *Rowe Case*. In that case, which is relied upon by appellants, the horse was not unattended. The driver was on the wagon at the time the horse started to run, and he was thrown off the wagon. There was no evidence showing fault of the driver. All the facts were before the jury and there was nothing shown from which negligence could be imputed to the driver. Hence the rule had no application.

[3] But, whether this particular rule should apply or not, we think that, under the circumstances here appearing, there was sufficient evidence of negligence to call for an explanation by the defendants and that the court erred in granting the motion for nonsuit. Let us turn for a moment to what the courts have said. The decisions are generally to the effect that the running away of horses where no driver is present creates a *prima facie* case of negligence on the part of the owner. Where, however, a horse runs away with his driver, it has been held that there is nothing in that fact itself to show negligence on the part of the driver. 29 Cyc. 595. Generally, negligence will not be presumed from the mere fact that a horse ran away, unless the horse was unattended. 6 *Thompson on Negligence*, § 7665. We do not consider those cases where the horse is attended by his driver, although we find that they are sometimes inappropriately referred to as sustaining a view contrary to that we have taken. It must be remembered, too, that in some states negligence is a question solely with the jury, and the court is not permitted to say that certain facts constituted negligence *prima facie*, and thus remove the case from the jury. This is the rule in Connecticut and cases from that jurisdiction, such as *Button v. Frink*, 51 Conn. 342, 50 Am. Rep. 24, cited in *Rowe v. Such*, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760, relied on by respondents, and *O'Brien v. Miller*, 60 Conn. 214, 22 Atl. 544, 25 Am. St. Rep. 320, cannot be used to support the position taken by defendants. In *Gorsuch v. Swan*, 109 Tenn. 36, 69 S. W. 1113, 97 Am. St. Rep. 836, it was held that when a team is found running away, unattended, upon a public thoroughfare, and doing hurt to one lawfully thereon, negligence is *prima facie* imputable to the owner from this fact alone.

In *Gannon v. Wilson*, 1 *Sadler (Pa.)* 422, 5 Atl. 381, the charge of the trial court was approved that "when a horse and wagon are found running along, without a driver, upon the sidewalk of a public street, and injury to another person or his goods is caused by it, it is *prima facie* evidence of negligence on the part of the owner." The court held that it is the duty of the owner of a horse not voluntarily to permit it to run on the sidewalk of a public street, and, when so found, the owner must rebut the presumption of negligence arising therefrom.

It was held in *Crawford v. Upper*, 16 Ont. App. Rep. 440, that the fact that a horse



runs away in a city street, and does injury, shows a prima facie case of negligence which calls for explanation on the part of the defendant owner, and a nonsuit was held erroneous.

In *Unger v. Forty-Second St. Ferry, etc.*, 51 N. Y. 497, a team of horses became detached from one of the defendant's cars and ran away, injuring the plaintiff. No proof was offered to show how the horses became detached from the car, or as to the cause. The court said this was sufficient to make out a prima facie case, and the fact that the horses were unattended and unfastened in the street was, unexplained, evidence of negligence against the defendant, and hence no error was committed in refusing to nonsuit the plaintiff at the close of the evidence.

*Hummell v. Wester, Brightly, N. P. (Pa.)* 133, was similar to *Gannon v. Wilson, supra*, and it was held that the law presumes negligence on the part of the owner of a horse attached to a wagon or carriage, found running away on a city sidewalk, and it lies upon the owner to show that there was no fault on his part.

In the case of *Watson v. Weekes*, it was held, as stated in *Tolhausen v. Davies*, 59 L. T. N. S. 436, that upon proof that defendant's horse harnessed to a cart, unattended, running along a highway, whereby the plaintiff, being lawfully thereon, was injured, a judge could not rightly nonsuit, for such facts were more consistent with the absence of ordinary care in the superintending a horse, than with such care having been used.

*Snee v. Deerkie*, 6 F. (Ct. Decisions) 42 (England), cited in 1 *Butterworth's Dig.* 67, held that a presumption (though a rebuttable one) of negligence arises if a runaway horse and carriage knock a person down in a public street.

The fact that a team of runaway horses was found dashing along a public highway, without attendance of the owner or his servants, was held, in *Kokoll v. Brohm & B. L. Co.*, 77 N. J. Law, 169, 71 Atl. 120, to raise a presumption of negligence in their management and care which will render the owner liable, in the absence of explanation, for injuries caused by their unrestrained acts. Followed in *Francois v. Hanff*, 77 N. J. Law, 364, 71 Atl. 1128.

In *Pearl v. Macaulay*, 6 App. Div. 70, 39 N. Y. Supp. 472, the court said: "This is an action to recover for personal injuries. The plaintiff, while crossing a street in the city of Brooklyn, was knocked down and run over by the defendant's horse and wagon. At the time of the accident the horse and wagon was unattended by any person. On proof of those facts the plaintiff presented a prima facie case of negligence on the part of the defendant. *Unger v. Forty-Second St.,*

*etc.*, R. Co., 51 N. Y. 497; *Doherty v. Sweetser*, 82 Hun, 556, 31 N. Y. Supp. 649. The defendant therefore was called upon to explain how it was that the horse was running at large without fault on his part."

In a Louisiana case it was held that: "The fact that a team is found running away upon the streets of a city without a driver requires explanation as to how and why this should have been, and if the driver is not produced as a witness, or his absence accounted for, it is fair to presume that no satisfactory explanation could have been given." *Maus v. Broderick*, 51 La. Ann. 1153, 25 South. 977.

There would seem to be a peculiar hardship in the present case to deny the plaintiff the benefit of this rule, for she endeavored to show by the driver himself what the explanation was and was deprived of his testimony, on objection of defendants, by the suicide of the witness before he had the opportunity to read his deposition and sign it. The plaintiff in our opinion was not called upon to make any explanation of the cause of the running, but that this duty devolved upon defendants. See, also, *Howley v. Kraemer*, 36 Misc. Rep. 190, 73 N. Y. Supp. 142; *Kelly v. Adelman*, 72 App. Div. 590, 76 N. Y. Supp. 574; *Manzoni v. Douglas*, L. R. 6 Q. B. Div. 145.

It is freely admitted that, on the principal question discussed, there are cases holding squarely to the rule contended for by respondents. But the weight of authority is clearly the other way, and, if it were not, we should still adhere to the views herein expressed.

[4] Respondents call attention to the complaint, and claim that there was no evidence of any kind that defendants had "left said horse and wagon unsecured and without a driver upon the public highway in the city of Stockton," or "that the defendants carelessly and negligently left said horse and wagon unsecured and without a driver upon the public highway," etc. It is said the proof is at variance with the pleadings, and hence the court was justified in granting the nonsuit. The only ground for the motion for nonsuit was "that no negligence whatsoever has been proven against the defendants." We have endeavored to show that plaintiffs made out a prima facie case of negligence. The motion was not on the ground of variance between the proofs and pleadings. The reviewing court is not at liberty to consider any ground which was not stated in the motion. *Shain v. Forbes*, 82 Cal. 577, 583, 23 Pac. 198.

The judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

164 Cal. 296

**HENDERSON v. DE TURK.** (L. A. 2,887.)  
(Supreme Court of California. Dec. 5, 1912.)

**1. TAXATION (§ 758\*)—TAX DEEDS—STATUTORY PROVISIONS.**

Under Pol. Code, § 3785, requiring deeds to the state on account of delinquent taxes to recite the name of the person assessed, the deed must recite such name as it appears on the assessment roll.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1508; Dec. Dig. § 758.\*]

**2. TAXATION (§ 757\*)—TAX DEEDS—RECITALS.**

A tax deed which misrecites or omits to recite any of the facts required by statute is ineffectual as a conveyance, since where the statute prescribes the form of the instrument, which, as the result of a proceeding in invitum, can alone divest the citizen of his title, the form becomes substance, and must be strictly pursued, regardless of what the courts may think as to its materiality.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1507; Dec. Dig. § 757.\*]

**3. TAXATION (§ 758\*)—TAX DEEDS—RECITALS.**

Under Pol. Code, § 3785, requiring deeds to the state on account of delinquent taxes to state the name of the person assessed, such a deed reciting the name of such person as "E. W. Davies" was void, where the assessment was to "E. W. Davis."

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1508; Dec. Dig. § 758.\*]

**4. COURTS (§ 93\*)—FORCE OF PREVIOUS DECISIONS—RULES OF PROBATE.**

Previous decisions of the courts as to the invalidity of tax deeds not in compliance with the statute constitute a rule of property from which the court should not depart.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 336-339; Dec. Dig. § 93.\*]

**5. TAXATION (§ 758\*)—IDEM SONANS.**

The rule of idem sonans has no application to tax proceedings which, to be valid, must closely follow the statute.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1508; Dec. Dig. § 758.\*]

**6. TAXATION (§ 770\*)—TAX DEEDS—RECITALS.**

The failure of a deed to the state on account of delinquent taxes to recite correctly the name of the party assessed is not cured by Pol. Code, § 3628, providing that no mistake in the name of the owner of real property shall render the assessment thereof invalid, nor by section 3807, providing that, when land is sold for taxes correctly imposed as the property of a particular person, no misnomer of the owner or supposed owner or other mistake relating to the ownership affects the sale or renders it void or voidable, since the first relates only to an assessment, and the second to a sale, and neither refers to a tax deed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1537, 1538; Dec. Dig. § 770.\*]

**7. TAXATION (§ 788\*)—TAX DEEDS—EFFECT AS EVIDENCE.**

Under Pol. Code, § 3787, providing that a tax deed is conclusive evidence of the regularity of all other proceedings from the assessment to the execution of the deed, such a deed is conclusive only when it conforms to the requirements of the law.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1555, 1557, 1559-1569; Dec. Dig. § 788.\*]

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by H. G. Henderson, administrator of John J. Davies, deceased, against J. G.

De Turk. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

C. A. Stice, of Los Angeles, for appellant. Carter, Kirby & Henderson, of Los Angeles, for respondent.

**PER CURIAM.** Appeal from a judgment in favor of plaintiff and an order denying motion for new trial in an action to quiet title to certain real property in Los Angeles county.

Defendant claims solely under a deed from the state based on a sale and alleged deed to the state on account of delinquent taxes. The deed to the state recited the name of the person assessed as "E. W. Davies," while the assessment was to "E. W. Davis."

[1-3] The law in force both at the time of the sale and the time of the execution of the deed provided that the deed to the state must recite, among other things, "the name of the person assessed." Section 3785, Pol. Code. This means, of course, the name of the person assessed as it appears upon the assessment roll. It has uniformly been held in this state that a tax deed which misrecites or omits to recite any one of the facts required by the statute to be recited has no effect at all as a conveyance, the theory being that it is competent for the Legislature to prescribe the form of instrument which, as the result of a proceeding in invitum can alone divest the citizen of his title, and that, where the statute prescribes the particular form of the tax deed, the form becomes substance, and must be strictly pursued, and it is not for the courts to inquire whether the required recitals are of material facts or otherwise. See *Baird v. Monroe*, 150 Cal. 560, 564, 89 Pac. 352, and cases there cited. The particular point here involved was decided in *Grimm v. O'Connell*, 54 Cal. 522, where the assessment was to "Charles Grimm," and the tax deed recited that the property was assessed to "Charles Grimm and all owners or claimants known or unknown." It was held, upon the theory above stated, that the deed was void because it failed to correctly recite the name of the person assessed. There are other decisions holding that any such deed is void when it misrecites or omits to recite any one of the facts required by statute to be recited therein, and there is no decision laying down a different rule.

[4] As is substantially said in respondent's petition for a rehearing, these decisions constitute a rule of property from which the court should not depart.

[5] The deed cannot be held valid by applying the rule of idem sonans, if we are to adhere to the ruling in *Emeric v. Alvarado*, 90 Cal. 444, 465, 27 Pac. 356. There the assessment was to "Castero," while the owner's name was "Castro." The court said: "It



is not a case to which the rule of *idem sonans* applies. Tax proceedings are in *invitum*, and, to be valid, must closely follow the statute, and *idem sonans* applies to cases of pleas of misnomer and issues of identity, where the question is whether the change of letters alters the sound—not to assessments and other cases of description, where the written name is material. 'Different letters will make different names, though the sound be the same.' The deed to Pollard described the land sold as having been assessed to 'Castro,' and does not purport to be made in pursuance of an assessment to 'Castero.' While there is a diversity of opinion in other jurisdictions on this point, we think this ruling should be followed in this state.

[6] The failure of the deed to the state to recite correctly the name of the party assessed is not remedied or cured by either section 3807 or 3628, Political Code. Section 3628 refers only to the "assessment." Under it, an "assessment" is not rendered invalid by reason of a mistake in the name of the owner. Section 3807, Political Code, provides: "When land is sold for taxes correctly imposed as the property of a particular person, no misnomer of the owner, or supposed owner, or other mistake relating to the ownership thereof, affects the sale, or renders it void or voidable." This section has existed in its present form ever since the codes were adopted in 1872, and was the law when the deed involved in *Grimm v. O'Connell*, *supra*, was held invalid. It was cited in the argument in that case. It does not purport to apply to the deed made in pursuance of the sale, and, as the law now stands, five years thereafter in the event that no redemption has been had, and cannot be held to dispense with the requirement that the deed shall correctly recite the name of the person to whom the property was assessed, as a condition to its validity. Until a valid deed is made to the state, the state cannot sell the property to another (section 3897, Pol. Code), and the owner has the right to redeem at any time prior to a valid sale by the state (section 3780, Pol. Code).

[7] Section 3787, Political Code, makes such a tax deed evidence of the regularity of such proceedings as are named therein only when it is a deed conforming to the requirements of the law.

The learned judge of the trial court did not err in holding that the deed was invalid.

The judgment and order denying a new trial are affirmed.

164 Cal. 291

SMITH v. WOODS et al. (S. F. 5,866.)  
(Supreme Court of California. Dec. 3, 1912.)

1. JUDGMENT (§ 576\*)—CONCLUSIVENESS—ERRORS.

In an action on notes alleged by defendants to have been procured by fraud, the court

properly refused defendants' offer of the reporter's record of the testimony in the trial of a former case, wherein a judgment for a cancellation of the same notes for the same fraud was denied to defendants; such judgment being *res judicata*, regardless of nonjurisdictional errors.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1003-1007; Dec. Dig. § 576.\*]

2. BILLS AND NOTES (§ 452\*)—DEFENSES—INDORSEMENT TO ANOTHER.

Where plaintiff was the owner and in possession of the notes sued on, it was no defense that they bore an indorsement of an order to pay to another.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1352-1364, 1367-1376; Dec. Dig. § 452.\*]

Department 2. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by H. O. Smith against J. R. Woods and others. From judgment for plaintiff and denial of new trial, defendants appeal. Affirmed.

Henry Hawson and E. A. Williams, both of Fresno, for appellants. Frank H. Short and F. E. Cook, both of Fresno, for respondent.

MELVIN, J. Defendants appeal from a judgment against them, and from an order denying their motion for a new trial. The action was upon three promissory notes, each for the principal sum of \$1,200. Plaintiff herein sued as an assignee of the notes, for a valuable consideration, before maturity, and as one who received them in good faith. The defense alleged was that the notes had been obtained by J. B. McCrairie, the payee thereof, by false and fraudulent representations in a transaction involving the sale of a certain stallion; that plaintiff had been a party to the fraud; and that he had taken the instruments in question with full knowledge of their fraudulent taint.

[1] Defendants rely upon two assignments of error in asking for a reversal of the judgment against them. These are: (1) That the court erred in excluding certain evidence offered to prove the alleged fraud which induced the making of the notes; and (2) that one of the notes was improperly admitted in evidence, because, as appellants contend, the real owner was not a party to this suit. There had been another action, entitled *Woods et al. v. McCrairie*, in which the plaintiffs were the persons who appear as defendants here. That was a suit to cancel the notes here involved. The complaint therein contained the identical allegations of fraud which were set forth in the answer in this case. At the trial of this case counsel for defendants offered the reporter's record of the testimony received in the trial of the former case. Plaintiff's counsel made no objection to the form of the offered testimony, but opposed its admission upon the ground that the defense sought to be established thereby had been passed upon by the court in the former action and adjudicated

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

adversely to the contention of these defendants; a judgment having been entered in the earlier action to the effect that this plaintiff had acquired the notes for a valuable consideration, before maturity, as a purchaser in good faith. This objection was properly sustained by the court. Much of appellants' brief is devoted to a discussion of the alleged errors committed in *Woods et al. v. McCrairie*. If there were material errors in that trial, they would have been available upon the appeal of that cause; but they have no place here, where all of the evidence taken in that case was offered in bulk as there received. No matter what the condition of the record in *Woods et al. v. McCrairie* may have been, the ultimate fact remained that upon the evidence adduced in the trial of that cause the court, acting within its proper jurisdiction, had entered a judgment against the plaintiffs therein, and that was a subsisting judgment at the time of the trial of this cause.

[2] There is nothing in the other point made by appellants that plaintiff, H. O. Smith, is not the real party in interest in the action upon one of the notes. This is based entirely upon the fact that the note in question bore an indorsement of an order to pay the sum mentioned therein to John W. and Edgar W. Loyd. This is signed by the plaintiff, but he swore that the note was his property, acquired September 20, 1909; that it had never been out of his possession; that while the purported assignment had been written by him the note had never been delivered to the Loyds. In the absence of bad faith, an action upon a note cannot be defended upon the ground that the title is not in the plaintiff, if plaintiff has possession, and defendant would be protected by the payment of any judgment on the note. *Dyer v. Sebrell*, 135 Cal. 597, 67 Pac. 1036; *Naglee v. Lyman*, 14 Cal. 453; *Bank of Lassen County v. Sherer*, 108 Cal. 513, 41 Pac. 415. It has been held that even the owner of the equitable right to a part of the proceeds of a note is not a necessary party to an action on the note. *Curtis v. Sprague*, 51 Cal. 239; *Caldwell v. Lawrence*, 84 Ill. 161.

The judgment and order are affirmed.

We concur: HENSHAW, J., LORIGAN, J.

164 Cal. 287

FOX et al. v. HALL et al. (S. F. 5,688.)  
(Supreme Court of California. Dec. 2, 1912.)

1. TRIAL (§ 139\*)—NONSUIT—EVIDENCE.

In an action for the proceeds of a ranch and for general relief through an accountant,\* the fact that, while the plaintiffs proved the gross income from the ranch, they failed to prove the expenses, did not justify a nonsuit; they being entitled to any relief consistent with

the case made out by their complaint and embraced within the issues.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341, 365; *Dec. Dig.* § 139.\*]

2. ACCOUNT (§ 3\*)—RIGHT OF ACTION.

Where a defendant takes possession of plaintiffs' ranch under a contract providing that he shall pay all taxes, and apply the net income until a mortgage on the ranch is paid, and receives the income therefrom, but fails to make the payments as agreed, the plaintiffs are entitled to an accounting.

[Ed. Note.—For other cases, see *Account*, Cent. Dig. §§ 10-12; *Dec. Dig.* § 3.\*]

3. ACCOUNT (§ 20\*)—STATING—REFERENCE.

Where an accounting is required, the court may order same through a reference, or may, with or without a preliminary interlocutory order, proceed to take and state the account itself, rendering such final judgment thereon as may appear to be proper.

[Ed. Note.—For other cases, see *Account*, Cent. Dig. §§ 109-131; *Dec. Dig.* § 20.\*]

In Bank. Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by Henry Fox and others against L. J. Hall and others. From judgment of nonsuit, plaintiffs appeal. Affirmed in part, and reversed in part.

James W. Oates, of Santa Rosa, for appellants. J. T. Coffman, of Healdsburg, and A. B. Ware, of Santa Rosa, for respondents.

PER CURIAM. From the judgment which followed the granting of defendants' motion for a nonsuit, plaintiffs appeal.

The averments of plaintiffs' complaint essential to this consideration are the following: Lola Fox (wife of plaintiff, Henry Fox), her brother, Clarence C. Hall, and her sister, Rosa E. Patchett, defendants herein, were the owners in fee as tenants in common, each seized of an undivided one-third of a certain ranch in Sonoma county. The ranch was incumbered by a mortgage securing an indebtedness of some \$29,000, due the William Hill Company, a corporation. Lola Fox died in 1905, and her husband, Henry Fox, became administrator of her estate which in due course was distributed in equal shares to the heirs of Lola Fox, namely, her husband and her children, Chrystal Fox and Elizabeth Fox. In February, 1905, and before administration upon the estate of Lola Fox, but after her death, Henry Fox and Chrystal Fox, entered into a written agreement with L. J. Hall, the father of Lola and of Clarence C. Hall and Mrs. Patchett. This agreement provided that the undivided interest of Lola Fox, deceased, in the ranch above mentioned (which interest by her death had descended to Henry Fox, Chrystal Fox and Elizabeth Fox) should "remain in the custody and control of said L. J. Hall, and to his use, during his natural life, provided and so long as said Clarence C. Hall and Rosa E. Hall (now Patchett) take no steps to divide or partition the said lands. But during the time the same shall so remain in the custody and control

\*For other cases see same topic and section NUMBER in *Dec. Dig.* & *Am. Dig. Key-No. Series* & *Rep'r Indexes*  
Cal. Rep. 127-130 P.—21



of said L. J. Hall he is to pay all taxes on the same and shall pay upon the mortgage debt now subsisting against the same the net income from the same until said mortgage debt is paid off." The complaint then alleges the receipt of large sums of money annually by L. J. Hall as the net income of the ranch, his failure to devote any portion of this net income to the payment of the mortgage debt, the foreclosure of the mortgage and the compulsory payment by the administrator of the estate of Lola Fox of \$11,314.70, the one-third part of the mortgage debt at the time of foreclosure. Specifically it is averred that in the year 1905 the net income of the said one-third interest in said lands so received by L. J. Hall was \$5,000, in the year 1906, \$5,000, and in the year 1907, \$6,500, and it is further averred that no part of this income had ever been paid over to plaintiffs or for their use.

It is further charged that the defendants Clarence Hall and Rosa Patchett knew of the agreement, knew of their father's intent, alleged in the complaint to have existed when he made the agreement, not to perform his covenant to pay the net income upon the mortgage debt, and that they joined with and assisted their father to dispose of all the net income by expending it for improvements upon lands belonging to Clarence and Rosa, and that defendants Clarence and Rosa became the purchasers at the foreclosure sale. It is also alleged that L. J. Hall is insolvent. For relief plaintiffs demanded a judgment against L. J. Hall for the sum of \$11,314.70, with interest, and a lien upon the ranch property now owned by Clarence and Rosa for whatever part of this \$11,314.70 L. J. Hall had expended for improvements upon it. A like lien is sought upon other real estate owned by Clarence and Rosa for such portion of the net income as might have been by Hall expended upon these lands. There was also a prayer for general relief. The complaint was unverified. L. J. Hall made answer by general denial. Clarence and Rosa answered separately by general denial, and further pleaded a specific defense not necessary to set forth.

The evidence was clearly insufficient to have supported any judgment against Clarence Hall or Rosa Patchett, and, so far as these defendants are concerned, the motion for nonsuit was properly granted. They were not parties to the contract upon which the claim of plaintiffs is founded. The theory of the complaint apparently was that the lands of Clarence and Rosa should be held for the amount of net income expended thereon by L. J. Hall, because L. J. Hall had, with their knowledge, made this agreement without intending to perform it, and because he was insolvent, and therefore unable to compensate plaintiffs by a payment to them of an amount equal to the net income which he had failed to apply to the satisfaction of the mortgage debt. We need not inquire whether this theory is well founded in law, since

there was no attempt to introduce evidence in support of the supposed facts on which it rests. The record contains no testimony tending to show that L. J. Hall, when he made his agreement, intended to violate it, or, by necessary consequence, that his codefendants knew of such intent. Nor is there any evidence to sustain the allegation of insolvency.

With respect to the defendant L. J. Hall, the case presents a different aspect. The plaintiffs introduced evidence tending to show the making of the contract as alleged, the occupancy of the ranch by L. J. Hall, the receipt of large sums of money derived from the sale of products of the ranch, the failure on the part of L. J. Hall to pay any part of the mortgage debt, and the satisfaction by the estate of Lola Fox of one-third of the mortgage, amounting to \$11,314.70.

[1] There was, however, no proof of the expenses incurred in operating the ranch; in other words, the plaintiffs made a showing of gross income, but none of net income realized. They failed, therefore, in establishing their allegation that L. J. Hall had received sufficient net income to have paid off the mortgage, or any part of it, and were not, as the proof stood when they rested, in a position to demand judgment against L. J. Hall for any specific sum. But the fact that they were not entitled to all the relief which they had asked did not justify a nonsuit. The complaint closed with a prayer for general relief. It is the right, indeed the duty, of the court, to grant any relief consistent with the case made by the complaint and embraced within the issues. Code Civ. Proc. § 580; *Hurlbutt v. N. W. S. S. Co.*, 93 Cal. 55, 28 Pac. 795; *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786.

[2] The contract between the plaintiffs and L. J. Hall, followed by his possession of their property and the management thereof, entitled them to an accounting from him of such management, and of the receipts and disbursements, to the end that they might then demand the payment of any net income which should have been applied to the reduction of the mortgage debt. The facts alleged and proved showed the existence of a fiduciary relation sufficient to invoke the jurisdiction of a court of equity to compel an accounting, which, as the evidence shows, had been demanded of the defendant L. J. Hall. 1 Cyc. 427; *Wooster v. Nevills*, 73 Cal. 58, 14 Pac. 390; *Green v. Brooks*, 81 Cal. 328, 22 Pac. 849; *San Pedro Lumber Co. v. Reynolds*, 111 Cal. 588, 44 Pac. 309; *Coward v. Clanton*, 122 Cal. 451, 55 Pac. 147. Upon such accounting, the burden would probably be upon the said defendant to establish any expenditures or credits upon which he might rely as offsets to the gross income shown to have been received by him. 1 Cyc. 448; *Marvin v. Brooks*, 94 N. Y. 71; *Thatcher v. Hayes*, 54 Mich. 184, 19 N. W. 946. But, be that as it may, the plaintiffs were entitled to

an accounting, and, if the case had been submitted without further evidence, an interlocutory judgment directing such accounting would have been proper. 1 Ency. of Pl. & Pr. 102; 1 Cyc. 447. See *Duff v. Duff*, 71 Cal. 513, 12 Pac. 570.

[3] The accounting might have been ordered through a reference, or the court might, with or without a preliminary interlocutory order, have proceeded to take and state the account itself (*Emery v. Mason*, 75 Cal. 222, 16 Pac. 894), rendering such final judgment thereon as might appear to be proper.

The judgment in favor of the defendants Clarence C. Hall and Rosa E. Patchett is affirmed.

The judgment in favor of the defendant L. J. Hall is reversed.

BEATTY, C. J., does not participate in the foregoing decision.

(164 Cal. 279)

JAMES J. STEVINSON v. JOY. (Sac. 1,896.)  
(Supreme Court of California. Dec. 2, 1912.)

1. EVIDENCE (§ 441\*) — PAROL EVIDENCE — VARYING WRITTEN INSTRUMENT.

Statements, made before the execution of a contract to convey land, that the forfeiture clause would not be enforced, were inadmissible as varying the terms of a written instrument, in the absence of extrinsic ambiguity or fraud.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719-1845, 2030-2047; Dec. Dig. § 441.\*]

2. EVIDENCE (§ 441\*)—WRITTEN INSTRUMENTS — AGENCY.

Where a written contract for the sale of land provides that no agent can change its terms, evidence of statements made by an agent that the forfeiture clause would not be enforced were inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719-1845, 2030-2047; Dec. Dig. § 441.\*]

3. CONTRACTS (§§ 262, 271\*)—TIME—FORFEITURE—NOTICE.

Where time is the essence of a contract, the acceptance of payments after they are due with knowledge of the facts is a temporary suspension of the right of forfeiture, which can only be revived by giving definite notice of an intention to enforce it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1181-1183, 1190, 1191; Dec. Dig. §§ 262, 271.\*]

4. VENDOR AND PURCHASER (§ 207\*)—COVENANTS—"ASSIGN."

A covenant in a contract of sale of land against assigning will be strictly construed and will not be held to embrace a subletting.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 423; Dec. Dig. § 207.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 559-561.]

5. FIXTURES (§ 7\*)—TRESPASS—BUILDINGS.

A small building, resting upon boards not imbedded in the ground or attached to any material affixed to the land, is not a part of the realty.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 7-13; Dec. Dig. § 7.\*]

In Bank. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by James J. Stevinson, a corporation, to quiet title and to enjoin William H. Joy from removing a building. Judgment for defendant, and plaintiff appeals. Affirmed.

Frank H. Farrar, of Merced, for appellant. F. G. Ostrander and H. K. Landram, both of Merced, for respondent.

HEENSHAW, J. This action was brought by plaintiff to quiet its title to a parcel of land in the county of Merced and to enjoin defendant from removing a building which he had constructed thereon. As to the land in controversy, defendant asserted an interest growing out of the following facts found by the court: On October 1, 1908, the plaintiff, with one Lee Pearson, entered into a written contract, whereunder plaintiff extended to Pearson the privilege of purchasing the land for the sum of \$1,195, upon the payment by Pearson to plaintiff of the sum of \$2 per week until the total sum paid should equal the sum of \$1,195. Pearson was given the right to use and occupy the land during the life of the agreement, and under it Pearson did enter into possession of the land. Time, and in particular the time of payments, was declared to be material and of the essence of the contract. The court found that the provision making the punctual payments of the essence of the contract and providing for a forfeiture thereof in case such payments were not made at or within the times limited was waived by the plaintiff; that plaintiff "accepted from said Pearson various sums of money at various times long after the same were due, which it credited upon the said purchase price of \$1,195; and did inform the said Pearson that said weekly payments would not be insisted upon, and, before any forfeiture of said privilege to purchase said lands would be declared by plaintiff, that notice of any delinquency in said payments and a demand for the payment of the same would be made upon him by the plaintiff; that on the 19th day of October, 1909, and before any notice of forfeiture of said privilege, or any notice of delinquency of any payment had been given the said Pearson, and before any demand for the payment of any money then due under the said agreement had been made upon said Pearson, the said Pearson forwarded the plaintiff all the moneys due from him to plaintiff at said time under said agreement, but plaintiff refused to accept the same or any part thereof. Plaintiff has never given said Pearson any notice of his delinquency of any of said payments and has never made any demand upon said Pearson for any payment or payments due under said agreement. Plaintiff has never given said Pearson any notice that it would insist upon the provisions of said agreement as to time being of the essence of said agreement for



said weekly payments." Further, the findings show that the defendant leased this land from Pearson at a monthly rental sum of \$4.50, and that defendant was in possession of the leased land under the terms of his lease; that he erected upon the leased land a building of the value of about \$500; that this building is not permanently affixed to the land, but rests upon boards which are not imbedded in the ground or attached to any material which is affixed to the land; that this building may be removed from the land without disturbing it; that at the time of the erection of the building it was agreed and understood by and between Pearson and the defendant that defendant should have the privilege of removing the building at any time he so desired.

The precise terms of the contract touching the matters hereinafter to be considered are as follows: "Time and punctuality are hereby made material to and of the essence of this option. Upon termination of the option herein except by purchase, if possession has been taken by first party, second party shall have the right to immediately or at any time thereafter enter upon said land and premises and retake possession thereof, together with improvements and appurtenances thereunto belonging, and said party covenants and agrees that he will then surrender unto said second party upon demand said lots, improvements and appurtenances without delay or hindrance. No waiver of times of payments for continuance of option shall be valid in favor of the first party unless reduced to writing and subscribed by the second party thereto. No assignment of this option shall be valid unless the same be made with the written consent of the second party. It is further understood and agreed that no agent of either party to this option has authority to alter or to change the terms of this option or to bind either party hereto by any statement, except those herein contained."

The court under the findings, which have been sufficiently indicated, gave judgment for defendant, sustaining him in his possession and refusing an injunction against him. From this portion of the judgment plaintiff appeals.

[1] It is first urged that the court erroneously admitted evidence upon which it based its finding that plaintiff "did inform the said Pearson that said weekly payments would not be insisted upon, and before any forfeiture of said privilege to purchase said lands would be declared by plaintiff, that notice of any delinquency in said payments and a demand for the payment of the same would be made upon him by plaintiff." The evidence here referred to is the evidence of Pearson, the party to the option contract made with plaintiff. Pearson was allowed to testify that Whistler, plaintiff's agent, prior to the execution of the contract, told him that, "as long as a man was trying to do right making his payments, everything

would be all right whether or not I had kept up on my land," and that subsequently, after the execution of the contract and when Pearson was in default in his payments, that he (Pearson) said to Whistler: "In an off-hand way, not thinking but what it was all right, I said 'I suppose if I get behind, would they be apt to take the land from me?' and he said, 'Don't you worry about that.' He said: 'It will be credited up to you. There will be a statement if you get behind two weeks.' He said: 'There will be a statement sent to you showing you have paid so much and so much in arrears.'" This evidence was clearly inadmissible. As to the first purported statement of Whistler made antecedent to the execution of the contract, it was a bald attempt to vary by parol the terms of a subsequently executed written contract. None of the circumstances under which such evidence is permissible are here present. Even going to the unwarranted extent of saying that this testimony amounted to "evidence of the circumstances under which the agreement was made," still the occasion was not shown which makes evidence of such circumstances permissible. There was no extrinsic ambiguity to be explained; there was no illegality or fraud to be established. Code Civ. Proc. § 1856.

[2] The testimony of Whistler's declaration subsequent to the execution of the contract was equally inadmissible. Here again was a plain effort not only to vary the terms of a written contract, but to vary the terms of a written contract which declares the agreement to be that no agent has authority to alter or change its terms, by showing that an agent of the plaintiff did undertake to do this precise thing, moreover, to show this without any attempt to establish any authorization or power in the agent so to do. If therefore the judgment which the court rendered depended upon the findings based upon this evidence, a reversal would be necessary. But the finding above quoted, to the effect that plaintiff informed Pearson that the weekly payments would not be insisted upon, may be entirely discarded, and the judgment still be supported by the finding of ultimate fact, namely, that plaintiff waived the agreement making time of the essence of the contract.

[3] To a consideration of the evidence and of the law touching this finding we are thus brought. It is shown without dispute that the contract between plaintiff and Pearson was entered into on October 1, 1908; that thereafter he made numerous payments which were received by plaintiff and credited to him under his option contract; that no one of these payments was made within the times limited by the contract; that they were made at irregular intervals from October 1, 1908, until August 21, 1909; that thus in October, 1909, he was 12 weeks overdue in his payments; that he had received no notice from plaintiff demanding the payments and

no notice that plaintiff had or would exact the forfeiture because of nonpayment. When, in October, he sent to plaintiff the full amount of the moneys due, he received a letter from plaintiff in response returning the \$25 which he had sent; the letter stating that it was returned "for the reason that your option to purchase the west half of lot 18, section 14, of the Stevinson Colony has been canceled by us on account of your failure to make your payments when due, in accordance with the conditions expressed in the option formerly held by you."

Thus, then, is presented the question of the correlative rights of the parties under the facts shown. Appellant insists that by its conduct in accepting the delinquent payments it did no more than to waive its right to declare a forfeiture on account of such delinquencies, but that its right to declare and enforce a forfeiture as to any other delinquencies and to enforce this forfeiture without previous notice to the defendant cannot be questioned. The cases, however, which it cites in support of this position, fall far short of sustaining it. *McGlynn v. Moore*, 25 Cal. 384, was an effort to enforce the forfeiture of a lease for a failure to build a warehouse within the time covenanted by the lease. It appeared that after the failure to build the warehouse the landlord accepted rent. This court declared that this acceptance of rent, with full knowledge of the facts constituting a breach of the covenant, was a waiver of the forfeiture, unless the covenant to build was a continuing covenant. It determined upon the language of the lease that it was not a continuing covenant, and the tenant was therefore right in insisting upon a waiver. Clearly this case has no bearing upon the question. In *Jones v. Durrer*, 96 Cal. 95, 30 Pac. 1027, no question of notice to the tenant was involved. The tenant persistently refused to comply with continuing covenants of the lease, and the holding of this court is merely to the effect that waivers of former breaches do not preclude the lessor from maintaining an action for subsequent breaches continuous in their nature. It is equally plain that this case is not in point. The right of plaintiff to maintain an action of forfeiture for breach of the covenant is not here in question. The real question is whether or not the tenant is entitled to notice before the forfeiture is exacted, and, if so, to what kind of notice. *Thompson v. Gerner*, 104 Cal. 168, 37 Pac. 900, 43 Am. St. Rep. 81, which appellant declares to be precisely in point and conclusive upon the matter, was an action upon a promissory note which provided for the payment of a monthly interest at 8 per cent. per annum, but further that, if the principal or interest be not paid as it becomes due, it shall thereafter bear interest at the rate of 1 per cent. per month. The payee, after the principal had become due, had paid interest for a certain time at the rate of 8 per cent. per an-

num, and this interest had been accepted. Thereafter, upon a later offer by the payee to pay another month's interest at the rate of 8 per cent., the holder of the note refused to receive it and demanded interest at 1 per cent. per month. The payee then tendered to plaintiff the whole amount of the principal due and the amount of interest at 8 per cent. per annum. This the plaintiff refused to accept. The court held that as to those months in which plaintiff had accepted interest at the rate of 8 per cent. per annum there was a waiver of the right to demand 1 per cent. a month; that the acceptance amounted to an executed oral agreement at variance with the terms of the written contract only for the months for which it was accepted. But, says this court, plaintiff "is entitled, however, to interest at 1 per cent. per month from the time she first demanded it." There is no parallelism between *Thompson v. Gerner* and the case at bar. But applying its reasoning, it would be unquestioned that plaintiff would be entitled to exact prompt payments and to enforce the forfeiture from and after the time it made demand on Pearson, a demand, however, which it never made. These are all the cases cited and relied upon by appellant, and it must be apparent that no one of them touches the question under consideration. The true rule is firmly established and recognized by all the authorities. Where time is made of the essence of the contract for the payment of rent or other payments of money, and this covenant has been waived by the acceptance of the rent or other moneys after they are due, and with knowledge of the facts, such conduct will be regarded as creating "such a temporary suspension of the right of forfeiture as could only be restored by giving a definite and specific notice of an intention to enforce it." Such is the language of *Monson v. Bragdon*, 159 Ill. 66, 42 N. E. 383, quoted with approval by this court after an extensive review of the authorities in *Boone v. Templeman*, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126. So in *Standard Brewing Co. v. Anderson*, 46 South. 926, the Supreme Court of Louisiana declares that where month after month the lessor has been receiving payment of the rent a few days later, without objection, if he desires in the future to hold the lessee strictly to payment on the day the rent falls due, he must give him notice to that effect; otherwise, the lessee will not be in legal default from delaying the usual time. In *Barnett v. Sussman*, 116 App. Div. 859, 102 N. Y. Supp. 287, the same principle is declared in a case where realty was sold under a contract providing for payments in monthly installments at regular stated periods, and that on default in any payment the vendor might 30 days thereafter elect without notice, that all payments become forfeited to her as liquidated damages. It was held that the acceptance by the vendor from the beginning of payments



not made according to the contract but irregularly as to time and amount, the purchaser being at all times in arrears, was a waiver of the forfeiture clause, which could not be revived, except on notice to the purchasers that if they did not pay the balance due within a reasonable time specified the forfeiture would then be exercised. It follows herefrom that the court's finding that plaintiff had waived its forfeiture clause and that the result was that it could not be restored without notice to Pearson and an opportunity to him to make good the delinquent payments cannot be controverted.

Appellant's argument upon the second count, namely, its right to an injunction to stay the threatened removal of the building, is based almost wholly upon its previous contention that Pearson had forfeited his option, and that defendant Joy therefore was a mere trespasser upon the property.

[4] Its further argument that the clause in the option declaring that an assignment of it should be invalid unless made with the written consent of the plaintiff is without efficacy in this consideration. The distinction between an assignment and a subletting is important and well recognized. A covenant against assigning will be strictly construed and will not be held to embrace the subletting. 18 Am. & Eng. Ency. of Law (2d Ed.) pp. 659, 680. There was therefore nothing in Pearson's contract with plaintiff which forbade his subletting to Joy.

[5] And, finally, it may be said under the finding of the court, which is not attacked, the building erected by defendant was not attached to and did not become a part of the realty. *Collins v. Bartlett*, 44 Cal. 371; *Pennybecker v. McDougal*, 48 Cal. 160. As personal property plaintiff had no right whatsoever to defendant's structure.

The judgment appealed from is therefore affirmed.

We concur: ANGELLOTTI, J; SLOSS, J.; MELVIN, J.

20 Cal. App. 161

WILLIAMS v. HAWKINS et al. (Civ. 1,212.)  
(District Court of Appeal, Second District, California. Oct. 21, 1912. Rehearing Denied by Supreme Court Dec. 20, 1912.)

# 1. APPEAL AND ERROR (§ 757\*)—REQUISITES OF BRIEF ON APPEAL.

An attorney presenting an appeal in accordance with Code Civ. Proc. § 953a, must comply with section 953c, providing that the briefs shall contain such portions of the record as the parties desire to call to the attention of the court, and, where he wholly fails so to do, the court on appeal will not examine the record to ascertain whether the evidence supports the findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.\*]

# 2. LANDLORD AND TENANT (§ 78\*)—CONTRACTS—CONSIDERATION.

Where an assignment of a lease by a lessee and the assumption by the assignee and a third

person of the lease and their acceptance by the lessor as lessees were executed at the same time, the assignment of the lease and the acceptance of the assignee and third person constituted a consideration for the promises implied in the assumption of responsibility under the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 233-243; Dec. Dig. § 78.\*]

# 3. JUDGES (§ 29\*)—EXTRA SESSION—CALLING IN OTHER JUDGE.

Under Const. art. 6, § 8, providing that a judge of any superior court may hold court in any county at the request of a judge of the superior court thereof, and that there may be as many sessions of the superior court at the same time as there are judges thereof, including any judge acting on request, and Code Civ. Proc. § 67b, authorizing extra sessions of the superior court, and authorizing a judge of the superior court of some other county to preside over such extra sessions, a majority of the judges of the superior court of a county may join in ordering an extra session and in requesting a judge of the superior court of another county to preside over the same, since, in view of Civ. Code, § 3536, declaring that the greater contains the less, the request made by a majority of the judges is necessarily a request by one judge.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 140-152; Dec. Dig. § 29.\*]

Appeal from Superior Court, Los Angeles County; W. M. Conley, Judge.

Action by C. B. Williams against Ralph S. Hawkins and another. From a judgment for plaintiff, defendant Charles H. Eager appeals. Affirmed.

Wm. Crawford, of Los Angeles, for appellant. John C. Stick, of Los Angeles, for respondent.

SHAW, J. Action to recover a sum of money alleged to be due as rental under the terms of a lease. Plaintiff sues as assignee of the lessor of the property, and it is alleged in the complaint, and so found, that Hawkins and Eager, the defendants, are assignees of the original lessee. Judgment went for plaintiff, from which and an order denying his motion for a new trial defendant Eager appeals.

[1] The appeal is presented upon a record prepared and certified in accordance with the provisions of section 953a, Code of Civil Procedure, designated as the alternative plan of appeal. Under this section no printed transcript of the record is required. "In filing briefs on said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." Section 953c, Code Civ. Proc. No attempt whatever is made by appellant to comply with this provision, and the meager references to the evidence, such as "Rep's trans. pp. 41-45, lines 13 to 6," made in his brief, are unintelligible. It is the duty of attorneys who choose this method of appeal to comply with the provisions of the act governing the presentation of cases thereunder, and, where they wholly fail to so comply,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

this court will not assume the labor of examining the entire record for the purpose of ascertaining whether or not the evidence supports a finding attacked for want of sufficiency of evidence.

[2] It is claimed that the court erred in overruling a general demurrer interposed to the complaint. There was attached to the complaint as a part thereof a copy of the lease. The instruments indorsed thereon, and upon which the judgment rendered against appellant is founded, are as follows:

"Los Angeles, Cal., Oct. 9, 1908. For valuable consideration, I hereby transfer and set over all my right, title and interest in and to the within lease, to Ralph S. Hawkins. David De Munbrun."

"Los Angeles, Cal., Oct. 9, 1908. I hereby agree to assume the within lease assigned to me by the lessee and all responsibility thereunder from date. Ralph S. Hawkins. Charles H. Eager."

"Los Angeles, Cal., Oct. 9, 1908. I hereby accept Ralph S. Hawkins and Charles H. Eager as the lessees in the within lease. C. M. Straub."

These papers were all executed at the same time and constituted one transaction, whereby the assignment of the lease by De Munbrun to Hawkins was assented to by C. M. Straub, the lessor, in consideration of both Hawkins and Eager assuming the covenants therein contained. Not only the assignment of the lease, but the acceptance of the assignee as lessee, constituted a consideration for the promises implied by appellant in assuming all responsibility upon the lease from the date of such assignment. There was no error in the ruling upon the demurrer.

[3] It appears that a majority of the judges of the superior court of Los Angeles county joined in the making of an order providing for an extra session of said court, and likewise joined in a request to the Hon. William M. Conley, judge of the superior court of Madera county, asking him to preside over the same. The case was duly assigned for trial to the department of the court so in obedience to such request presided over by Judge Conley. At the commencement of the trial, appellant's attorney objected to the introduction of any evidence upon the ground that neither section 67b, Code of Civil Procedure, nor section 8, art. 6, of the Constitution, as amended, authorized a majority of the judges to request a judge of the superior court of another county to hold a superior court in Los Angeles county. "My position," stated counsel, "is that only one judge can require another judge to sit, and that the majority of the judges cannot." Granting the point can be raised in the manner here presented, as to which we express grave doubts, there is no merit in appellant's contention. Section 8, art. 6, of the Constitu-

tion, provides that, "A judge of any superior court may hold a superior court in any county, at the request of a judge of the superior court thereof"; and further provides: "There may be as many sessions of a superior court at the same time as there are judges thereof, including any judge or judges acting upon request." Since the greater contains the less (section 3536, Civ. Code), the request here made by seven of the judges would necessarily constitute a request made by one judge.

The appeal is without merit, and the judgment and order are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

20 Cal. App. 252

SARTORI v. POZZI et al. (Civ. 1,100.)

(District Court of Appeal, First District, California. Oct. 30, 1912. Rehearing Denied Nov. 27, 1912; Denied by Supreme Court Dec. 27, 1912.)

# 1. PARTNERSHIP (§ 55\*)—EXISTENCE OF CO-PARTNERSHIP—SUFFICIENCY OF EVIDENCE.

Evidence, in an action to recover for merchandise sold defendants, held not to show that a partnership existed between them in conducting a restaurant business after the business was transferred to an individual defendant.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 78, 79, 81; Dec. Dig. § 55.\*]

# 2. EVIDENCE (§ 589\*)—WEIGHT—EVIDENCE OF PARTY.

The court is not compelled to accept the evidence of a party, if contradicted by other facts and circumstances.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2438; Dec. Dig. § 589.\*]

Appeal from Superior Court, City and County of San Francisco; J. E. Prewitt, Judge.

Action by V. Sartori against Mario Pozzi and others. From a judgment for plaintiff and an order denying a motion for new trial, defendants appeal. Affirmed.

John C. Scott, of Oakland, for appellants. John V. Filippini, of San Francisco, for respondent.

LENNON, P. J. In this action the defendants, Mario Pozzi, August Borlini, and Valeria Borlini were sued as individuals and as copartners in a restaurant business, which it was alleged they had been conducting under the name of the "Borlini Café and Grill." The action was for the reasonable value of merchandise alleged to have been sold and delivered to the defendants, and resulted in a judgment for the plaintiff in the sum of \$554.88, from which and from an order denying a new trial the defendants appeal upon the single point that the evidence does not support the finding of the trial court, on the one hand, to the effect that the defendants were copartners, and, on the other hand, that the goods sued for were sold and



delivered to them at their individual instance and request.

The facts of the case upon which the judgment is based are practically without conflict and are substantially as follows: The Borlini Café and Grill was originally conducted by the Borlini Company, a corporation, which was managed by the defendant August Borlini. The other two defendants each held one share of stock in the corporation. The Borlini Company became insolvent, and settled with its creditors, of whom the plaintiff was one, at 50 cents on the dollar. The defendant Mario Pozzi at that time advanced to the Borlini Company the sum of \$2,350 for the purpose of enabling it to settle with its creditors, and thereupon and in consideration thereof the corporation executed to him a bill of sale of its entire business. Thereafter the Borlini Café and Grill continued in business for the period of about eight months, under the personal management of Mr. August Borlini and his wife, the defendant Valeria Borlini. At the expiration of this time it was sold and transferred by the defendant Mario Pozzi to a Mr. Polli for the sum of \$4,200. The plaintiff had sold and delivered merchandise to the Borlini Company prior to and up to the time of its failure, and continued to deliver merchandise to the Borlini Café and Grill until it was sold and disposed of by the defendant Mario Pozzi. The claim here sued on is for merchandise supplied to the Grill after its transfer from the corporation to the defendant Mario Pozzi and while it was being personally conducted by the defendants August Borlini and his wife. Out of the sum of \$4,200 received from the sale of the Grill to Mr. Polli, the defendant Mario Pozzi gave to the defendant August Borlini the sum of \$1,000.

In addition to the foregoing there is some evidence to the effect that the defendant August Borlini and Valeria Borlini, his wife, and the sister of the defendant Mario Pozzi, were in constant attendance upon the business of the Grill. There was also some evidence to the effect that the defendant Mario Pozzi was often present at the Grill and at times actually attended to some of its business. The plaintiff testified in part to the effect that the defendant Mario Pozzi had admitted, shortly after the settlement of the Borlini Company with its creditors, that he had purchased the business, and from that time on would run it himself. This testimony was flatly contradicted by Mario Pozzi, who testified that after the business was transferred to him by the Borlini Company he leased it to the defendant August Borlini from month to month at a monthly rental of \$25.

[1] It is apparent, it seems to us, that neither the admitted nor the disputed facts of the case are sufficient to support the trial

court's finding of fact that a copartnership existed between the several defendants in the conduct of the business after it was transferred by the Borlini Company to the defendant Mario Pozzi. Nothing that was said or done at any time by any one or all of the defendants indicated the existence of a real or ostensible partnership; and therefore the finding of the trial court in this behalf cannot be sustained.

It is equally apparent that the evidence is insufficient to support the trial court's finding that the merchandise delivered to the Borlini Café and Grill was sold to the defendants August Borlini and Valeria Borlini at their individual instance and request. While it is true that these last-named defendants were in charge of the business at the time the merchandise was ordered and delivered, it is evident from the testimony upon the whole case that they were acting merely as the agents of the defendant Mario Pozzi. This being so, the judgment against them cannot stand.

[2] The evidence, however, was, we think, amply sufficient to support the findings upon which the individual judgment against the defendant Mario Pozzi is based. True, he testified that he had no interest in the business after the time he claimed to have leased it to his codefendants; but the trial court, in the face of facts and circumstances to the contrary, was not compelled to accept his testimony as the truth.

Upon the whole case the trial court was justified, we think, in finding, as it did in effect, that the business of the Borlini Café and Grill was in fact owned by the defendant Mario Pozzi, and was being conducted by his codefendants as his agents at the time the merchandise sued for was sold and delivered.

The judgment and order appealed from are reversed as to all of the defendants save and except Mario Pozzi, and as to him the judgment and order are affirmed.

We concur: KERRIGAN, J.; HALL, J.

#### TRINDADE v. ATWATER CANNING & PACKING CO. (Civ. 915.)

(District Court of Appeal, Third District, California. April 19, 1912. Appeal Dismissed by Supreme Court Nov. 25, 1912.)

#### 1. CORPORATIONS (§ 215\*)—EXISTENCE OF RELATION—STOCKHOLDER AND CORPORATION.

Under Civ. Code, § 322, making a corporate stockholder individually and personally liable for such proportion of its debts, contracted while he was a stockholder, as the amount of his stock bears to the whole capital stock, and permitting corporate creditors to institute joint or several actions against stockholders to recover on such statutory liability, the statutory liability of a stockholder for corporate debts is primary and not secondary, and hence a stockholder and director who has paid his part of the corporate debts cannot maintain an ac-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion against the corporation to recover the amount so paid on the theory that he was only a surety.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 826-828, 845-848, 852, 854; Dec. Dig. § 215.\*]

## 2. CORPORATIONS (§ 215\*)—PRIMARY LIABILITY.

Since a stockholder's statutory liability to creditors for his proportion of the corporate debts is primary, a stockholder and director who had paid his part of the corporate debts cannot recover such amount from the corporation under the principle of subrogation, especially since to permit such recovery would work injustice upon the other stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 826-828, 845-848, 852, 854; Dec. Dig. § 215.\*]

## 3. CORPORATIONS (§ 182\*)—ASSETS—RIGHTS OF STOCKHOLDER.

Each stockholder is entitled to have the capital stock of the corporation unimpaired for the purpose of the corporate business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 686-690; Dec. Dig. § 182.\*]

## 4. CORPORATIONS (§ 309\*)—ASSETS—PREFERENCES.

Since a corporate director's superior position would give him an undue advantage in obtaining preferences, he may not acquire a preference in any form whatever in the payment of corporate debts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1366-1373; Dec. Dig. § 309.\*]

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by J. M. Trindade against the Atwater Canning & Packing Company. From a judgment for plaintiff, defendant appeals. Reversed.

Jas. F. Peck, of Oakland, Terry W. Ward, of San Francisco, and W. B. Bunker, of Oakland, for appellant. F. W. Henderson, of Merced, for respondent.

BURNETT, J. [1] On motion plaintiff was given judgment on the pleadings, and the question to be decided on this appeal of the defendant is whether a stockholder and director of a corporation, who has paid his proportion of the corporate debts, can successfully maintain an action against said corporation for reimbursement for the amount which he has paid. The claim of respondent is that the action "is one on implied contract and based upon the law that where one, although himself under a liability to make a payment, pays a sum for which another is primarily liable, he may recover from the latter the amount so paid." In support of his position, among other authorities, he cites sections 2847 and 2848 of the Civil Code, providing for the obligation of the principal to the surety who has satisfied the claim, and the remedies which the latter is entitled to enforce against the former. There is no doubt of the doctrine as thus stated, but the foundation principle is manifestly that the parties sustain to each other the relation of principal

and surety. In other words, this duty exists and may be enforced where the primary obligation rests upon the one from whom reimbursement is sought and where the one paying the debt has simply become responsible for the performance by the principal of an express or implied promise in favor of a third party. Under the Constitution, statute, and decisions of this state, however, the relation of principal and surety does not exist between the corporation and its stockholders. As is well known, each stockholder of the corporation, by virtue of section 322 of the Civil Code, based upon section 3, article 12, of the Constitution, is rendered liable individually and personally "for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation." The said section of the Code provides that the creditor "may institute joint or several actions against any of its stockholders for the proportion of his claim payable by each, and in such action the court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be rendered against each, in conformity therewith." The creditor is not required to sue the corporation at all, and there is certainly nothing in the language of the statute that would seem to contemplate an action by the stockholder against the corporation for reimbursement. The responsibility of the stockholder is apparently considered and treated as independent and primary and we find it so declared by the Supreme Court.

In *M., etc., M. Co. v. Woodbury*, 14 Cal. 267, it is said: "It would seem, from a just and reasonable construction of the constitutional and statutory provisions upon this subject, that an individual corporator, in respect to his personal liability for the debts of the corporation, does not occupy the position of a surety, but that of a principal debtor. His responsibility commences with that of the corporation, and continues during the existence of the indebtedness. It is not in any sense contingent, but is declared to be absolute and unconditional. The remedial effect of these provisions, in which consists their only value, should not be impaired by construction. Similar provisions in other states have generally been construed in the same manner. It has frequently been decided that the members of a corporation, who are answerable personally for the corporate debts and liabilities, stand in the same position, in relation to the creditors of the corporation, as if they were conducting their business as a common partnership."

In *Young v. Rosenbaum*, 39 Cal. 654, it is declared, through Chief Justice Rhodes,



that "the stockholders are not sureties of the corporation, but are principal debtors. A judgment against the corporation does not extinguish or suspend the liability of the stockholders, and it clearly does not merge it. The remedy against the corporation may, for some cause, be suspended, or, perhaps, barred without impairing the remedy against the stockholders, because the liability of the latter is primary, and is conditional or contingent only in this: that there must be a subsisting debt against the corporation."

In *Morrow v. Superior Court*, 64 Cal. 386, 1 Pac. 355, it is said: "As to the primary liability of the stockholders of the company for its debts, we entertain no doubt. \* \* \* The liability of the stockholder is, in our opinion, as distinct and separate from that of the corporation as it would be if the act had made no provision for any other liability than that of the stockholders for the debts of the company."

A similar view, with the citation of a large number of authorities, is announced in section 4802 of *Thompson on Corporations* (2d Ed.) as follows: "The liability imposed by constitutions and statutes on stockholders for the debts of the corporation is now held and recognized generally as primary and not secondary. The conclusion, therefore, is that stockholders under such provisions do not occupy the position of surety to the corporation. Their liability is not only primary, but generally is direct to the creditors, and may be enforced without any proceedings whatever against the corporation, unless a suit against the corporation is made a condition precedent."

It is true, as pointed out by the learned author in section 4803 et seq., that by the wording of the statutes in many of the states the liability imposed upon the stockholders is secondary to that of the corporation itself, and therefore it has been held in those states that the stockholders sustain the relation of surety or guarantor. This circumstance explains the apparent conflict in some of the decisions. The utterances of our Supreme Court upon the subject, however, seem to be entirely harmonious. Some importance is attached by respondent to the dissenting opinion of Mr. Justice Crockett in *Prince v. Lynch*, 38 Cal. 535, 99 Am. Dec. 427, but it is hardly necessary to state that we are required to attach more importance to the opinion of the court therein, prepared by Chief Justice Sawyer, wherein it is declared, on page 532 of 38 Cal., 99 Am. Dec. 427, that: "The stockholder is not a surety in any sense of the term. He is under the Constitution and the statute primarily liable in the same sense as the corporation is primarily liable. The same identical act which casts the liability on the corporation also casts it on the stockholder. These are not separate contracts.

The stockholder does not stand in the position of an indorser or guarantor."

Nor do we find any comfort for respondent in *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047, cited by him. The question there in relation to the point was one of pleading. It was properly held that the debt of the corporation must be averred as such and the showing that it was incurred while defendant was a stockholder fixed his statutory liability; the court saying: "The stockholder is, perhaps, not strictly liable on the contract, but on the statute. Still, if the debt of the corporation is created by a written contract, the debt of the corporation must be pleaded in the usual mode." We can find in the statutes or decisions of this state—we repeat—no warrant for the assumed position that said relation of principal and surety exists, and thus is the foundation of respondent's main contention swept away.

[2] The only other ground upon which with any degree of plausibility the action can be supported is that afforded by the principle of equitable subrogation in its broadest application as recognized by the authorities. In 37 Cyc. 363, for instance, it is said: "The doctrine is one of equity and benevolence and like contribution and other similar equitable rights was adopted from the civil law and its basis is the doing of complete, essential and perfect justice between all the parties without regard to form and its object is the prevention of injustice." On page 370 et seq. it is further stated that: "Formerly the right of subrogation was limited to transactions between principals and sureties, but it is no longer confined to cases of strict suretyship, but is broad enough to include every instance in which one party is required to pay a debt for which another is primarily answerable, and which in equity and good conscience ought to be discharged by the latter and in the mode which equity adopts to compel the ultimate discharge of the debt by him, who in good conscience ought to pay it, and to relieve him whom none but the creditor could ask to pay, \* \* \* and, as its purpose is only to prevent fraud or subvert justice, it will not be applied where its exercise would promote injustice and thus can be applied only with a due regard to the legal and equitable rights of others." But the same author, on page 374, declares that subrogation is not allowed "in favor of him who pays a debt in performance of his own covenants, for the right of subrogation never follows an actual primary liability and there can be no right of subrogation in one whose duty it is to pay," and many cases are cited in support of the text.

Substantially the same statement of the doctrine is made by Sheldon on Subrogation, quoted in *Redington v. Cornwell*, 90 Cal. 58, 27 Pac. 42, as follows: "It is treated

as the creature of equity, and is so administered as to secure real and essential justice, without regard to form and is independent of any contractual relation between the parties to be affected by it. It is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which in equity and good conscience should have been discharged by the latter, \* \* \* and it is not allowed where it would work any injustice to the rights of others." As we have already seen, respondent simply discharged his statutory and primary liability when he paid his proportion of the debt, and therefore, within the principle stated by the aforesaid authorities, he is not entitled to subrogation. But, looking at the question from a somewhat different viewpoint, a judgment for plaintiff under the circumstances would, or might, at least, operate to work an injustice to the rights of others. The probable effect would be the appropriation by plaintiff of all the assets of the corporation. This means an interference with the business of the corporation and a preference for one stockholder, who is also a director, to the disadvantage of other stockholders.

[3] As to the the former contingency, it will not be disputed that "each shareholder is entitled to have the capital stock of the corporation preserved unimpaired for the purpose of carrying on the business which the corporation was organized to perform." 10 Cyc. 551. Nor does it appear to us according "to equity and good conscience" to allow plaintiff to exhaust the funds to the detriment of others similarly situated. The stockholders are, of course, equal before the law, and none of them should have a better right than the others to appropriate the funds of the corporation for the payment of his particular claim. Of course, if the corporation were solvent, this feature of the case would not be entitled to such consideration. But, upon respondent's theory of subrogation, the stockholders who have paid their proportion of the liabilities become creditors, and the result is that the corporation is hopelessly insolvent.

[4] There would seem to be no difference, equitably considered, if, instead of a judgment for plaintiff, the corporation had preferred respondent, and, with knowledge of the claims of the other stockholders, had directed the remaining funds to be appropriated for the payment of plaintiff's demand. There is a conflict in the decisions of different jurisdictions, it is true, as to whether this should be permitted, but the more equitable view is that expressed by Mr. Freeman and quoted in section 6192 of Thompson on Corporations as follows: "When a corporation has become insolvent, every director must, as a general rule, be chargeable with notice of such insolvency,

either because he actually has such notice or because his failure to have it cannot exist without his being negligent in the discharge of the duties of his office. \* \* \*

The usual rule of allowing a race between creditors, and of rewarding the most diligent by permitting him to retain the fruits of his diligence, cannot be fairly applied between creditors, some of whom are directors or managing officers of a corporation and others of whom are not. The early start which the special knowledge of the director would permit and incite him to make will but rarely fail to enable him to distance all competitors. The only just and equitable rule, therefore, is one which will wrest from him the fruits of every form of device by which a preference may be sought, whether it be payment, security, assignment, or by judicial proceedings taken by him whether actually aided or not by his fellow directors."

The facts alleged in the pleadings bring this case, as we view it, within the compass of the foregoing principles. It appears that in October, 1910, the Merced Security Savings Bank and the Commercial Savings Bank of Merced commenced separate actions against the stockholders of defendant corporation to secure from them their proportional share of the debts due from defendant herein to said banks. The aggregate indebtedness was over \$40,000. The subscribed capital stock of appellant corporation was 1,288½ shares, held by about 50 individuals, whose holdings ranged from 1 share to 340 shares. In January, 1911, all the stockholders, except four, paid their pro rata of said debts or suffered default judgments to be taken against them for the amounts due. Plaintiff was one of said four who appeared in the action by demurrer. Thereafter he voluntarily paid his proportion of said debts, and immediately brought the present action to recover of defendant the amount which he paid, to wit, the sum of \$744.97. When he filed his complaint herein, the actions brought by said banks against the other three stockholders were still pending. The amount of the assets of defendant corporation does not exceed \$1,000. Upon the theory of respondent as to his rights, it is thus to be seen what an advantage he secured by his speed in instituting the present action. We think, however, for the reasons already stated, that his vigilance should not be thus rewarded. The other stockholders, it is true, have not intervened, but the facts are fully set forth in the pleadings, and, if there is to be a virtual dissolution of the corporation and distribution of the remaining assets, the other stockholders should be brought in by order of the court that there may be an equitable disposition of the whole matter.

The view we have taken is in harmony with the decision of the Supreme Court in *Sacramento Bank v. Pacific Bank*, 124 Cal.



147, 56 Pac. 787, 45 L. R. A. 863, 71 Am. St. Rep. 36, wherein it is said: "Under the Constitution and statutes of this state, each stockholder may be compelled to pay to the corporation assessments to the full amount of his subscription to the capital stock of the corporation for the payment of creditors of such corporation, and also be individually liable to each creditor for such proportion of his claim as the amount of stock held by said stockholder bears to the whole of the capital stock. The two liabilities and the remedies based thereon are concurrent.

\* \* \* It follows, then, that whatever the intervenor has paid, either directly to the corporation in the way of assessments, or on account of his personal liability as a stockholder directly to the creditor, he was bound to pay under the law and can recover no portion back either by subrogation or otherwise." In that action the intervenor was a stockholder in the defendant bank, and, by virtue of his statutory liability, had been compelled to pay his proportion of its indebtedness to plaintiff therein and he therefore made the claim that he was entitled to be subrogated to that extent in and to plaintiff's right to the dividend declared by the directors of the defendant corporation. While the facts, of course, were different, that case bears a striking analogy to this and the principle enunciated therein, we think, is controlling herein.

There is no harshness, we may say, in the rule we have announced. When the corporation is organized, the stockholders assume the burdens imposed by the statute. Each one is presumed to know that the Legislature has prescribed the measure of his liability, and has not provided that the creditor shall first bring his action against the corporation, or that the stockholder who pays his proportion of the indebtedness can look to the corporation for reimbursement. The stockholder takes this risk in view of the prospect of gain and to relieve him of it in the way attempted by respondent would be virtually to render nugatory the said statutory provision.

Without more particular specification, we may add that, if the doctrine espoused by respondent should be recognized by the courts, it might and would lead to serious complications in corporate liabilities, would likely work grievous injustice to many stockholders, and would greatly hamper the business and impair the usefulness of many corporations, and, furthermore, we cannot see that it is demanded by any requirement of the law or principle of equity and fair dealing.

The judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

KARRY et al. v. SUPERIOR COURT OF  
SAN JOAQUIN COUNTY et al.  
(Civ. 893.)

(District Court of Appeal, Third District, California. Aug. 30, 1911.)

This opinion is referred to in the dissenting opinion published in 122 Pac. 475.

BURNETT, J. This is a proceeding in certiorari and grows out of the following situation: On April 22, 1909, in the superior court of the county of San Joaquin, an action was brought by E. Gjurich, one of the petitioners herein, against one Fanny Fieg, to recover the sum of \$5,000 for alleged services. Thereupon a writ of attachment was issued and levied upon certain real and personal property of the defendant in the action. The undertaking for said attachment was executed by A. T. Karry and Herman Wendel, petitioners herein, and provided that they "do jointly and severally undertake in the sum of \$400, and promise to the effect that, if the defendant recover judgment in said action, the said plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of said attachment, not exceeding the sum of \$400." The action was tried, and on June 10, 1910, judgment rendered in favor of the defendant Fieg for costs in the sum of \$145.71. On June 14th, following, notice of appeal from said judgment was given, and on the same day the said Gjurich filed his undertaking on appeal with the clerk of the court. For the purpose of continuing in force the said attachment during the pendency of said appeal, the said Gjurich, on June 15, 1910, filed an undertaking in due form, according to the provisions of section 946 of the Code of Civil Procedure, in the sum of \$10,000, being double the amount of the debt claimed by said Gjurich, to secure the payment to said Fieg of all costs and damages which she might sustain by reason of said attachment. On the 1st day of July, 1910, while the aforesaid action was pending on appeal in the Supreme Court, the said Fieg brought an action in the justice court of O'Neal township, in said county, against petitioners herein, to recover said costs and damages claimed by reason of said attachment. The defendants appeared and pleaded in abatement the pendency of said appeal in the Supreme Court and the giving of said undertaking to continue the attachment in force. The justice court awarded judgment to the plaintiff therein as prayed for. The defendants thereupon appealed to the superior court of said county and, after a trial before Hon. J. A. Plummer, judgment was rendered in favor of said plaintiff, Fieg, and against the said defendants, the petitioners herein, for \$145.71, the amount of the judgment recovered in the first-mentioned action.

As a return to the order to show cause issued by this court, a demurrer was filed and also a certified copy of the proceedings in the court below, sufficiently ample for the purposes of this decision. For convenience of reference, we shall hereafter designate the original action brought by Gjurich against Fieg as No. 1 and the action brought by Fieg against petitioners here to recover her costs and damages as No. 2.

The first question in order of sequence is, seemingly: What was the effect upon the judgment of the appeal in action No. 1? As to this, in view of the provisions of the statute and the decisions of the appellate courts, there can be, apparently, no kind of doubt. Section 946 of the Code of Civil Procedure provides that: "Whenever an appeal is perfected as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein, \* \* \* but the court below may proceed upon any other matter embraced in the action and not affected by the order appealed from. \* \* \* An appeal does not continue in force an attachment unless an undertaking be executed and filed on the part of the appellant by at least two sureties, in double the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment in case the order of the court below be sustained; and unless, within four days after the entry of the order appealed from such appeal be perfected." Section 949 of the same Code is, as far as it goes, to the same effect and is as follows: "In cases not provided for in sections nine hundred and forty-two, nine hundred and forty-three, nine hundred and forty-four, and nine hundred and forty-five, the perfection of an appeal by giving the undertaking or making the deposit mentioned in section nine hundred and forty-one, stays all proceedings in the court below upon any judgment or order appealed from, except where it directs the sale of perishable property." It is not disputed that the appeal here was perfected as required by the statute.

If we are to give effect to the simple, unequivocal terms of the law, unless we have a case within some of the exceptions mentioned, it necessarily follows that no step could be taken legally to enforce or carry into execution or to impair or modify in any respect said judgment during the pendency of said appeal. It is apparent, indeed, from an examination of the foregoing provisions relating to the exceptions, that they have no application to the case at bar. In fact, there can be and is no pretense that any of them is germane to the question before us except possibly said section 942, Code of Civil Procedure, which provides that, "if the appeal be from a judgment or order directing the the payment of money, it does not stay the

execution of the judgment or order unless a written undertaking be executed on the part of the appellant by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order," etc. But a judgment for costs is not a judgment directing the payment of money in the sense of the statute. The judgment under review was essentially that plaintiff take nothing and, as an incident thereto, that defendant be allowed her costs.

If additional assurance of the foregoing be sought, we may find it in the decisions at hand.

In *Snow v. Holmes*, 64 Cal. 232, 30 Pac. 806, it was held that, on appeal from a judgment of foreclosure of a mortgage upon personal property, the undertaking in the sum of \$300 is sufficient to stay the execution of a judgment pending the appeal.

In *re Schedel*, 69 Cal. 241, 10 Pac. 334, involved the effect of an appeal from a decree of distribution, and the general rule was held to apply, and it was declared that "sections 942 to 945, inclusive, apply to appellants who are required to perform the directions of the judgment or order appealed from. This is manifest from their language."

In *Pennie v. Superior Court*, 89 Cal. 31, 26 Pac. 617, it was held that, on appeal from an order requiring the administrator to pay a family allowance to a certain claimant, an undertaking in the sum of \$300 stayed all proceedings, and that an order made after said appeal directing the administrator to make the payment is beyond the jurisdiction of the superior court and should be annulled upon certiorari.

So, in *Powers v. Chabot*, 93 Cal. 266, 28 Pac. 1070, it was held that, since no bond is required to stay execution in addition to the usual bond for costs on appeal from a judgment foreclosing a chattel mortgage, a bond given upon such appeal, to secure a judgment for deficiency, is not a statutory bond and is without consideration and void.

In *McCallion v. Hibernia, etc., Society*, 98 Cal. 445, 33 Pac. 330, it is said: "As to that portion of the judgment awarding costs against appellants, a stay bond was not required to restrain the issuance of an execution to recover such costs. The appeal bond effected that object. The real judgment in the case is that plaintiffs are the owners of the money, and, no stay bond being required by the statute as to such a judgment, no stay bond is demanded as to the costs. The costs taxed against the defendant were incidental to the judgment, and as to a stay of execution, inseparably connected therewith. A judgment for costs is not the judgment directing the payment of money contemplated by section 942. If such were the fact, a stay bond would be required in almost every conceivable case, when to the contrary, it is only required in the four cases covered by sections 942 to 945 of the Code."



It must be apparent that even the exceptions provided for in the Code present a somewhat anomalous situation. It seems rather peculiar that an execution based upon and presupposing a judgment should be permitted before there really is a judgment in the proper sense of the term. "A judgment is the final determination of the rights of the parties in an action or proceeding" (Code Civ. Proc. § 577), and, "until litigation on the merits is ended, there is no finality to the judgment, in the sense of a final determination of the rights of the parties, although it may have become final for the purpose of an appeal from it." *Gillmore v. American C. I. Co.*, 65 Cal. 63, 2 Pac. 882. In the exceptional cases referred to, however, the "judgment" signifies the determination by the trial court of the rights of the parties; but those cases should not, obviously, be enlarged beyond the terms of the statute.

The next inquiry is: What was the basis for the complaint or the cause of action in No. 2 upon which plaintiff relied for recovery? It is contended by respondent that the action was brought upon the undertaking in attachment and that the suit was not brought on the judgment in action No. 1. In a sense it must be true that said undertaking is the basis for the action. The undertaking constituted a contract for the payment of money under certain conditions. But it is as clear as anything can be that the obligation imposed upon the sureties on that undertaking was a conditional one, contingent upon the happening or existence of certain facts. The sureties bound themselves to pay only "if the defendant recover judgment in said action." Said recovery of judgment in No. 1 was and is, therefore, an essential element in the cause of action in No. 2. The recovery of judgment was the circumstance agreed upon to fix the liability of the sureties and make it absolute instead of conditional. "A suit on a bond cannot be commenced before there is any breach of the bond." *Cook v. Ceas*, 143 Cal. 226, 77 Pac. 65. While it may not be said, probably, that the recovery of judgment in action No. 1 is the sole cause of action in No. 2, it must be conceded that no cause of action could have been stated without an averment that said judgment had been recovered, and the said action could not be maintained without proving that judgment was rendered for defendant in action No. 1. But there is no principle better established than that sureties may stand upon the strict letter of their undertaking and its terms must be strictly construed in their favor. Indeed, since it is a statutory bond, it is reasonable to hold that the terms used therein which are defined by the statute were used in such statutory sense. Therefore the action against the sureties was premature for the reason that no judgment has as yet been rendered in action No. 1; the action being still pending on appeal, and

the "judgment" referred to meaning the final determination of the rights of the parties.

But, again, the sureties promised to pay "all costs that may be awarded to the defendant and all damages which he may sustain by reason of said attachment." What does the term "costs" comprehend? Considered in connection with the preceding clause in reference to the recovery of judgment, it can simply mean that the sureties will pay all costs that may be awarded to the defendant therein by the judgment in action No. 1; in other words, whatever judgment for costs that may be rendered. By said judgment, therefore, if rendered, is the fact of their liability fixed and the extent of their liability determined. Thus it is clearly disclosed that the judgment in action No. 1 is the basis for action No. 2. But it is settled beyond controversy that "an action will not lie upon a judgment until it has become final." *Feeney v. Hinckley*, 134 Cal. 468, 66 Pac. 580 (86 Am. St. Rep. 290). "Until that time has arrived, no cause of action upon the judgment has accrued." *Hills v. Sherwood*, 33 Cal. 474. In *Cook v. Ceas*, supra, it is said: "It has been held here in a great number and great variety of cases that so long as an action or proceeding is pending in this sense the judgment or order from which an appeal has been or may be taken cannot be made the basis of any new action."

There is only one other possible application of the term "costs" as used in said undertaking, and that is to refer it to the expense that may be incurred by reason of the attachment. But, under said construction, it is apparent that no ground for the action exists, since the attachment is still in force by virtue of the said \$10,000 bond. There could be no breach of the undertaking to pay the costs and damages caused by the levy of the writ of attachment while the property is still lawfully subject to said writ. We presume this will not be disputed.

The result of the foregoing discussion, as we conceive it, is that the trial court awarded judgment upon a cause of action that had not arisen and that may never arise by reason of the disposition hereafter of said appeal to the Supreme Court. It may be stated, also, that if respondents should be upheld petitioners will be required to pay the money, although it may be subsequently determined that defendant in action No. 1 is not entitled to judgment for costs. Whereas, if the action of the court below is annulled, plaintiff in No. 2 is abundantly protected by the said \$10,000 bond.

No doubt this was given consideration by the learned trial judge, but it appears from his opinion that he felt constrained by the decision in *Bailey v. Aetna Indemnity Co.*, 5 Cal. App. 740, 91 Pac. 416. In our opinion, however, that case is easily distinguishable from this. There an action was brought and

a writ of attachment was levied upon property belonging to the defendant. A bond was thereupon given by defendant for the release of said property, and it was accordingly relieved from the lien of said levy. Judgment was obtained by plaintiff in the action, and there was *no stay of execution*. A writ of execution was thereupon issued and *returned unsatisfied*. The very conditions existed, therefore, which were necessary to fix the liability of the sureties on the bond given to release the attachment, and a judgment against them was properly upheld. This is made clear by reference to sections 552, 554, and 555 of the Code of Civil Procedure. The last two provide for the release of the attachment upon the giving of an undertaking, and they prescribe the terms of said undertaking; and section 552 provides that "if the execution be returned unsatisfied, in whole or in part, the plaintiff may prosecute any undertaking given pursuant to section five hundred and forty or section five hundred and fifty-five, or he may proceed, as in other cases, upon the return of an execution." Here, as we have seen, no execution on the original judgment was issued or could be legally, and the liability of the sureties is contingent and not absolute.

The remaining question is as to the remedy. Herein it is claimed that at most a mere error was committed not in excess of jurisdiction and that it cannot be reached by certiorari.

We deem it unnecessary to discuss the function and scope of this writ, as the subject has received ample consideration from various courts. Reference may profitably be had to the following decisions, among others, of our Supreme Court: *Monreal v. County Judge*, 46 Cal. 79; *Reynolds v. Co. Ct. San Joaquin*, 47 Cal. 604; *In re Schedel*, 69 Cal. 241, 10 Pac. 334; *Pennie v. Sup. Ct.*, 89 Cal. 31, 26 Pac. 617; *Buckley v. Superior Court*, 96 Cal. 119, 31 Pac. 8; *Stewart v. Superior Court*, 100 Cal. 543, 35 Pac. 156, 563; *Holbrook v. Superior Court*, 106 Cal. 589, 39 Pac. 936; *Schwartz v. Superior Court*, 111 Cal. 106, 43 Pac. 580; *McClatchy v. Superior Court*, 119 Cal. 413, 51 Pac. 696, 39 L. R. A. 691; *Daly v. Ruddell*, 129 Cal. 300, 61 Pac. 1080; *Stumpf v. Board of Supervisors*, 131 Cal. 364, 63 Pac. 663, 82 Am. St. Rep. 350.

It may be said as to these cases that they are substantially consistent in their exposition of the nature of the writ and of the legal principles involved in its operation, but in the application of those principles to the diverse facts of the various cases we find quite a contrariety of opinion. This is not surprising, since it is manifestly a question of great difficulty, at times, to determine whether an error is jurisdictional or not and what facts are essential to clothe the court with legal authority to proceed with the trial of an action.

It is confidently asserted, though, that if the situation here is understood, authority for the issuance of the writ will not be hard to find and such authority will be recognized as consonant with well-established principles of law.

To reiterate somewhat, the case is essentially this: A judgment was rendered in a certain action. An appeal was taken which ipso facto, stayed all proceedings upon that judgment. Nevertheless, another action was brought, based upon said judgment and which constituted in effect an attempt to make said judgment operative and to carry it into execution. The prosecution of this proceeding was permitted by the trial court. It would be no different in principle if the court had allowed an execution to be issued and levied to satisfy said judgment. Since all proceedings upon said judgment looking towards its enforcement were and are stayed by the plain provisions of the statute, no court has any legal authority—in other words, any jurisdiction—to entertain a proceeding to appropriate the fruits of the litigation while that litigation is still pending and undetermined.

In *re Schedel*, supra, decided that a writ of supersedeas should issue to stay proceedings on a decree of distribution of the estate of a deceased testator pending an appeal therefrom by a legatee. The writ of supersedeas is "an auxiliary process designed to supersede the enforcement of the judgment of the court below brought up by a writ of error for review." *Williams v. Bruffy*, 102 U. S. 249, 26 L. Ed. 135. It is issued because of the want of jurisdiction to enforce the judgment. It stays a threatened step towards execution. The effect is the same as the annulment by certiorari of steps that have already been taken for the enforcement of a judgment whose operation has been suspended.

In *Pennie v. Superior Court*, as we have already seen, the order directing the payment of the family allowance was annulled on certiorari.

*Stewart v. Superior Court* involved the application for a writ of review to annul an order of the court below adjudging petitioner guilty of contempt for the disobedience of its judgment. It was held that the appeal in the original action operated as a supersedeas against the judgment, and that, since said petitioners did nothing except to restore the property to the condition that existed at the time said judgment was rendered, there was no contempt on their part, and the order adjudging them guilty was annulled on certiorari.

So, in *Daly v. Ruddell*, 129 Cal. 300, 61 Pac. 1080, it was held that a supersedeas would issue to restrain the lower court from taking any action to enforce a judgment in reference to the laying of a pipe line where



there was an appeal from said judgment pending in the Supreme Court.

We think it reasonably certain, upon principle and under the foregoing and other authorities, that this is a proper case for certiorari, and the demurrer is overruled, and the judgment of the lower court is set aside and annulled.

We concur: CHIPMAN, P. J.; HART, J.

20 Cal. App. 199

BLACK v. RILEY. (Civ. 1,080.)

(District Court of Appeal, First District, California. Oct. 23, 1912.)

1. APPEAL AND ERROR (§ 1002\*) — REVIEW — VERDICT.

A verdict based on conflicting evidence cannot be disturbed, as not supported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

2. ATTORNEY AND CLIENT (§ 128\*) — COLLECTIONS—ACTIONS—NATURE.

An action for money had and received may be maintained by a client against an attorney to recover money collected by him and wrongfully withheld.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 274-283; Dec. Dig. § 128.\*]

3. ATTORNEY AND CLIENT (§ 123\*)—RELATION —DUTIES.

While an attorney dealing with a person about to become a client occupies the same position as any other person contracting for the rendition of services, yet, whenever an attorney in his own behalf deals with his client as to the client's property, he is, though in a hostile position, held to the utmost good faith towards his client, and the burden is on him to rebut the presumption of undue influence, unless he has openly assumed a hostile attitude.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 239-245, 247-249; Dec. Dig. § 123.\*]

4. TRIAL (§ 252\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action by a client to recover from an attorney money which he had collected in her behalf and withheld without her knowledge, in which plaintiff testified that there was no agreement as to the fee and that defendant settled the case and concealed the amount for which settlement was made, an instruction that where the relation of client and attorney exists, whereby an advantage is procured by the attorney over his client, the law requires the fairest and most conscientious dealings on his part, is not inapplicable to the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\*]

5. ATTORNEY AND CLIENT (§ 143\*)—CONTRACT FOR COMPENSATION—VALIDITY.

A contract between an attorney and client for the payment of a contingent fee is void if procured by undue influence or mistake, as well as if procured by fraud.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 328-331; Dec. Dig. § 143.\*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Isabella Black against J. F. Riley. From a judgment for plaintiff and an order denying his motion for a new trial, defendant appeals. Affirmed.

W. E. Wright and Crittenden Thornton, both of San Francisco, for appellant. Edwin H. Williams, of San Francisco, for respondent.

HALL, J. This is an appeal from a judgment in favor of plaintiff and the order of the court denying defendant's motion for a new trial.

The action was brought to recover the sum of \$930, alleged to have been wrongfully retained and converted to his own use, out of a sum of \$2,500, alleged to have been collected by defendant for and on behalf of plaintiff as her attorney.

The answer is in substance and effect that, though defendant did collect the sum of \$2,500, only the sum of \$1,366.51 was the property of plaintiff, and that the balance thereof, according to agreement between plaintiff and defendant, was the property of defendant as and for his fee for services rendered to plaintiff. The action was tried before a jury, and resulted in a verdict for the sum of \$930 in favor of plaintiff.

The general facts of the case are that plaintiff asserted a claim to certain moneys on deposit in three different banks in San Francisco, standing on the books of said banks in the names of Sophia Moore and plaintiff. The moneys, to the amount of \$13,611.18, had been deposited by Sophia Moore, who had since died.

Plaintiff employed defendant as her attorney in the matter, and he procured a settlement with the administrator of the estate of said Sophia Moore, whereby there was paid to plaintiff the sum of \$2,500 in full settlement of her claim. This money was paid by check drawn to the order of plaintiff, but the check was retained by defendant until presented to the bank for payment, when plaintiff, for the purpose of procuring payment, wrote her name on the back thereof, at the direction of defendant, but without seeing or knowing the amount thereof, as she claimed, upon which it was presented to the bank by defendant, and the money placed upon the counter and at once taken into the possession of the defendant, who shortly afterward, on the same day, turned over to plaintiff the sum of \$1,366.51, and gave her a receipt in full for his services in the matter. Such receipt, however, stated no amount.

Plaintiff's theory of the case, which is supported by the evidence given by her, is that defendant was employed by her as her attorney in the matter, and that as her attorney he collected for her \$2,500 with little trouble, and after only three interviews with the attorneys representing the estate, and, without any agreement as to his fee, retained for his own use all but \$1,366.51, and in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

so doing, not only failed to inform her of the amount for which he had settled, but, in fact, concealed from her such knowledge, and that the amount retained was to the extent of \$930 in excess of the reasonable value of his services. Defendant, on the other hand, claimed that at the time of his employment, and as a part of the terms thereof, it was agreed between plaintiff and defendant that he should be entitled to all that he should succeed in obtaining for her in excess of the amount on deposit in the German Savings & Loan Society, which amount turned out to be \$1,366.51. His testimony tended to support this theory of the case, and also that he informed her, when he turned over to her such sum, of the amount he had collected.

[1] The record presents a clear case of a conflict of evidence as to the matters really in controversy, and for that reason the verdict of the jury cannot be disturbed as not supported by the evidence.

[2] The second point urged by the appellant is that "the action is misconceived, and, if any action at all will lie against the defendant, it should be in equity." Precisely the same contention was made, and the same authorities cited by the appellant, in *Cox v. Delmas*, 99 Cal. 104, 112, 33 Pac. 836, a case in all its essential features similar to the case at bar, and in which the judgment was sustained, though the action was, as is the one at bar, an action at law for money had and received. "The action for money had and received may be maintained whenever an equity arises from the circumstances that one has money which he ought to pay to another." *Quimby v. Lyon*, 63 Cal. 394. The testimony of plaintiff, if true, showed such a case, and the action was therefore properly brought at law to recover money had and received for the account of plaintiff.

[3] The court refused to give an instruction requested by defendant as follows: "You are instructed that an attorney dealing with a person about to become a client as to his contract for payment for services occupies no different position than any other two persons contracting for payment of services. No presumption of undue influence applies to a transaction where an attorney is in a hostile attitude to his client, nor in case of the contract by which the relation of attorney and client is originally created and the compensation of the attorney fixed." The court was justified in so doing. While the first and last propositions stated are correct statements of the law, it is not true that "no presumption of undue influence applies to a transaction where an attorney is in a hostile attitude to his client," and the authority cited by appellant in support of such proposition does not sustain him. It is said in *Cooley v. Miller & Lux*, 156 Cal. 510, 105 Pac. 981, that "the presumption does not apply to a transaction in which the attorney

*openly assumes a hostile attitude to his client.*" (Italics are ours.) This is a very different proposition from the one that "no presumption of undue influence applies to a transaction where an attorney is in a hostile attitude to his client." Whenever an attorney, for his own benefit, deals with his client, in regard to property that is the subject of his employment, he is in a hostile attitude to his client, but is still bound to the exercise of the utmost good faith toward his client in such transaction, and the burden is upon him to rebut the presumption of undue influence. It is only when he openly assumes a hostile attitude that his transactions with his client will be free from the presumption of undue influence on the part of the attorney. *Cooley v. Miller & Lux*, supra. The court, therefore, did not err in refusing the requested instruction.

[4] The court gave as an instruction an extract that it read from the case of *Cox v. Delmas*, 99 Cal. 123, 33 Pac. 836, in regard to the duty of the attorney to act with entire fairness in dealings with his client, and to which the court added: "That rule of law applies where the relation of client and attorney exists between two parties, and where in a matter relating to the business or affairs of the client, intrusted to the attorney as such, in any dealing of that kind, whereby an advantage is procured or obtained by the attorney from the client, the law requires the fairest and most conscientious dealings upon his part, because, upon transactions of that character, it looks with a jealous scrutiny." No complaint can be justly made of the law as read from *Cox v. Delmas*, or as stated by the court, as an abstract proposition. Appellant, however, claims that it was not pertinent to the facts of this case. It was perfectly pertinent to the theory of the facts as testified to by plaintiff, which we have heretofore detailed in substance.

[5] It is claimed that the court erred in omitting the last sentence from the following instruction requested by defendant: "You are instructed that the contract of employment between an attorney and a client need not be in writing, and that an attorney can agree to perform his services on a contingency. And if the client agrees to employ the attorney, and pay him for his services all over a certain sum which he may recover for him, said contract will be enforced, unless fraud was used by the attorney in securing the contract." So far as the last sentence correctly states the law, it is substantially covered by the first sentence. The omitted sentence is not an accurate statement of the law, for not only may such a contract be avoided if procured by fraud, but the same result follows if procured through undue influence or mistake.

Some other minor matters have been called to our attention by appellant, which we do not think necessary to notice in detail.



The verdict of the jury finds sufficient support in the evidence given by the plaintiff. The judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

20 Cal. App. 194

MAIN v. THORNTON et al. (Civ. 761.)

(District Court of Appeal, Third District, California. Oct. 22, 1912.)

1. TAXATION (§ 788\*) — REDEMPTION FROM TAX SALE—PRESUMPTION.

Under the law in force at the time of a tax sale providing, upon a sale to the state without redemption within the time allowed, a deed should be made to the purchaser, but continuing the right of redemption until the notice therein required was given by the purchaser to the owner, a tax deed created no presumption that such notice had been given.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1555, 1557, 1559-1569; Dec. Dig. § 788.\*]

2. TAXATION (§ 696\*) — REDEMPTION FROM TAX SALE—STATUTORY PROVISIONS.

The law existing in 1894, at the time of a tax sale, regulated the right of redemption and applied to the state as a purchaser.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1393; Dec. Dig. § 696.\*]

3. TAXATION (§ 749\*) — REDEMPTION FROM TAX SALE—RIGHT OF ACTION.

Where the owner's right to redeem continued until the provisions of Pol. Code, § 3785, relating to a tax collector's deed, were complied with, a tax deed executed before a compliance with such provisions conveyed no title to the purchaser.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1496; Dec. Dig. § 749.\*]

4. TAXATION (§ 709\*)—TAX SALE—RE-SALE—STATUTES.

Pol. Code, § 3813, expressly provides that land once sold for taxes shall not be again exposed to sale, and under section 3815 subsequent assessments on the land merely fix the amount, in addition to the original charges, to be paid on redemption.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1430-1435; Dec. Dig. § 709.\*]

5. TAXATION (§ 667\*)—TAX SALE—SALE FOR EXCESSIVE AMOUNT.

An excess of 72 cents in the amount for which property was sold for taxes is sufficient to make the sale void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1350; Dec. Dig. § 667.\*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Ejectment by William Main against Susan A. Thornton and others. Judgment for defendants, and plaintiff appeals. Affirmed.

N. C. Coldwell, of San Francisco, and Frank H. Short and F. E. Cook, both of Fresno, for appellant. M. K. Harris, of Fresno, for respondents.

CHIPMAN, P. J. This is an action in ejectment in which the complaint alleges ownership and right of possession in plaintiff to the W. ½ of section 4, township 15 south, range 19 west, situated in Fresno

county, wrongful possession of which is alleged to be in defendants. Defendants had findings and judgment. Plaintiff appeals from the order denying his motion for a new trial.

It was stipulated at the trial that title was in the defendants "subject to, and unless the same has been, divested by the assessments, taxes, tax proceedings and tax deeds introduced in evidence as hereinafter set forth, \* \* \* and that the only question concerning the title to the property between plaintiff and defendants relates to the regularity and sufficiency of the tax deeds and proceedings introduced in evidence with relation thereto, as herein in this bill of exceptions referred to." In his opening brief plaintiff claims title by virtue of the following deeds: July 18, 1899, J. B. Hancock, tax collector of Fresno county, to the state, "conveying to the state the S. W. ¼, section 4/15/19; also, June 25, 1903, deed from said tax collector to the state, "for the N. W. ¼, section 4/15/19"; also July 27, 1903, authorization of the state controller to the tax collector of Fresno county "to sell at public auction the said S. W. ¼, section 4/15/19, sold to the state July 3, 1894. And also N. W. ¼, section 4/15/19, sold to the state June 24, 1898"; also that, pursuant to such authorization, the tax collector of said county, "by deed dated the 22d day of August, 1903, sold the S. W. ¼, section 4/15/19 to the plaintiff, William Main; and that on the 22d day of August, 1903, said tax collector, in pursuance of such authorization, sold to the plaintiff, William Main, the N. W. ¼, section 4/15/19."

In his opening brief appellant states that, "In the absence of any specific objection to their sufficiency (the proceedings set forth in the transcript), we rest upon the presumption that 'official duty has been regularly performed.'" Code Civ. Proc. § 1963, subd. 15. And upon section 3786 of the Political Code, making a tax deed "primary evidence," and section 3787 of the same Code, "declaring that such deed shall be conclusive evidence of the regularity of all other proceedings, from the assessment by the assessor, inclusive, up to the execution of the deed." Claiming that, as the deeds are sufficient on their face, "it is the duty of the party attacking them," says the brief, "to show to the court by these records \* \* \* that they are insufficient to vest title in the state," citing Klumpke v. Baker, 131 Cal. 81, 63 Pac. 137, 676, and other cases. Awaiting the announcement of defendants' objections, plaintiff does not attempt to show the regularity of the proceedings under which he claims title. This was, perhaps, logical and not unfair to the court, although an appellant is usually expected to state the grounds on which a reversal is asked. But after the objections were fully pointed out by the re-

spondents, plaintiff filed no reply brief, and, in submitting the matter contents himself with calling attention again to the fact that the southwest quarter of the section was twice sold to the state and, "as to the multiple attacks made on the proceedings affecting the northwest quarter, we submit the same on the record." If we have fallen into error in reaching a conclusion, appellant cannot claim to have aided us very much to avoid it; and, if we have been so fortunate as to reach a right conclusion, it will be largely due to our being guided by the uncontroverted statements of fact found in the record as pointed out by respondents. The tax proceedings in relation to the two parcels are separate and will be so considered.

[1] The southwest quarter: This parcel was assessed for taxes for the year 1893, and, the taxes not being paid, the land was sold to the state on July 3, 1894. Basing his deed on said sale made in July, 1894, the tax collector conveyed the land to the state July 18, 1899. As the law stood in July, 1894, when the sale was made to the state, it provided that if the land is not redeemed within the time allowed for redemption, a deed should be made to the purchaser, but a provision in the law continued the right of redemption for an indefinite period and until the notice therein required is given the owner by the purchaser. The tax deed created no presumption that the law requiring notice to be given had been complied with.

[2] The law existing in 1894 governed the case and regulated the right of redemption. *Miller v. Miller*, 96 Cal. 376, 31 Pac. 247, 31 Am. St. Rep. 229; *Reed v. Lyon*, 96 Cal. 501, 31 Pac. 619; *Walsh v. Burke*, 134 Cal. 594, 66 Pac. 866; *Johnson v. Taylor*, 150 Cal. 201, 208, 88 Pac. 903, 10 L. R. A. (N. S.) 818, 119 Am. St. Rep. 181. The statute applied to the state as a purchaser. *San Francisco & Fresno L. Co. v. Banbury*, 106 Cal. 129, 132, 39 Pac. 439. The case of *Johnson v. Taylor*, supra, is quite like the case here and discusses the questions fully.

[3] As the owners' right to redeem the southwest quarter remained until the provisions of section 3785, Political Code, were complied with, and as they were not complied with, plaintiff's tax deed conferred no title.

[4] The tax collector undertook to cure the title by again selling the land to the state in July, 1895, and making a deed in 1900. But section 3813 of the Political Code expressly provided that the land should not be again exposed to sale. The law provided for assessing the land, and these assessments became a charge to be paid on redemption. Section 3815. These assessments merely fixed the amount, in addition to the original charges, which were to be paid on redemption. See *San Francisco, etc., L. Co. v. Banbury*, supra;

*Honeycutt v. Colgan*, 3 Cal. App. 348, 352, 85 Pac. 165.

Respondents make the point that the description of the land as "S. W.  $\frac{1}{4}$  of section 4/15/19" in the certificate, and S. W.  $\frac{1}{4}$ , section 4/15/19, is not a sufficient description, although the county is designated. It is not necessary to pass upon the question. We held in *Canty v. Staley*, 10 Cal. App. Dec. 327, that a similar description was sufficiently definite. The trial court allowed the deputy auditor of the county to testify, as he did, that he would have no difficulty in finding the land from such description. The case was reheard in the Supreme Court, but this point was not referred to. 123 Pac. 252.

The northwest quarter: The deed of the tax collector, based on the sale for delinquent taxes for the year 1897, recites that the assessment was \$2,400; that the amount of taxes was \$47.04, made up of county taxes, \$34.08, and state taxes, \$12.24, making together \$46.32. There was added \$12.76 as accruing costs, and the property was sold for \$59.80, whereas the true amount was \$59.08. The sale was for 72 cents in excess of the taxes and charges.

It is pointed out by respondents "that there is hardly any resemblance between the recitals in the deed and in the certificate," whereas section 3786 of the Political Code requires them to be the same. The deed recites that the property was assessed at \$2,400, the certificate says \$43,950; the deed states the taxes levied to be \$47.04, the certificate \$664.69; the deed says the property sold for \$59.80, the certificate \$743.05. In the tax proceedings confusion is worse confounded. Respondents seem to be supported in the following statement: "It cannot be determined from an inspection of the records what the tax was upon the property, what the assessed valuation was, or what it sold for." Section 3785 of the Political Code provides that the deed must recite the person assessed, the date of the sale, and description of the land sold, the amount for which it was sold, that it was sold for delinquent taxes, giving the assessed value and the year of assessment, with other requirements. The record in the present case shows that but little regard was paid to these requirements.

[5] So far as the sale of the N. W.  $\frac{1}{4}$  is concerned, the excessive amount of 72 cents, for which the property was sold, is of itself sufficient to make the sale void. In *Rimmer v. Hotchkiss*, 11 Cal. App. Dec. 499, 503, an excess of 52 cents was held fatal to the deed. The cases on the point are there cited. The case was reheard in the Supreme Court and the same view taken of this excess. 123 Pac. 256.

The order is affirmed.

We concur: HART, J.; BURNETT, J.



20 Cal. App. 255

GEORGEOS v. LEWIS et al. (Civ. 1,076.)  
(District Court of Appeal, First District, California. Oct. 30, 1912.)

1. LANDLORD AND TENANT (§ 130\*)—LEASES—COVENANTS.

Every lease in the usual form implies a covenant for quiet possession, in absence of stipulation to the contrary, but such covenant ceases with the determination of lessee's original estate.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 470-481; Dec. Dig. § 130.\*]

2. LANDLORD AND TENANT (§ 80\*)—SUBLEASE—NOTICE OF ORIGINAL LEASE.

A subtenant is charged with notice of the existence of the original lease and of its terms and conditions, so as to be bound thereby.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 254-257; Dec. Dig. § 80.\*]

3. LANDLORD AND TENANT (§ 80\*)—SUBLEASE—NOTICE OF ORIGINAL LEASE.

A clause in a sublease that the subtenant was "to hold only to the conditions of the original lease" was actual notice to the subtenant of the original lease, so as to charge him with knowledge of its conditions, which were made a part of the sublease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 254-257; Dec. Dig. § 80.\*]

4. LANDLORD AND TENANT (§ 80\*)—SUBLEASE—TERM.

An original lease was for nine months from the day of July 15, 1909, or for so much of that time as the buildings were not removed by order of any municipal authority, and at the same time the original lessees executed a sublease from July 20, 1909, to July 20, 1910, which provided that it was "to hold only to the conditions of original lease." Some 13 months after the expiration of the original lease the month to month tenancy of the original lessees was terminated by notice of the owner and sublessees' furniture removed. *Held*, that the term granted by the sublease when construed with the original lease was not for a year absolutely, but only for a year in case the original lease was not sooner terminated.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 254-257; Dec. Dig. § 80.\*]

Appeal from Superior Court, City and County of San Francisco; S. E. Crow, Judge.

Action by George Georgeos against M. Lewis and another. From a judgment for plaintiff, defendants appeal. Reversed.

Wm. H. Chapman, of San Francisco, for appellants. Edward R. Eliassen, of Oakland, for respondent.

LENNON, P. J. In this action the plaintiff secured a judgment for damages against the defendants in the sum of \$210 for the alleged breach of an implied covenant of quiet possession, which it is claimed was contained in a sublease from defendants to plaintiff of a portion of certain premises occupied by the defendants in the conduct of a saloon business, under a lease from the owners of the building.

The defendants have appealed from the judgment alone, and the case comes here

upon the judgment roll and a duly authenticated transcript of the record of the proceedings and all of the evidence had upon the trial in the lower court, as provided in section 953a of the Code of Civil Procedure.

The essential facts of the case upon which the judgment is based are shown by the findings of the lower court and the record of the evidence adduced at the trial to be as follows:

The original lease of the entire premises from the owner of the building to the defendants was dated the 20th day of July, 1909, and granted the use and occupation of the premises to the defendants "for a period of nine months from the 15th day of July, 1909, or for so much of that time as the buildings are not removed by order of any municipal authority of the city and county of San Francisco, or in compliance with the requirements of any municipal authority of the city and county of San Francisco."

On the 20th day of July, 1909, the date of the original lease, the defendants, by a lease expressed in writing, sublet to Michael Pappas and William Pasros for use as a bootblack stand a space five feet in width by 12 feet in depth, situate in the front of the premises, from the said "20th day of July, 1909, to the 20th day of July, 1910, at the annual rental of \$900 payable monthly in advance in equal payments of \$75." This sublease was in the ordinary form; and, in addition to the usual covenants and agreements of such instruments, stipulated that it was "to hold only to the conditions of original lease."

On February 24, 1910, the plaintiff, for a valuable consideration and with the consent of the defendants, became the assignee of the sublease, and was in the occupation of the space leased thereunder on June 20, 1910, at which time the building was torn down and both the plaintiff and defendants evicted and deprived of possession by the overlandlord.

On June 14, 1910, some 13 months after the term expressed in the original lease had expired, the month to month tenancy, under which the defendants were then holding, was terminated by due notice to that effect from the owner of the building; and, when the work of the destruction of the building was commenced, plaintiff's fixtures and furniture were summarily and forcibly removed from the premises.

It is an undisputed fact in the case that neither of the defendants was instrumental, directly or indirectly, in the destruction of the building, and that the eviction of the plaintiff was caused solely by the independent act of the defendants' landlord.

It will be noted that the life of the defendants' tenancy under the original lease was by the very terms of that instrument limited to April 15, 1910, and might have been

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sooner terminated by an order from the municipal authorities to destroy the demised premises. Notwithstanding this, the defendants granted on the 20th day of July, 1909, and the plaintiff acquired by assignment, the sublease in question for a period of time which on its face extended three months beyond the term granted to the defendants by the original lease.

Out of this situation but one question arises, and that is: Were the defendants, as the immediate lessors of the plaintiff, liable as a matter of law for the admitted damage resulting to plaintiff from his eviction solely at the hands of the overlandlord, merely because they, the defendants, had undertaken to give a sublease to the plaintiff for the full period of a year rather than for the unexpired nine months of the term granted by the original lease?

The judgment of the lower court evidently was founded upon the theory that, notwithstanding the defendants' limited and contingent tenure under the original lease, the relation of landlord and tenant existed between the defendants and plaintiff for the full period of time granted in the sublease, and that this relation, with all of its attendant rights and liabilities, could not be avoided nor in any wise abridged by the fact that the defendants' tenure under the original lease had expired on April 15, 1910, and was from that date by operation of law transformed into a tenancy from month to month, under which the defendants occupied and used the building until the date of its destruction.

This theory, when viewed in the light of the express covenants and conditions of the original lease and sublease, cannot be sustained.

[1] It may be conceded generally that every lease in the usual and ordinary form carries with it an implied covenant that the lessee will not be disturbed in his possession during the term by the lessor nor any other person having the paramount title. This is so, however, only in the absence of a stipulation in the lease to the contrary; and even then this implied covenant of quiet enjoyment ends with the determination of the original estate of the lessee. Rawle on Covenants for Title, § 275; McCowry v. Croghan's Adm'r, 1 Grant Cas. (Pa.) 307; Brookhaven v. Baggett, 61 Miss. 383; Maxwell v. Urban, 22 Tex. Civ. App. 565, 55 S. W. 1124; Mershon v. Williams, 63 N. J. Law, 398, 44 Atl. 211. But, however that may be, the plaintiff in the present case took the sublease in question subject to the terms and conditions of the original lease, and therefore the respective rights and liabilities of the parties must be ascertained from a consideration of their agreement and understanding as contained in the expressed covenants and conditions of the original and sub lease.

[2] It is the duty of a person contracting for a sublease to ascertain the provisions of the original lease; and a subtenant is charged with notice of the existence of the original lease, and is bound by its terms and conditions. 1 Wood on Landlord and Tenant, § 93, p. 184; Jones on Landlord and Tenant, § 455; Blachford v. Frenzer, 44 Neb. 829, 62 N. W. 1101; Dunn v. Barton, 16 Fla. 765.

[3] But, even if this were not so, the clause contained in the sublease under consideration that it was "to hold only to the conditions of the original lease" was actual notice to the plaintiff of the existence of the original lease; and knowing of its existence he was charged with knowledge of its covenants, conditions, and limitations which, by reference, were made a material part of the terms and conditions of the sublease. Coalinga, etc., Co. v. Associated Oil Co., 16 Cal. App. 361, 116 Pac. 1107; Brock v. Desmond & Co., 154 Ala. 634, 45 South. 665, 129 Am. St. Rep. 71.

The expressed covenants of the original and sublease are obviously opposed to the existence of an implied covenant which was to endure beyond the term granted to the defendants by the original lease.

[4] In short, the sublease expressed the complete understanding and agreement of the parties only when read and construed in conjunction with the original lease; and, when so read and construed, it is apparent that it was the agreement and understanding of the parties that the term granted by the sublease was not for one year absolutely, but only for that time in the event that the tenancy of the defendants under the original lease was not sooner terminated. Illinois Starch Co. v. Ottawa, etc., Co., 125 Ill. 237, 17 N. E. 486.

It follows from what has been said that the evidence adduced at the trial does not support the trial court's findings of fact, and that the plaintiff was not entitled as a matter of law to recover for the breach of an implied covenant of quiet enjoyment.

The judgment appealed from is reversed.

We concur: KERRIGAN, J.; HALL, J.

20 Cal. App. 231  
CITY OF CORONA v. MERRIAM et al.  
(Civ. 1,195.)

(District Court of Appeal, Second District, California. Oct. 25, 1912.)

1. MUNICIPAL CORPORATIONS (§ 120\*)—OFFICERS—SALARIES—ORDINANCES—"AND"—"OR."

A city ordinance providing that the city treasurer shall receive a monthly salary and a specified "per cent. of all moneys received and paid out by him as treasurer," which shall be payable monthly, is unambiguous, and comprehends both a receipt and disbursement of funds before any commission is payable; and under



Code Civ. Proc. § 1858, requiring the court, in the construction of a statute, to declare its terms, and not insert what has been omitted, the court may not construe the ordinance so as to allow the percentage on all moneys received, and on all moneys paid out, by construing the word "and" in the quoted phrase to mean "or."

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 274-280; Dec. Dig. § 120.\*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 385-394; vol. 8, p. 7575; vol. 6, pp. 5002-5015; vol. 8, p. 7739.]

## 2. MUNICIPAL CORPORATIONS (§ 120\*)—ORDINANCES FIXING SALARIES—CONSTRUCTION.

A city ordinance fixing the compensation of a city officer, if ambiguous, must be given a construction favorable to the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 274-280; Dec. Dig. § 120.\*]

## 3. OFFICERS (§ 94\*) — SALARIES — STATUTES — CONSTRUCTION.

Statutes relating to the fees and compensation of public officers must be strictly construed, and such officers are entitled only to what is clearly given by law.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 132, 133, 136-138, 140, 141; Dec. Dig. § 94.\*]

## 4. MUNICIPAL CORPORATIONS (§ 120\*)—ORDINANCES — CONSTRUCTION — CONTEMPORANEOUS CONSTRUCTION.

A contemporaneous construction of a plain and unambiguous ordinance is not controlling, nor entitled to weight in the construction thereof by the court.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 274-280; Dec. Dig. § 120.\*]

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by the City of Corona against John L. Merriam and another. From a judgment for defendants, plaintiff appeals. Reversed, with directions.

G. R. Freeman, of Corona, for appellant. Purington & Adair, of Riverside, W. S. Clayson, of Corona, and H. L. Carnahan, of Riverside, for respondents.

ALLEN, P. J. The original action was brought by the city to recover of defendant, its treasurer, upon his official bond, certain public moneys alleged to have been wrongfully, unlawfully, and without right converted by the treasurer to his own use, which sum, it is alleged, was the property of said city. It was stipulated upon the trial: "That the defendant John L. Merriam, while acting as city treasurer, deducted from the moneys in his hands belonging to said city the sum of \$556.43, claiming the right to do so under the terms of an ordinance, No. 140, of said city of Corona." The ordinance referred to provides as follows: "The city treasurer shall receive a salary of fifteen dollars (\$15) per month, and the sum of one per cent. on all moneys received and paid out by him as treasurer of the said city, which said salary and percentage shall be payable monthly." It was further stipulat-

ed: "If the correct construction of said Ordinance 140 is that said defendant Merriam is entitled, as city treasurer, to 1 per cent. only on all moneys both received and paid out by him, then the judgment will be in favor of the plaintiff and against said defendant for \$556.43." And further: "If, however, the proper construction of said ordinance is that said defendant is entitled to retain to himself 1 per cent. on all moneys received by him, and also 1 per cent. on all moneys paid out by him, then judgment shall be in favor of the defendant, dismissing said action." The trial court, in construing said ordinance, determined that the proper construction thereof is that said defendant is entitled to retain to himself 1 per cent. on all moneys received by him, and also 1 per cent. on all moneys paid out by him, and dismissed the action at plaintiff's costs, from which judgment plaintiff appeals.

[1,2] We are of opinion that the court erred in its construction of the ordinance. Section 1858 of the Code of Civil Procedure provides: "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted." We think that the terms of the ordinance are plain and unambiguous. Its literal interpretation, to our minds, comprehends both a receipt and disbursement of funds before any commission is payable. To construe the ordinance otherwise would be to say that the word "and," as it appears in the ordinance, should be read "or." Our Supreme Court, in *Robinson v. Southern Pacific Co.*, 105 Cal. 543, 38 Pac. 94, 722, 28 L. R. A. 773, has determined that ordinarily the words "and" and "or" are in no sense interchangeable terms, but, upon the contrary, are used in the structure of language for purposes entirely variant. We see nothing which would warrant a court, in the face of section 1858 of the Code of Civil Procedure, in reading into this ordinance the word "or." By so doing an entirely different meaning would be given the ordinance, which, as said in *Robinson v. Southern Pacific Co.*, supra, would be judicial legislation pure and simple. In addition to this, were it even conceded that the terms of the ordinance are ambiguous, nevertheless the rule of strict construction applicable in such cases demands that a construction should be given favorable to the government. *San Diego County v. Bryan*, 123 Pac. 347.

[3] "Acts relating to the fees and compensation of public officers are strictly construed, and such officers are only entitled to what is clearly given by law." *Lewis' Sutherland, Statutory Construction*, § 714. "It is well-settled law that no officer is entitled to fees of any kind, unless provided for by statute, and that the law conferring such right must be strictly construed, because of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

statutory origin and right." *State v. Wofford*, 116 Mo. 220, 22 S. W. 486.

[4] Respondents insist that, by reason of the fact that defendant had been permitted to retain 1 per cent. of the moneys received, and, in addition, 1 per cent. on moneys disbursed, for a time preceding June 1, 1911, the same amounted to an adopted construction. It has never been held, to our knowledge, that a contemporaneous construction adopted by the parties interested in the enforcement of an ordinance is in any sense controlling. The extent to which any of the decisions go is that, where an ordinance is ambiguous, such adopted construction is to be given weight. But we do not consider the language of the ordinance under consideration to be such as would, under any circumstances, permit an adopted construction to be either controlling, or to be given weight in its construction.

Judgment reversed, with instructions to the trial court to render a judgment in plaintiff's favor for the amount claimed in the complaint.

We concur: JAMES, J.; SHAW, J.

20 Cal. App. 250

SIEVERS v. UNION ASSUR. SOCIETY OF LONDON. (Civ. 1,085.)

(District Court of Appeal, First District, California. Oct. 29, 1912.)

INSURANCE (§ 503\*)—FIRE INSURANCE—INSURABLE INTEREST—RECOVERY FOR LOSS.

Under Civ. Code, §§ 2550, 2551, 2588, providing that the measure of insurable interest in property is the extent to which insured may be damaged by loss, etc., a tenant erecting a building on the premises, though the lease contained no privilege of renewal and provided for a reversion of the building to the lessor at the end of the lease, and procuring an insurance on the building which is destroyed before the end of the term, may recover the value of his interest in the building and not the value of the building.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1280, 1281; Dec. Dig. § 503.\*]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by Louis J. Sievers against the Union Assurance Society of London. From a judgment for plaintiff, defendant appeals. Reversed.

J. F. Riley, of San Francisco, for appellant. L. S. Melsted and E. H. Williams, both of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from the judgment in favor of plaintiff and from an order denying defendant's motion for a new trial in an action upon a policy of insurance against loss by fire. From the record it appears that the plaintiff took out said policy in the defendant company, being in the sum of \$1,000, and upon a building

erected on leased ground; that the lease contained no privilege of renewal, and the building at the expiration of the lease was to "revert to and become the property of" the lessor; that during the life of the policy, and at a time one year lacking four days before the expiration of the lease, the building was totally destroyed by fire; that the plaintiff received a monthly rental from the building of \$225, and paid \$175 per month as ground rent, making a profit of \$50 a month; that the value of the building destroyed was \$1,650. The judgment was in favor of the plaintiff for the face of the policy, i. e., \$1,000.

We think, as contended by defendant, that the judgment should have been for the value of the interest of the insured, and not for the value of the building; in other words, that the judgment is excessive by approximately \$400. Section 2588 of the Civil Code provides that where, as here, the "name of the person intended to be insured is specified in the policy, it can be applied only to his own property interest." To the same effect is section 2550 of the Civil Code, which reads: "The measure of an insurable interest in property is the extent to which the insured might be damaged by loss or injury thereof." So, too, is section 2551, which provides: "The sole object of insurance is the indemnity of the insured, and if he has no insurable interest the contract is void."

The question was decided in the case of *Davis v. Phoenix Insurance Co.*, 111 Cal. 409, 43 Pac. 1115. There the plaintiff had paid on account of the purchase price of certain property the sum of \$450, when it was destroyed by fire; the actual cash value was \$800, and a policy of insurance for that amount had been issued to him. Under the terms of the contract of purchase, the plaintiff was under no obligation to carry out the contract, he not having bound himself to pay the whole purchase price, and the court held that the extent of his insurable interest was the amount paid on account of the purchase of the property at the time of the fire. At page 415 of 111 Cal., at page 1117 of 43 Pac., of the opinion, the court observed: "What is the extent of plaintiff's insurable interest? Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss. It is a contract of indemnity. \* \* \* Under such a contract reparation must be made to the injured for the loss which he has suffered through his interest in the subject-matter, and to the extent of that interest, not exceeding the limit fixed by the policy. \* \* \* In common parlance we speak of a house as being insured; but, strictly speaking, it is not the house but the interest of the owner therein that is insured. \* \* \*

The defendant contends that there is no sufficient allegation of nonpayment, and that the complaint is defective in several other



respects. The defendant filed an answer, and the case was tried and decided as though the matters criticised by it were properly in issue. Hence, perhaps, the defects in the complaint must be regarded as cured. However that may be, the alleged defects are of such a character that they may be easily remedied upon another trial, which must be had for the error discussed hereinbefore, so we do not deem it necessary to deal with them at length.

The judgment and order appealed from are reversed.

We concur: HALL, J.; LENNON, P. J.

20 Cal. App. 204

HANKE v. McLAUGHLIN, City Clerk.  
(Civ. 1,090.)

(District Court of Appeal, First District, California. Oct. 23, 1912.)

APPEAL AND ERROR (§ 102\*)—DECISIONS REVIEWABLE.

An appeal does not lie from an order either sustaining or overruling a general demurrer, and the order can be reviewed only by an appeal from the final judgment, and an appeal merely from the order will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 688-698; Dec. Dig. § 102.\*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Petition by W. F. Hanke for mandamus against H. B. McLaughlin, city clerk of Sanger. A demurrer was sustained, and petitioner appeals. Appeal dismissed.

Everts & Ewing, of Fresno, for appellant. E. L. Howell and Drew & Drew, of Fresno, for respondent.

HALL, J. This purports to be an appeal from a judgment and order "sustaining the demurrer of defendant to plaintiff's petition herein." The petition was one for a writ of mandate against the defendant as city clerk of the city of Sanger. The record before us discloses that the court sustained defendant's demurrer to plaintiff's petition, but it does not disclose that any judgment, either denying or dismissing the petition, was ever rendered or entered. The notice of appeal in the record purports to be an appeal "from that certain order and judgment \* \* \* sustaining the demurrer of defendant to plaintiff's petition herein." The only order in the record is as follows: "The demurrer to the petition for a writ of mandamus, which said demurrer is on file herein, is argued by respective counsel and submitted, and it is by the court ordered that the said demurrer be, and it is hereby, sustained." There is no final judgment in the record whatever.

An appeal does not lie from an order either sustaining or overruling a demurrer. The action of the court upon the demurrer can only be reviewed upon an appeal from the final judgment entered in the action or

special proceeding. *Moraga v. Emeric*, 4 Cal. 308; *Moulton v. Ellmaker*, 30 Cal. 529; *Agard v. Valencia*, 39 Cal. 292; *Hibberd v. Smith*, 39 Cal. 145; *Fortain v. Smith*, 114 Cal. 494, 46 Pac. 381; *Wood, Curtis & Co. v. Missouri, etc., Ry. Co.*, 152 Cal. 344, 92 Pac. 868; *Litch v. Kerns*, 8 Cal. App. 747, 97 Pac. 897; *Code Civ. Proc. §§ 939, 963*. (See, also, *Kimple v. Conway*, 69 Cal. 71, 10 Pac. 189; *Foley v. Foley*, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 147; *Stebbins v. Larson*, 4 Cal. App. 482, 88 Pac. 505.)

As this court has no jurisdiction of the appeal, we must dismiss the appeal. *Pedlar v. Stroud*, 116 Cal. 461, 48 Pac. 371; *Bienenfeld v. Fresno Milling Co.*, 82 Cal. 425, 22 Pac. 1113.

The appeal is dismissed.

We concur: LENNON, P. J.; KERRIGAN, J.

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FRENCH v. PHELPS. (Civ. 988.)

(District Court of Appeal, Third District, California. Oct. 15, 1912. Rehearing Denied by Supreme Court Dec. 14, 1912.)

1. VENDOR AND PURCHASER (§ 129\*)—MARKETABLE TITLE.

The test determinative of the proposition whether in a particular case the purchaser in an executory contract for the sale of real estate will be legally justified in rescinding or repudiating the contract on the ground that the vendor is unable to convey a perfect title is whether the tender of a deed conveys a legal and equitable title free from all litigation, palpable defects, and grave doubts, or whether the tendered conveyance will be such proof of title as will give the purchaser the recorded means of vindicating the validity of the title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 238-244, 249; Dec. Dig. § 129.\*]

2. EXECUTORS AND ADMINISTRATORS (§ 315\*)—DECREE OF DISTRIBUTION—CONCLUSIVE-NESS—COLLATERAL ATTACK.

A decree of distribution made by a court acquiring jurisdiction on the giving of the notice of the hearing of the petition for distribution as required by *Code Civ. Proc. § 1659*, which distributes the estate to decedent's widow, acquiring the interests of legatees, some of whom are minors or mentally incompetent, cannot be attacked collaterally on the ground of the insufficiency or incompetency of the evidence to sustain the finding, but is conclusive on the heirs, legatees, or devisees whose interests are involved and adjudicated within sections 1666, 1678, 1908, declaring that a decree of distribution is conclusive as to the rights of the parties interested, subject only to be reversed or modified on appeal, and authorizing the distribution of the estate, though some of the heirs, legatees, or devisees may have conveyed their shares, and providing that a judgment in respect to the administration of the estate of a decedent is conclusive, and they can only attack the decree for fraud through an appropriate proceeding.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.\*]

3. EXECUTORS AND ADMINISTRATORS (§ 315\*)—DECREE OF DISTRIBUTION—PRESUMPTIONS.

The rule that all presumptions must be indulged favorably to the regularity of the pro-

ceedings leading to a judgment will be applied to a decree of distribution of an estate, and it will be presumed that the evidence on which such a decree is predicated is sufficient and competent, and that any legal objections that could have been made against it were made by the party objecting to the decree.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.\*]

**4. EXECUTORS AND ADMINISTRATORS (§ 172\*)**  
—PURCHASE BY EXECUTOR OF INTEREST OF LEGATEES.

A purchase by an executor of the interests of legatees, though prohibited by Code Civ. Proc. § 1576, is not void, but only voidable.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 650½; Dec. Dig. § 172.\*]

**5. EXECUTORS AND ADMINISTRATORS (§ 315\*)**  
—DECREE OF DISTRIBUTION—VALIDITY.

A decree of distribution which distributes the estate to decedent's widow acting as executrix and acquiring the interests of legatees, some of whom are infants and some incompetents, confirms title in her, in the absence of any evidence of inadequate consideration for the title acquired.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.\*]

**6. VENDOR AND PURCHASER (§ 141\*)**—TITLE OF VENDOR—DEFECTS.

Where a defect in a vendor's title or a doubt as to its soundness is disclosed on the face of the record title, the purchaser need go no farther; but, where the title depends on some extrinsic fact not disproved by the record, he must prove such fact to justify a refusal to accept the title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 265; Dec. Dig. § 141.\*]

**7. VENDOR AND PURCHASER (§ 129\*)**—TITLE OF VENDOR—SUFFICIENCY.

The title of a vendor contracting to convey a perfect title was based on a decree of partial distribution of the estate of the deceased husband of the vendor who acted as executrix. The decree confirmed in her the interests of legatees acquired by purchase. Some of the legatees were minors and one was mentally incompetent. The decree on its face was valid. The conveyance from the legatees constituted a part of the evidence on which the court acted in making the decree. There was no substantial ground on which the decree could be attacked on the ground of fraud on the rights of the infants or the incompetent. *Held*, that the vendor could convey a title free from litigation, palpable defects, and doubts, and the purchaser was not justified in refusing to accept the title tendered by the vendor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 238-244, 249; Dec. Dig. § 129.\*]

Appeal from Superior Court, San Mateo County; G. H. Buck, Judge.

Action by R. A. French against Josephine A. Phelps. From a judgment for defendant, plaintiff appeals. Affirmed.

Hillyer, Stringham & O'Brien and Robt. L. Mann, all of San Francisco, and Chas. N. Kirkbride, of San Mateo, for appellant. Ross & Ross, of San Mateo, and W. C. Sharpstein, of San Francisco, for respondent.

HART, J. This is an appeal by the plaintiff from a judgment rendered and entered

against him by the superior court of San Mateo county.

The action was instituted for the purpose of recovering judgment for the sum of \$27,750, the major portion of which sum is for damages for the alleged breach of a contract for the sale of certain real estate, \$5,000 of the balance representing the sum deposited, at the time of the execution of said contract, by the intending vendee, one George W. Phelps, as a payment on the purchase price, and \$250 thereof for the expense incidental to the examination of the title to the property involved in the agreement and preparing the necessary papers.

It is alleged in the complaint that, prior to the commencement of the action, said George W. Phelps assigned the claim declared upon to the plaintiff.

The land affected by this controversy is situated in the county of San Mateo, and it appears that on the 17th day of December, 1906, the defendant, by a writing, conferred upon the real estate firm of Filcher & Cox, having offices in Redwood City, in said county, the authority and right "to sell, and they are given exclusive sale for a period of sixty days from date hereof, and thereafter until such authority is withdrawn by me in writing, of the following described property," and then follows a description of the land, which embraces 180.88 acres. The agreement further provides that the land should be sold at a price which would net to the defendant the sum of \$687.50 per acre, "or any less sum agreed upon by me," and, in consideration of the services performed by Filcher & Cox for so negotiating the sale, said firm was to receive as compensation "all they receive over the above stated price, if said property is sold during the life of this contract," etc. Filcher & Cox were further authorized by the agreement "to execute and deliver for me and in my name a contract of sale of said property at the price agreed upon by me, and to accept and hold a deposit on account of the purchase price of said property," and it was stipulated upon the part of the defendant that she would, upon the sale of said property as indicated, convey the same, with a perfect title, free and clear of incumbrances, to the purchaser. The agreement also contains this provision: "If the title to said real estate is imperfect, I am to be allowed thirty days from and after notification to said Filcher & Cox of any defects therein, and I agree within that time to make the title perfect if it can be done, and if the judgment is that it cannot be done within the time allowed, the deposit made to said Filcher & Cox may be returned to the purchaser, unless the time to perfect the title is extended by mutual consent." The authorization further provided that, upon a sale being made, the sum of \$20,000 should be paid in cash, and the balance to



be made in deferred payments and secured by a mortgage upon the land.

In pursuance of the authorization to dispose of said land thus conferred upon them, Filcher & Cox, for the respondent, and one George W. Phelps, as trustee, on the 15th day of February, 1907, entered into a contract of sale, whereby the former agreed to sell and the latter agreed to purchase said land for the sum of \$875 per acre, the payments to be made as specified in the written engagement of Filcher & Cox to negotiate and consummate the sale of said property. Upon the execution of said contract, George W. Phelps, on account of the cash payment of \$20,000 required by the contract to be made, paid to and deposited with Filcher & Cox the sum of \$5,000. This money was turned over to the respondent. The agreement of sale, substantially following the stipulation in that respect embraced in the instrument conferring upon Filcher & Cox the authority to sell the land, contained the following provision with regard to the title to the property: "The vendee shall have a reasonable time to examine title to said property, but in no event shall said time exceed sixty (60) days from date. If, however, the title to said real estate is imperfect, the vendor shall be allowed thirty (30) days from and after notification by the vendee to the vendor or Filcher & Cox, her agents, of any defects and the vendor agrees to make the title perfect if it can be done within that period, and if it cannot be so done, said deposit of five thousand dollars (\$5,000.00) shall be returned to the vendee unless he shall extend the time to perfect the title or shall consent to waive said defects." It appears that George W. Phelps (not related to the respondent) in the proposed purchase of the land represented a syndicate, which appears to have been organized for the special purpose of buying the property and of which he, Filcher & Cox, and some others were members. The respondent, in due course, tendered a deed to the land to the vendee named in the contract of sale, and the latter refused to accept said instrument or the title purporting to be conveyed thereby, for the asserted reason that it did not, and that the respondent could not, for certain reasons to be hereafter examined, convey a perfect title to the property. In order that the objections to the title thus interposed by the proposed vendee may be clearly understood, the facts from which crystallized the source of the respondent's title to the property involved in this controversy should now be given.

The respondent derails her title through conveyances from the legatees which transfers were confirmed by a decree of partial distribution of the estate of her deceased husband, Timothy Guy Phelps, who died testate in the county of San Mateo, on the 11th day of June, 1899, leaving a valuable estate situated in said county, and consisting, among other kinds of property, of some 2,900

acres of land and a number of blocks in the town of Redwood City.

The will of the deceased contains the following provisions:

"After paying all my just debts and liabilities, including my funeral expenses, I will and bequeath unto my wife, Josephine Amelia Phelps, the sum of \$50,000.00 and one-half of all my estate, real, personal and mixed, etc., over and above said sum of \$50,000.00.

"And I will and bequeath to my sisters Phoebe W. Daughaday and Frances L. Witter, and their heirs, and the heirs of my deceased brothers, Alexander Dean Phelps and Mark Gale Phelps, and the heirs of my deceased sisters, Elizabeth Bentley and Permelia Harris, one-half of the surplus or remainder of my estate, over and above the said \$50,000.00; one share to Phoebe W. Daughaday, one share to Frances L. Witter; one share to the heirs of Alexander Dean Phelps, and one share to the heirs of Elizabeth Bentley; and one share to the heirs of Permelia Harris;

"I will to the heirs of my deceased brothers and sisters the amounts to which said brothers and sisters would have been entitled had they been alive, under distribution of the one-half of my estate over \$50,000.00, and without reference to the number of heirs either of them may have left;

"In order that I may be clearly understood, I repeat; I will to my wife, Josephine Amelia Phelps;

"First. \$50,000.00 and

"Second. The one-half of my estate over \$50,000.00, and the other persons named, the remaining one-half above that amount."

Said will named the widow (respondent) as executrix thereof, to act as such without the necessity of giving a bond for that purpose, and by due proceedings the instrument was admitted to probate, and letters testamentary granted and issued to her. Some six years after the proof of the will and the appointment and qualification of the respondent as executrix, the latter purchased the entire interests of all the other beneficiaries under said will, and on May 9, 1905, after due proceedings, the superior court of the county of San Mateo entered its decree of partial distribution of said estate, the effect of which was to vest in the respondent the title of all the other legatees or beneficiaries named and referred to in the last will of the deceased to all their interests in said estate. The petition for said partial distribution alleged, among other things, that the petitioner "has purchased of and from all of the heirs and devisees mentioned in said last will and testament all of their right, title, and interest in and to all of the real and personal property mentioned and described" in the will and in the instruments conveying said interests, and the decree, after setting forth that certain objections were filed against the petition, declares that "the court proceeded with

the hearing on said petition and objections. And evidence having been introduced and heard and said matter and objections having been submitted to the court for decision, the court finds that all the allegations of said petition are true." The property involved here was accordingly distributed to the respondent; the objections to the petition not having been sustained.

It appears that some of the legatees or beneficiaries, whose interests the respondent thus acquired, resided in other states, and that some were minors and one mentally incompetent, and that the conveyances transferring their respective interests to the respondent were executed, in most of the instances, by and through their attorneys in fact, exercising their authority as such, and to so execute conveyances, under powers of attorney, executed by said legatees. In the case of Elizabeth Carpenter, an insane legatee, the conveyance was by Joseph Leggett, guardian of her estate, and for and in the names of Arthur and Natalie Phelps, minors, the conveyance was by Willis G. Witter, appointed attorney in fact by the "mother and natural guardian" of said minors, residing in the state of Texas.

The alleged defects in the title to the land specified and urged by the vendee are based upon the absence from the abstract of title of the proceedings culminating in the appointment of guardians of the estates of Elizabeth Carpenter, incompetent, and Arthur and Natalie Phelps, minors, and upon the alleged insufficiency of certain powers of attorney to confer authority upon the attorneys in fact therein named to execute deeds or conveyances of real property. The respondent was notified by the intending vendee of the alleged defects so specified in the title to the property, but, nevertheless, as seen, tendered her deed to the vendee, insisting that the title, notwithstanding the alleged defects pointed out by the vendee, was perfect.

The vital question presented here is: Did the respondent tender to the vendee named in the contract of sale a deed conveying both a legal and equitable title "free from all litigation, palpable defects and grave doubts"? *Sheehy v. Miles*, 93 Cal. 288, 292, 28 Pac. 1046; *Lawton v. Gordan*, 37 Cal. 202, 206; *Bauer v. Pierson*, 46 Cal. 293. Or, to put the question in the language employed in *Crim v. Umlsen*, 155 Cal. 697-703, 103 Pac. 178, 180 (132 Am. St. Rep. 127), did the respondent tender to the vendee a conveyance with such proof of title "as will arm him with the recorded means of vindicating its validity in after times"? See *Calhoun v. Belden*, 66 Ky. (3 Bush) 674.

[1] The rule as stated in the above interrogatories must be conceded to involve the test determinative of the proposition whether, in a particular case, a party to an executory contract for the sale of real estate as an intending vendee will be legally justified in rescinding or repudiating such contract upon

the ground that the vendor is unable to convey a complete or perfect title to the property. And we think that, in the case at bar, the conveyance tendered to the party named as vendee in the contract of sale fully measured up to the requirements as to title prescribed by such test, and that consequently the findings and judgment must be upheld.

[2] It is not claimed that the decree is void upon its face, but the contention is that certain of the evidence upon which the court predicated said decree discloses imperfections in the title of respondent acquired through the decree. It is, in other words, claimed, as we have already shown, that certain powers of attorney did not confer upon the attorneys in fact therein named the power or authority to execute conveyances of real estate, and that the abstract of title fails to show the proceedings of the superior court in the matter of the guardianship of two minors and an incompetent, the deeds conveying the interests of said minors and incompetent in the estate of the deceased to the respondent having been executed by the guardians. (It seems that the record of the guardianship proceedings was destroyed by the great fire in San Francisco in April, 1906.) Thus it will be observed that the objections thus urged against the respondent's title necessarily involve, in effect an attack, collateral in its nature, upon the decree. It is very clear that the objections to the title, which has been adjudged by a decree or judgment of court having jurisdiction of the proceeding and the subject-matter thereof to be in the respondent, entered by a court having jurisdiction of the proceeding and the subject-matter thereof, would not be heard in a proceeding collateral to that culminating in the making of the decree, and we think the objections urged under the circumstances revealed here afford no legal excuse for the refusal of the vendee to carry out his part of the agreement of sale. Indeed, it is our opinion that the decree of distribution confirmed in the respondent a perfect title to the property.

Section 1908 of the Code of Civil Procedure provides that in case of a judgment or order against a specific thing, or in respect of a will, or the administration of the estate of a decedent, the judgment or order is conclusive upon the title to the thing, the will, or the administration. Section 1678 of the same Code provides: "Partition or distribution of the estate may be made as provided in this chapter, although some of the original heirs, legatees or devisees may have conveyed their shares to other persons, and such shares must be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs, legatees, or devisees."

As seen, the petition for a partial distribution of the estate, including the property concerned here, alleged that the petitioner "has purchased of and from all of the heirs and



devises mentioned in said last will and testament all their right, title, and interest in and to all of the real and personal property belonging to said estate, \* \* \* and that all of said heirs have by their instruments in writing conveyed to and invested in her all of their right and interest in all of the property, real and personal, mentioned and described," etc. Upon the filing of said petition due notice was given directing "all persons then and there to appear and show cause, if any they have, why the said partial distribution of said estate as prayed for in said petition should not be granted." Upon the date designated in the notice, the court made its decree that "due notice of the hearing of said petition has been given in all respects as required by section 1659 Code of Civil Procedure and as required by law," and "that all the real property described be and the same is hereby distributed to said Josephine A. Phelps \* \* \* upon the filing of a bond," etc. Having thus acquired jurisdiction of the proceeding and the subject-matter thereof, the court had the legal power to make the decree as prayed for, and, incidentally, to make erroneous rulings and findings, which, if made, could have been corrected only on an appeal from the decree. And, until so corrected, they cannot otherwise be made available as a menace to the validity of the decree or its effect. In other words, the decree, as to the title to the interests so distributed, is conclusive upon all the heirs, legatees, or devisees whose interests were involved in the proceeding thus adjudicated (sections 1666 and 1908, Code Civ. Proc.; *Est. of Vaughn*, 92 Cal. 192, 28 Pac. 221; *Estate of Burton*, 93 Cal. 459, 29 Pac. 36; *De Castro v. Barry*, 18 Cal. 96, 98-99; *Kearney v. Kearney*, 72 Cal. 591, 15 Pac. 769), and they cannot now question its stability upon the ground that the evidence upon which it was predicated was incompetent or insufficient to sustain the findings from which it was deduced. Indeed, the decree is perfectly immune from attack by the parties whose interests were the subject of the adjudication therein and thereby affected, except upon some fraud or other sufficient matter collateral or extrinsic to the questions examined in the proceeding leading to the decree, and therefore, even in a direct attack, if it could be shown that the testimony was altogether insufficient to support the decree, or that it was the result of forged documents or perjured testimony, all the parties interested having had their day in court in the proceeding in which the decree was made, it certainly could not be successfully challenged for any of these reasons. *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159, and cases therein cited; *Mulcahey v. Dow*, 131 Cal. 73, 63 Pac. 158; *Sohler v. Sohler*, 135 Cal. 323, 328, 67 Pac. 282, 87 Am. St. Rep. 98. In *Mulcahey v. Dow*, supra, the rule as it is approved by all the cases in this state is thus

stated: "A proceeding for the distribution of an estate of a deceased person is a proceeding in rem; and the decree of distribution binds all who have constructive notice thereof, and, if not appealed from, is conclusive as to the whole world upon all questions of heirship."

It follows that the only way in which the effect of the decree here challenged may be disturbed is by the introduction, through an appropriate proceeding, of some issue of fact sufficient in itself to justify a court of equity in taking cognizance of the matter and making an inquiry into the justness of the decree independently of any of the issues of fact necessarily included in the adjudication leading to the making of said decree. In other words, to justify any interference with the result flowing from the decree, it would be necessary to charge and prove in a proceeding having that purpose in view some fraud collateral or extrinsic to the matters or questions examined and determined in the proceeding culminating in the decree—that is, some fact or facts not only sufficient to start the machinery of a court of equity but which were not necessarily or presumptively included in the inquiry resulting in the making of the decree of distribution.

[3] As to all matters, except the act of the executor or administrator in himself purchasing the property of the estate, the rule that all presumptions must be indulged favorably to the regularity of the proceedings leading to the rendering of a judgment and in support thereof is to be applied with no less rigor to a decree of distribution than to any other kind of a judgment, and it is therefore to be presumed that the evidence upon which the decree was predicated was in all respects sufficient and competent, and that any legal objections that could have been made against it were made by the party objecting to the granting of the petition and decided by the court at the hearing. It must be presumed that the question of the adequacy of the consideration, upon which proposition much emphasis is laid by appellant, was considered and passed upon by the court, and that the price paid for the interests of the beneficiaries was adequate, fair, and just.

[4] It is true that the act of purchasing property of the estate by the executor or administrator thereof is expressly enjoined by section 1576 of the Code of Civil Procedure, but it has been uniformly held by the Supreme Court that the purchase of such property by such officer involves an act which is not void but only voidable. *Estate of Richards*, 154 Cal. 478, 483, 484, 98 Pac. 528; *Boyd v. Blankman*, 29 Cal. 20, 87 Am. Dec. 146; *O'Connor v. Flynn*, 57 Cal. 293; *Burris v. Kennedy*, 108 Cal. 341, 41 Pac. 458.

If, then, the decree cannot be attacked upon any matter which necessarily or presumptively must have been considered and determined on the hearing of the petition—that is to say, if, as is obviously true, the

evidence upon which the decree was founded cannot be reviewed in a proceeding to vacate the decree—what tangible ground is apparent from anything presented or disclosed here for an assault upon the decree upon some question of fraud extrinsic to questions examined in the proceeding through which the decree was given existence? The conveyances, as shown, constitute a part of the evidence upon which the court acted, and they are therefore not subject to reconsideration in another proceeding attacking the decree. We can perceive no substantial, or, indeed, any, ground upon which the decree can be successfully attacked, and the suggestion that the minors or the incompetent may, upon becoming sui juris, set up some sort of plea that the decree was brought about in fraud of their just rights is too remote even to cast a visible shadow of a suspicion upon the soundness of the title sustained by the decree.

[5] But, conceding that the evidence upon which the court acted in making the decree could properly be considered in determining whether the title of the defendant thus confirmed is perfect or otherwise, it is to be remarked that there is nothing in this record supporting the specific objections of the vendee to said title. There is absolutely no evidence in this record disclosing that the consideration for which the other beneficiaries under the will of Timothy Guy Phelps parted with their interests in the estate of the deceased was inadequate. This proposition, as before suggested, comes solely from the suggestions of appellant himself. Nor is there any evidence here that the beneficiaries so disposing of their interests are dissatisfied with their bargain, or that they have threatened to attack the decree or manifested any intention of attempting to destroy its effect by some proceeding in a court of equity based, as it must be, if sustainable at all, upon matters of fraud which were not involved in the issues presented by the petition or which did not arise at the hearing thereof, or, as before declared, that they have any ground for so attacking it. In brief there is nothing shown here except those matters which must have been disclosed at the hearing of the petition.

It follows from the views herein expressed that, the time for an appeal from the decree having expired prior to the time at which the transactions giving rise to this litigation took place, the title of respondent to the property in controversy stands confirmed by a perfectly valid and, indeed, an impregnable decree, against the stability of which nothing has been or can be urged but a suggestion, growing out of mere chimerical speculation, and involving an objection which might as reasonably be urged against any judgment, perfectly valid on its face, that at some future time some one may challenge it on some of the grounds urged against it here, the reasons for which, it must be pre-

sumed, were considered and passed upon by the court at the hearing of the petition.

[6] The rule where the title to real property is brought into question is that if the defect therein or a doubt as to the soundness thereof is disclosed on its face—that is, on the face of the record title—the vendee need go no further, but if, as here, it depends upon some extrinsic fact not discovered by the record, he must prove this fact to justify a refusal to accept the title. *Greenblatt v. Hermann*, 144 N. Y. 13, 38 N. E. 966. In *Phillips v. Day*, 82 Cal. 24, 31, 32, 22 Pac. 976, where a vendee sought to escape the consequences of his contract to purchase land on the ground that a certain portion thereof had, previously to the making of the agreement, been dedicated to the purpose of a public street, the court approvingly quotes the following from *Heilreigel v. Manning*, 97 N. Y. 59: "A purchaser cannot justify his refusal to perform his contract by a mere captious objection to the title tendered him; nor is it sufficient for him, when the jurisdiction of an equity court is invoked to compel him to perform his contract, merely to raise a doubt as to the vendor's title. Before he can successfully resist performance of his contract on the ground of defect of title, there must be at least a reasonable doubt as to the vendor's title, such as affects its value, and would interfere with its sale to a reasonable purchaser, and thus render the land unmarketable." In *Sohler v. Sohler*, supra, the court, speaks thus: "The title conferred by a decree of distribution, after regular proceedings in probate, has always been justly recognized as a title of high and unimpeachable value, because of the nature of the proceedings and of the exclusive jurisdiction which has been vested in the probate court to pass upon the questions involved. If such a decree may at any time be vacated in equity, it must result that no title any longer stands secure." While the defendant's title was not directly conferred by or acquired from the decree itself, it was nevertheless confirmed thereby upon evidence presumptively sufficient to sustain it.

[7] Our conclusion is that the record title of the respondent to the property involved in this dispute fully measures up to the test heretofore referred to as having been formulated by the courts—that is to say, that it is, upon its face, "free from all litigation, palpable defects and grave doubts," and that it embraces both the legal and equitable titles. Or, as the test is otherwise put, the respondent's title having been confirmed by an unimpeachable decree or judgment of a court of competent jurisdiction, said court having legally acquired jurisdiction to make it, the conveyance tendered by the respondent to the intending purchaser was accompanied by such proof of title "as will arm him with the recorded means of vindicating its validity in after times." We think, in other words, that, there



being no possible objection to the respondent's title upon its face, a court of equity would not hesitate to decree a specific performance of the contract of sale between the owner of that title and the proposed purchaser. We perceive nothing in any of the cases cited and relied on by counsel for the appellant militating against or conflicting with the foregoing views. We shall not take the time to review them in this opinion, but we are satisfied that they are easily to be differentiated from this case.

Counsel for respondent present another view of this case which, if sound, furnishes a complete answer to some of the objections to the title raised by the appellant, viz.: That the language of the will of the deceased, properly construed, discloses that it was the intention of the testator that his estate should be sold, and that the respective interests of the beneficiaries named in the instrument should be distributed to them in the form of money. If this be true and no particular or definite time in the future is fixed by the will for the sale of the real property—that is, if the power to sell is not postponed to some future definite time or is not made to depend upon some future event or contingency—then, it is contended, these propositions follow: (1) That the will itself has ipso facto, et eo instanti, upon the death of the testator, worked a conversion of the real property into personalty—that is to say, the real property is then to be deemed personal property from the time of the testator's death—and the beneficiaries are therefore to be regarded as legatees rather than as devisees, and the provision for them considered as a bequest of money. Civ. Code, § 1338; Estate of Walkerly, 108 Cal. 652, 41 Pac. 772, 49 Am. St. Rep. 97; Bank of Ukiah v. Rice, 143 Cal. 265, 270, 76 Pac. 1020, 101 Am. St. Rep. 118; Rankin v. Rankin, 36 Ill. 293, 87 Am. Dec. 205; Gray v. Smith, 3 Watts (Pa.) 289. (2) That, conceding that the instruments by which the other beneficiaries of the estate conveyed their interests were insufficient for any reason to pass real property, they are, nevertheless, sufficient in all respects as transfers by assignment of the personalty, although in form conveyances of real property. Howell v. Mellon, 189 Pa. 169, 177, 42 Atl. 6; Snover v. Squires (N. J.) 24 Atl. 365; Walker v. Killian, 62 S. C. 482, 40 S. E. 887; Thornton v. Mulquinne, 12 Iowa, 549, 79 Am. Dec. 548; Williams v. Emberson, 22 Tex. Civ. App. 522, 55 S. W. 595. (3) That, the interests of all the beneficiaries having been merged or united in the respondent, it was within her right to take the property in its original form (Bank of Ukiah v. Rice, supra; Greenland v. Waddell, 116 N. Y. 234, 22 N. E. 367, 15 Am. St. Rep. 400), and that her petition to have the estate distributed to her in its original form constituted an election on her part to take the property in that form

and worked a reconversion. Estate of Pforr, 144 Cal. 121, 129, 77 Pac. 825; Burr v. Sim, 1 Whart. (Pa.) 252, 29 Am. Dec. 48.

We think that there is much force in the contention that the language of the testament here is quite clearly indicative of an intention that the estate should be sold and that the proceeds of such sale should constitute a fund from which the interests of the several beneficiaries should be gratified, and manifestly, if that contention be tenable, the legal propositions following therefrom, as above stated, are undoubtedly sound.

But we do not conceive it to be necessary to examine this feature of the argument. We are satisfied with the other view of the case, that the decree of partial distribution confirmed in the respondent a perfect title to the real estate involved in this controversy, and that she tendered and offered to convey to the intending purchaser named in the agreement of sale such a title. She therefore fully fulfilled her part of the engagement, while on the other hand, the vendee, having refused to accept the conveyance so offered, was guilty of a breach of the agreement to which he obligated himself.

In other words and in brief, our conclusion is that challenged findings are sustained by the evidence, and that the judgment cannot therefore justly be disturbed.

The judgment is accordingly affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(20 Cal. App. 133)

#### FORSYTH v. PHELPS. (Civ. 1,005.)

(District Court of Appeal, Third District, California. Oct. 15, 1912. Rehearing Denied by Supreme Court Dec. 14, 1912.)

#### BROKERS (§ 64\*) — COMMISSIONS — WHEN EARNED.

Where a contract for the employment of a broker to sell real estate stipulated for the payment of a sum received over a specified sum, and that, in the event of a sale, the owner would convey to the purchaser the property free and clear of incumbrances, and the failure to consummate a sale resulted from the wrongful refusal of the purchaser to accept the conveyance tendered and the broker advised the purchaser to reject the title offered, the broker could not recover commissions.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 97; Dec. Dig. § 64.\*]

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by Thomas W. Forsyth against Josephine A. Phelps. From a judgment for defendant, plaintiff appeals. Affirmed.

Frank S. Brittain, Hillyer, Stringham & O'Brien, Robert L. Mann, all of San Francisco, and Chas. N. Kirkbride, of San Mateo, for appellant. Ross & Ross, of San Mateo, and W. C. Sharpstein, of San Francisco, for respondent.

HART, J. The complaint in this action asks for judgment against the defendant for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

damages in the total sum of \$33,915 for the alleged breach of the terms of a certain instrument in writing, executed by the defendant, whereby the latter authorized Filcher & Cox, real estate brokers, and the assignors of the plaintiff, to negotiate and consummate the sale of certain land of the defendant, situated in San Mateo county, said amount representing the difference between the net price to the defendant at which said real estate was to be sold by the brokers and the gross price at which, it is alleged, the latter agreed in writing for the defendant to sell the property to the intending purchaser. It is alleged that, before the institution of this action, Filcher & Cox assigned to the plaintiff the claim in suit. The defendant was given judgment, from which and the order denying him a new trial the plaintiff appeals.

This action grows out of precisely the same transaction as that upon which the case of *French v. Phelps* (Civ. No. 988) 128 Pac. 772, is founded. An opinion affirming the judgment of the trial court was this day filed in the last-mentioned case, and therein a full statement of the facts from which both actions arose is presented. Therefore a repetition of said statement in full in this opinion is not deemed essential. By reference to the facts as given in said case of *French v. Phelps*, supra, it will be seen that the defendant, by the writing by which she authorized Filcher & Cox to sell the land therein described, agreed that the brokers mentioned should receive, as compensation for negotiating such sale, all that they might succeed in securing for said tract of land over the sum of \$687.50 per acre. She further therein stipulated that, in case of a sale, she would convey to the purchaser said property, with a perfect title, free and clear of incumbrances.

The evidence discloses that a purchaser was obtained by Filcher & Cox on the terms specified in said authorization to them to sell the property, except that the contract of sale called for a price in excess of that which was to be paid to the respondent, and that the brokers, by virtue of the authority so conferred on them by the respondent, in her behalf entered into a written contract of sale of the land with such purchaser. By the latter agreement the vendee therein named agreed to pay for the land the sum of \$875 per acre, or \$187.50 per acre in excess of the net price to the defendant.

It is further made to appear that the vendee, George W. Phelps, named as trustee in the contract of sale, was in fact not acting for himself alone, but for a syndicate organized for the special purpose of purchasing said land, and that he and Filcher & Cox were members of said syndicate and, between them, owned a one-half interest

therein—that is, each of the three was to have and own a one-sixth interest in the profits of the deal by the syndicate. Phelps, trustee, it appears, upon the execution of the contract of sale, made a deposit of \$5,000, paying the same to Filcher & Cox, the latter in turn paying said deposit for the defendant to one Chipman, her agent. Thereafter the other members of the syndicate returned to the vendee their respective proportions of the deposit so made.

Mrs. Phelps, in due time thereafter, tendered to Phelps, vendee, a deed purporting to convey to him, as trustee, a perfect title to the property, but the same was rejected upon the grounds that the title thus sought to be conveyed was defective in many particulars, which were specifically pointed out, and that the defendant could not convey a perfect title. The specific objections to the title are given in the case of *French v. Phelps*, supra, and they need not be repeated here. It is very clear from the terms of the agreement between Mrs. Phelps and Filcher & Cox that the latter could not claim that they were entitled to the compensation provided by that instrument except in the event that the defendant received the price which it was stipulated therein that she was to receive for her land, unless a sale was prevented by and through her fault.

We held, in the case of *French v. Phelps*, that the defendant tendered to the intending purchaser procured by Filcher & Cox a title to the property unembarrassed by any defects or imperfections—in other words, a perfect title. This being true, it necessarily follows that the failure to consummate the sale was not occasioned by the fault or remissness of the defendant. In other words, the defendant did not violate the terms of the agreement into which she entered with Filcher & Cox, but offered in good faith to fully meet her obligation under that instrument. The fact is that the refusal by Phelps, trustee, to accept the conveyance tendered him by the defendant was due entirely to the advice given him by the syndicate itself for which he was acting in the deal, and that Filcher & Cox, being members of said syndicate, necessarily joined in the advice so given, or, which is strictly true, admonished and approved the course of Phelps in rejecting the proffered conveyance. It is therefore plainly manifest that Filcher & Cox themselves, and not the defendant, committed a breach of the agreement.

There is absolutely no ground upon which this action can be maintained, and the judgment and order must, consequently, be affirmed. It is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.



20 Cal. App. 234

**HOPKINS v. WHITE et al.** (Civ. 1,018.)

(District Court of Appeal, Third District California. Oct. 28, 1912. On Rehearing. Nov. 27, 1912; Denied by Supreme Court Dec. 27, 1912.)

**1. EXECUTORS AND ADMINISTRATORS (§ 315\*)**  
—DECREE OF DISTRIBUTION—ASSIGNMENT OF INTEREST.

The interest acquired by assignee under the assignment by an heir of his interest in the estate was merged in the decree of distribution, so that assignee's title depends upon the decree, and not on the assignment.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.\*]

**2. EXECUTORS AND ADMINISTRATORS (§ 315\*)**  
—DECREE OF DISTRIBUTION—COLLATERAL ATTACK.

A decree distributing the proceeds of an heir's interest in an estate to his assignee was conclusive in a subsequent action to have the assignment declared void because made to defraud the assignor's creditors; such action involving a collateral attack on the decree.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.\*]

**3. WITNESSES (§ 324\*)—IMPEACHMENT—OWN WITNESS—ADVERSE PARTY.**

Where plaintiff relied solely on defendant's testimony to establish the averments of the complaint, it should be treated as having been voluntarily produced by plaintiff, and he vouches for its credibility, but plaintiff may call other witnesses to refute the testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1103; Dec. Dig. § 324.\*]

**4. WITNESSES (§ 386\*)—CREDIBILITY—INCONSISTENCY.**

The fact that some of the statements of witnesses on the question of fraud were apparently inconsistent with positive statements of fact does not require that the positive statements be disbelieved, unless such inconsistencies tend directly to establish fraud and clearly contradict the evidence of good faith.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1226, 1227; Dec. Dig. § 386.\*]

**5. FRAUDULENT CONVEYANCES (§ 295\*)—EVIDENCE.**

While fraud may be inferred from the circumstances, it cannot be left wholly to conjecture.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 867-875; Dec. Dig. § 295.\*]

**6. FRAUDULENT CONVEYANCES (§ 295\*)—SUFFICIENCY OF EVIDENCE.**

Evidence in an action to set aside an assignment to defendant of an interest in an estate held not to show actual fraud as to the assignor's creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 867-875; Dec. Dig. § 295.\*]

**7. FRAUDULENT CONVEYANCES (§ 263\*)—CONSTRUCTIVE FRAUD.**

Where constructive fraud is relied on in the complaint, the fraudulent intent must be alleged under Civ. Code, § 3442.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 771-781; Dec. Dig. § 263.\*]

**8. FRAUDULENT CONVEYANCES (§ 295\*)—CONSTRUCTIVE FRAUD.**

Fraud may be established constructively as contradistinguished from actual fraud only because it is recognized by Civ. Code, § 3442. [Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 867-875; Dec. Dig. § 295.\*]

**9. FRAUDULENT CONVEYANCES (§ 273\*)—INTENT TO DEFRAUD—PROOF—NECESSITY.**

While a transfer made with intent to defraud creditors is made void by Civ. Code, § 3439, the fraudulent intent is one of fact, and cannot be presumed from the mere transfer, section 3432 permitting a debtor to pay one creditor in preference to another, the transfer by the direct provisions of section 3442, being ignorant, fraudulent, and void as to creditors, were made without valuable consideration in contemplation of insolvency.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 805; Dec. Dig. § 273.\*]

**10. FRAUDULENT CONVEYANCES (§ 300\*)—CONSIDERATION—SECONDARY LIABILITY—SURETY.**

In an action to declare void an assignment of a wife's interest in an estate, evidence held to show that the wife was not liable to the assignee merely as a guarantor of her husband's indebtedness, but was herself a principal as to such indebtedness.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 896-903; Dec. Dig. § 300.\*]

**11. FRAUDULENT CONVEYANCES (§ 76\*)—"VOLUNTARY CONVEYANCE."**

"A voluntary conveyance is a conveyance without any valuable consideration. If there is a valuable consideration, no matter how trivial or inadequate, the conveyance is not voluntary" (quoting and adopting the definition of 8 Words and Phrases, p. 7345).

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 192-196; Dec. Dig. § 76.\*]

**12. FRAUDULENT CONVEYANCES (§ 77\*)—CONSIDERATION.**

If services in consideration for which an interest was assigned, were rendered at the instance and request of the assignor, they were rendered for her so as to be a valuable consideration for the assignment, though performed in another's interest.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 197-199, 202; Dec. Dig. § 77.\*]

Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by S. J. Hopkins against Roland J. White and others. From a judgment for plaintiff, and an order denying a motion for new trial, defendants appeal. Reversed.

W. H. Early, of Petaluma, for appellants. Lippitt & Lippitt and Chas. F. Fury, all of Petaluma, for respondent.

**CHIPMAN, P. J.** This is an action to have a certain assignment of the interest of defendant Harriette Macnider in her deceased father's estate declared void. Plaintiff had judgment, from which, and from the order denying their motion for a new trial, defendants appeal.

It is alleged in the amended complaint

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that on August 18, 1908, the defendants executed and delivered to plaintiff their promissory note for \$1,679.40, and that on August 2, 1910, plaintiff obtained a judgment against defendants in an action upon said promissory note for the sum of \$1,702.40, and that said judgment is now in full force; that on August 2, 1910, execution issued on said judgment against the property of defendants, and was duly served on the land hereinafter referred to and became a lien thereon on August 4, 1910; that on September 12, 1909, defendant Harriette Macnider executed and delivered to defendant White an assignment of all her property, to wit, all of her right, title, and interest in the estate of her father, John C. Haskell, deceased, by which the said Harriette directed that the same be "distributed to and fully and absolutely vested in the said R. J. White, as the same would have been distributed to and invested in me if this assignment had not been made, whether the same be real or personal property or both"; that at the time said assignment was executed the said defendant Harriette had no property other than that mentioned in said assignment, and defendant, her said husband, was and is insolvent, and that said assignment was made "with intent to delay and defraud the creditor of the said defendant, Harriette Macnider," and "was made without any consideration whatever passing from the defendant, Roland J. White, to the defendant Harriette Macnider," and that the "pretended indebtedness named and set forth in said assignment as due from said defendant Harriette Macnider to the said defendant, Roland J. White, was fictitious," and said Harriette was not at said time indebted to said defendant White "in any sum whatever." It is then alleged that subsequent to said assignment the estate of John C. Haskell, deceased, has been fully settled and distributed by the superior court of Los Angeles county, and that upon the settlement and distribution of said estate the sum of \$711.58 was distributed to defendant White, and also "an undivided one-seventh interest of, in, and to all that certain real estate described in the petition for distribution and in the decree of distribution in the matter of the estate of John C. Haskell, deceased, as follows, to-wit." (Then follows a description of the real estate the subject of the decree of distribution.) The answer admits the execution of the said promissory note, but denies any indebtedness to plaintiff; admits that judgment was had on said note, but alleges that, "immediately after said judgment was rendered, they served notice in due and regular form of their intention to move said court for a new trial in said action, and that said motion has not been heard and determined by said court"; admits the execution of said assignment, but denies the averments of fraud and want of consideration in its

execution, and denies the alleged insolvency of defendants Macnider, and denies that the indebtedness mentioned in said assignment was fictitious; alleges that said assignment was made for a good and valuable consideration, and that all of its terms and conditions have been fully complied with and that said defendant White is the "absolute owner of all of said property without any right or interest therein to defendant Harriette Macnider or defendant W. B. Macnider or either or both of them."

The findings of fact follow substantially the averments of the complaint; that said assignment was without any consideration from defendant White to defendant Harriette Macnider; that the pretended indebtedness set forth in said assignment was fictitious, and that said defendant Harriette was not indebted to defendant White in any sum whatever; that defendant Harriette, with full knowledge of her insolvency, made said assignment with intent to delay and defraud her creditors, and that she has remained, and still remains, in possession. It is found that defendants, the Macniders, moved for a new trial in the action on said promissory note, and that said motion has not been determined, but that "there was no stay of proceedings in the said action"; that "ever since said assignment to said defendant Roland J. White the property therein mentioned has remained and still remains in the possession and under the control of said defendant, Harriette Macnider"; that defendant White is not the owner of said property so assigned to him, but that it is the property of said Harriette Macnider.

As conclusions of law it was found that said assignment "is fraudulent and void as against this plaintiff and the said assignment should be set aside," and the property therein mentioned and subsequently distributed in said estate to defendant White "should be held and determined to be, and is the property of the said defendant Harriette Macnider so far as the plaintiff herein is concerned"; that defendant White "should account for all the property held by him under the terms of said written assignment, including the sum of \$711.28"; that defendants be restrained from selling or in any way interfering with said property, "except as shall be further directed by the court"; that the undivided one-seventh interest in said real property is the property of said Harriette, "so far as this plaintiff is concerned, and should be sold for the purpose of satisfying" said judgment, and said defendant White "should pay over to plaintiff said sum of \$711.28, distributed to him as found in the findings of fact, to be applied upon the said judgment in favor of plaintiff."

Judgment was entered accordingly. Substantially all of the findings are challenged for insufficiency of facts.



[1] Whatever interest defendant White acquired by the assignment was merged in the decree of distribution, and his title is referable to and he is now holding and is claiming under the decree and not under the assignment. *Toland v. Earl*, 129 Cal. 152, 61 Pac. 914, 79 Am. St. Rep. 100; *Goad v. Montgomery*, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145. The assignment was executed September 12, 1909, was duly acknowledged on September 13, 1909, and was duly recorded, in Los Angeles county, on September 30, 1909, where the land is situated, and where the Haskell estate was being settled. The decree of distribution was entered June 20, 1910. The complaint was filed October 13, 1910, more than one year after the assignment was recorded, and about four months after the entry of the decree of distribution. Plaintiff had constructive notice of the assignment, and he also had notice of the proceedings on final account and distribution in the matter of the estate of Haskell, deceased.

[2] Whether plaintiff had any remedy by which to have arrested the proceedings on distribution, so far as they related to defendant White or could, on proper showing, before the decree became final, have had it reopened, need not be now inquired into. It is very certain that the decree is final and conclusive. It is not open to collateral attack, and can be set aside by direct attack only upon "some ground of fraud or other matter collateral or extrinsic to the questions examined in the proceeding leading to the decree." *French v. Phelps* (No. 988, filed in this court, October 15, 1912), 128 Pac. 772, and cases there cited. In that case the attack was collateral, being as to the sufficiency of certain evidence introduced in support of the decree of distribution, and it was held that even "if it could be shown that the testimony was altogether insufficient to support the decree, or that it was the result of forged documents or perjured testimony, all the parties interested having had their day in court in the proceeding in which the decree was made, we do not see how it could be successfully challenged for any of these reasons"—(citing cases). The action here is not aimed at the decree, but is directly aimed at a certain piece of evidence, to wit, the assignment, upon which the court acted in making distribution to defendant White. The effect of the action is to question in an independent proceeding the validity of a thing done in court, to wit, the entry of a decree in distribution. Such attack is necessarily collateral. To declare in this action that this piece of evidence thus used was fraudulently contrived does not in the slightest degree impair the validity of the decree. It may be that a court of equity, under proper pleadings, would entertain an action to have White declared to be a trustee and holding the title for the benefit of his creditors, but the demand for judgment is "that the said assign-

ment is fraudulent and void as against this plaintiff," and, being void, that White "account for all property received by him as aforesaid." He received no property by the assignment; and not until distribution and only by distribution did he acquire title freed from administration. Nor does the prayer ask that plaintiff's judgment be declared to be a lien on the property. In its judgment, however, the court "set aside, annulled, and declared to be null and void" the assignment; declared plaintiff's original judgment against the Macniders to be a lien on the property, and that plaintiff "is at liberty to proceed upon his execution \* \* \* and to sell the real property," etc. The judgment grants relief in excess of that prayed for, and in its effect nullifies the decree of distribution without directly attacking it. Without appropriate averments in the complaint plaintiff has been given a judgment lien on property held by a title unimpeachable in this action.

We very much doubt the sufficiency of the complaint to support the findings and judgment. But, waiving the point, we are satisfied that the findings are not supported by the evidence.

[3] The evidence adduced to establish fraud and want of consideration is to be found in the testimony of the defendants who were the only witnesses to the facts relied upon as establishing the averments of the complaint. In considering their testimony these witnesses are to be treated as having been voluntarily produced by plaintiff, vouching for their competency and credibility. The rule would not estop plaintiff from calling other witnesses to dispute their statements, but this was not attempted.

[4] Some minor statements of the witnesses, apparently inconsistent with their positive statements of material facts, may be discoverable in their testimony, but these latter cannot for that reason be set aside and disbelieved. The conclusions deducible from positive statements of facts showing bona fides are not to be shaken by some comparison of inconsistent statements with each other, unless these inconsistencies tend directly to establish the issues of fraud and want of consideration and clearly dispute the evidence of good faith. An instructive discussion of the rule is found in *Clark v. Krause*, 2 Mackey (D. C.) 559-571. We quote: "The analogies, as well as the reason of the law, are against the ascription to the defendant of any especial obligation in giving his personal testimony on demand of the complainant to create a case for his opponent by acquiescing in the imputation of bad faith while the charge remains unsupported by the testimony of a single adverse witness, or that unfavorable inferences are to be drawn from his failure to strengthen circumstances of alleged suspicion, supposed to be inconsistent with his positive statements"—citing

Lingan v. Henderson, 1 Bland. (Md.) 268; Alexander's Practice, 72; 2 Dan'l Chy. 451.

[5] Fraud may be inferred from circumstances, but it cannot be left wholly to conjecture. Kerker v. Levy, 140 App. Div. 428, 125 N. Y. Supp. 357.

The testimony of defendants was taken by deposition, and is mostly found in narrative form in the transcript. Defendant White testified: That he was engaged in practicing law in the city of San Francisco. "That prior to the 12th day of September, 1909, the witness first represented the defendant W. B. Macnider, as his attorney in the case of People v. Macnider, and in the trial of W. B. Macnider in the matter of charges that were preferred against Macnider by plaintiff in the Elks Lodge of Petaluma. That Macnider had been arrested at the instance of S. J. Hopkins, plaintiff herein, on a charge of embezzling nearly \$7,000. That witness succeeded in getting Macnider dismissed at the preliminary hearing in the justice's court of Petaluma, which lasted three or four days.

\* \* \* That defendant Macnider had appeared before the grand jury of Sonoma county on several occasions, and witness had accompanied Macnider to Santa Rosa on several occasions. That witness discussed these matters with Macnider prior to the time that Mrs. Macnider came to the office with him. That witness discussed these matters with him alone, and with her alone, and with them both together, day after day, practically half the summer. They were in witness' office almost daily for a long while; that witness expended money for and on behalf of defendant W. B. Macnider amounting to more than \$300. That witness did not keep an exact account of said expenditures. Witness further testified that all of the services rendered for the defendant W. B. Macnider were also performed at the instance of Mrs. Macnider principally. \* \* \* That Macnider spoke to witness first about the employment of witness, and subsequently Macnider and Mrs. Macnider both came to witness' office and they hired witness. \* \* \* That witness had no written agreement with W. B. Macnider or Harriette Macnider concerning his employment or fees. \* \* \* 'I never made a statement of account to Macnider for my services and disbursements. I came to no agreement with Mr. Macnider or Mrs. Macnider as to the total amount due for services rendered, other than the assignment which was subsequently made, which was, as agreed upon, about the right charge to cover services for a period of about six months or a year, and the costs I had expended.' \* \* \* 'Mr. Macnider, Mr. Early, the notary public, and I were present when Mrs. Macnider executed the assignment. Mr. Early prepared it in the office of the notary public. They told me prior to the time that they received this property, or were about to receive it, prior to that time, in fact before he was arrested, or subsequent to his

arrest and before his trial, they told me of this interest in the estate, which they expected. \* \* \* Macnider never made a promise to pay me at any definite time. He and his wife told me they couldn't pay any money at that time, but even before the death of Mr. Haskell they said they had this interest in his estate, and it was on that information that they had given me that I acted for Mr. Macnider and performed the services for him and expended the costs and expenses.' \* \* \* Mrs. Macnider told witness that she expected money from her father, and would pay. 'I don't think that she expected him to die, but she expected to receive money from her father, who was living at that time.' That, after the death of John C. Haskell, Harriette Macnider came to witness' office, and stated that Macnider was working down there, but they required what actual money he had received at that time to pay their immediate expenses, and to pay off some other indebtedness, and then she assured witness about getting money from her father, and that she would pay witness, and that, after the death of John C. Haskell, Harriette Macnider wrote witness, and told him about her father's death, and that the estate was in probate, and that she would pay witness. \* \* \* Witness consulted with other attorneys pertaining to Macnider's case. \* \* \* That witness consulted Mr. Early and Mr. Peart several times concerning the case and paid for it. That Mrs. Macnider knew that witness had employed other attorneys in the matter of her husband's case, and she did not object to it: in fact, advised that witness employ other attorneys. That at the present time witness is square with the Macniders, as the assignment in question was taken in full satisfaction of witness' claim for services rendered and moneys expended for Macnider. That witness did not agree to give back any portion of the property to Mrs. Macnider or Mr. Macnider or to any one else. That witness has had absolute control of the one-seventh interest of Harriette Macnider in the Haskell estate since its assignment as his property. That witness has not accounted to Harriette Macnider for moneys received as income or anything from the assigned property, and does not intend to. That witness has nothing belonging to Harriette Macnider or W. B. Macnider. That at the time of taking the assignment witness did not agree to return any of the property or to account in any way to Mrs. Macnider and does not intend to. \* \* \* That witness at no time knew anything concerning the financial standing of Harriette Macnider or W. B. Macnider. 'I know that Hopkins claimed that Macnider owed him the money that he was alleged to have taken, and for which he was arrested and charged, and that the suit entitled Macnider v. Hopkins determined that matter or was to have determined it in the shape of an accounting. That



at the time said assignment was made witness had no conversation with Harriette Macnider or W. B. Macnider relative to defeating, delaying, or defrauding any of their creditors. \* \* \* That the property received by White under the assignment is of uncertain value. That, if witness disposes of the property for less than its estimated value, he will not look to the Macniders for the deficit. That, if it sells in excess of the estimated value, he will not account for the overplus."

Defendant Harriette Macnider testified that the ranch property of her father included some mining claims "but they had been pretty well worked out." After her father's death, her brother lived on the ranch, and after he left an old man had charge of it. "But since the death of her father the ranch has laid idle and rather neglected. She does not know of any income from the ranch since her father's death. Witness testified that she did employ Roland J. White as W. B. Macnider's attorney; that such employment was in November or December, 1908; that, previous to the time witness employed Mr. White as Mr. Macnider's attorney, Mr. White had been looking up and getting a case prepared for Macnider. At the time Mr. Hopkins and Mr. Macnider were having trouble Mr. Macnider employed White first. 'The services to which I have referred were services rendered by Mr. White as attorney at law, representing Mr. Macnider in an action in the superior court against S. J. Hopkins, for an accounting and in the proceedings wherein Macnider was charged with embezzlement. Mr. White had been representing Mr. Macnider and performed services for him three or four months before I made any arrangements with Mr. White for compensation. I made an arrangement with Mr. White in his office in San Francisco. It was not an agreement in writing. I was alone when I went to see him.' That previous to that witness saw Mr. Peart, and Mr. Peart said he thought Mr. White would take up the case and go on if witness would make arrangements about a settlement with White. \* \* \* That after that White rendered services for Macnider. \* \* \* That after witness talked with White he continued to represent Macnider through November, December, January, and probably February. An action was brought in Sonoma county by Mr. Hopkins against Mr. Macnider and myself upon a promissory note. Mr. White did not represent either Mr. Macnider or myself in that case (there is no evidence that White knew of this indebtedness). \* \* \* Witness paid White \$20 or \$30 on account. 'I just made that one payment to Mr. White. It was for services for Mr. Macnider, and was to go on account. Mr. White had not given me any statement of his account at that time, but he had written for money several times. I have none of his letters.' \* \* \* White told

witness at the time the arrangement was made that he, White, would take witness' share in said estate as full payment for his services to Macnider and call it square.

\* \* \* Defendant White gave witness a receipt when witness made said arrangement. Witness has not that receipt. She misplaced the receipt and cannot find it; has looked for it in all her papers. It read that the assignment made by witness to White covers all his services rendered to Macnider. Mr. Early prepared the receipt after we had signed the agreement or paper that he made out. \* \* \* After September 12, 1909, she had not received any letters from Mr. White, and did not see him again until the day before she testified. \* \* \* The first conversation the witness had with Mr. White, relative to his acting as Macnider's attorney, was around November, 1908. After that she saw him on an average of three or four times a month. \* \* \* Witness was present in the office of Mr. Holton in Los Angeles, when the distribution of the estate was made."

Much of the same ground is gone over in the deposition of defendant W. B. Macnider. Of the ranch which had been distributed he testified that one of the sons of deceased was in possession and harvested the crop of 1910; that different heirs visited the ranch at different times. We quote from the transcript: "That witness saw Harriette Macnider execute the assignment in question to Roland J. White. 'Mr. Early prepared the paper. He drafted it at our house, and Mrs. Macnider signed the paper in Mr. Clark's office in Santa Cruz (where the Macniders were then living). I was present at that conversation at the house between Mr. White and Mrs. Macnider relative to the making of the assignment. Mr. Early and Mr. White went out and took a walk, while my wife and I discussed the matter of making the assignment.' That witness saw Roland J. White give Harriette Macnider a receipt the day the assignment was made. That Roland J. White did not tell witness that day the amount of his bill for services rendered by him to the witness or how much Roland J. White had expended for Mr. Macnider prior to that time. 'I had an idea of how much he had expended for me but I don't think it was discussed at that time. Mr. White never presented a bill for his services rendered.'" Macnider testified to the different matters in which White served him, to White's urging him to pay him or in some way to assure him that he would be paid. "At one time White said that he, White, would not pay out much more out of his own pocket, and witness had his wife see him and he said if witness could not get somebody to guarantee the payment he would not carry on the work. \* \* \* I never secured White, in any way except that I had my wife, Harriette Macnider, see White and guarantee White's compensation at a time that White

thought he could not carry on the cases for me any longer, which was in the fall of 1908." Speaking of the assignment witness testified: "Witness and his wife had been endeavoring to square themselves with White, and Harriette Macnider thought the best thing they could do was to assign her interest over to White in payment, and White agreed to accept the assignment in full payment."

\* \* \* My wife made the assignment with the understanding that she assumed my obligations with him."

It appears from the deposition of the administrator of the Haskell estate that the inventory and appraised value of the real and personal property was \$26,745.60, of which \$24,700 was the value of the real estate; that a portion of the ranch was sold, before distribution, for \$1,800 less than its appraised value; that there remained for distribution \$20,583.09, of which \$4,981.07 was cash on hand. There is no evidence otherwise of the value of the ranch, except in a letter received from an attorney at Los Angeles. White was led to believe that the value of the estate property was about \$35,000. As to its producing an income the evidence was that but little was realized. What the actual value of the land was when the assignment or the distribution was made does not appear. It appeared that after the death of Mr. Haskell "the ranch was in the possession of the boys who lived on the ranch; that Mr. Charles Macnider lived on the ranch three or four months after their return from the north."

Respondent contends that actual fraud is shown, but his principal reliance is, first, that Mrs. Macnider's engagement was that of a guarantor, and, as it was not in writing, it was void under section 2793 of the Civil Code, and that the promise was not within any of the provisions of section 2794 of the same Code (i. e., that the creditor did not "part with value, or enter into any obligation, in consideration of the obligation, in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the principal debtor"); and, second, that the evidence established constructive fraud under section 3442 of the Civil Code, for that the transfer was made "voluntarily or without a valuable consideration, by a party while insolvent," and also under section 3439, for that the transfer was made "with intent to delay or defraud" creditors.

[3] We can discover no evidence in the record which in any just view can be said to support the claim of actual fraud, and actual fraud is always a question of fact. Civ. Code, § 1574.

[7] In a case where constructive fraud is relied on, it is necessary to allege the fraudulent intent, under section 3442. Schell v. Gamble, 153 Cal. 448, 95 Pac. 870.

[8] It is only by reason of the proviso in 128 P.—50

that section that fraud becomes established constructively or as matter of law. Cook v. Cockins, 117 Cal. 140, 48 Pac. 1025; Gray v. Brunold, 140 Cal. 615, 74 Pac. 303. Section 1573, Civil Code, provides that constructive fraud is "any such act or omission as the law specially declares to be fraudulent."

[9] The transfer of property with intent to delay or defraud creditors is declared by section 3439, Civil Code, to be void as to creditors. But the intent in such a case is a question of fact and is not to be presumed from the mere fact of the transfer, for section 3432 expressly provides that "a debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another." McKee v. Title Ins. Co., 159 Cal. 206-217, 113 Pac. 140. It is only where the transfer is "made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency," that the statute declares such transfer to "be fraudulent and void as to existing creditors." Section 3442, Civ. Code.

[10] Respondent devotes some attention to his claim that defendant, Mrs. Macnider, was merely a guarantor of her husband's liability. It seems to us a fair consideration of the evidence leads to the conclusion that she became a principal to whom as such, as well as to her husband, defendant White looked and had a right to look for payment. It is true that defendant Macnider, in his testimony, used the word "guarantee" in speaking of his understanding of the matter, but the testimony of Mrs. Macnider and of White, who were the parties to the engagement, shows that she employed White and agreed to pay him for his services, and did pay him. It is also true that White was first employed by Macnider and had performed some service for him before his wife came to his relief. But White refused to continue the employment under the original engagement, and his services in large part were performed after Mrs. Macnider employed him and in good faith relying on her promise. In rendering services, White parted with value, and it seems to us that Mrs. Macnider entered into the obligation with White under such circumstances as to render her a principal debtor, by virtue of her promise, and thus, even under the law of guaranty, section 2794, Civil Code, she became liable.

Is constructive fraud shown? Was the transfer made "voluntarily, or without a valuable consideration by a party while insolvent"?

[11] "A voluntary conveyance is a conveyance without any valuable consideration. \* \* \* If there is a valuable consideration, no matter how trivial or inadequate, the conveyance is not voluntary." 8 Words



and Phrases, p. 7345, and cases cited. The finding is that "the said assignment \* \* \* was made without any consideration whatever passing from the defendant, Roland J. White, to the defendant, Harriette Macnider," and that "the said assignment was not made for a good or valuable consideration from said defendant, Roland J. White, to the defendant, Harriette Macnider." This is not a finding that the transfer was made "without a valuable consideration," and does not meet the requirements of the statute, unless all the evidence of White's services must be disregarded because they were rendered in matters concerning Macnider and not directly for Mrs. Macnider.

[12] But if, as the evidence shows, the services were rendered at the instance and request of Mrs. Macnider, and under her employment they must be regarded as rendered for her, although performed in the interest of another, and there was, therefore, a consideration passing to her. There is no finding that the assignment was wholly without consideration, and therefore voluntary. To make the transfer void as to creditors, it must also have been without a valuable consideration by a party while insolvent. There was evidence that the Macniders had no considerable means with which to pay the claim of plaintiff, except the interest of Mrs. Macnider in her father's estate. One of the actions in which White was employed was a suit for an accounting brought by Macnider against plaintiff, in which Macnider claimed that plaintiff was indebted to him. This claim was in existence at the time plaintiff held the promissory note of the Macniders, and before suit was brought on the note. There is nothing in the record to show that at the time the assignment was made the Macniders were insolvent. It does appear, however, that, as the litigation between plaintiff and Macnider finally ended, the Macniders had nothing left but the interest of Mrs. Macnider in her father's estate, and at the time of the trial of the present action they were insolvent. But aside from the alleged insolvency of the Macniders, which may be conceded, the findings are not supported by the evidence. Defendant White was engaged in the business of serving as attorney under Mrs. Macnider's employment for several months, during which time he advanced of his own money, as expenses, over \$300. Of the \$711 received on distribution he paid Mr. Early \$300 and his account with him and Mr. Peart for services as his associates in the business is unsettled. There is no evidence that the interest assigned to him is greatly or at all in excess of a reasonable fee for his services and advances of money. His interest, acquired by the distribution, is of uncertain value. That his services constituted a valuable consideration cannot be doubted. If he was paid a sum grossly in

excess of the value of his services or such a sum as would shock the conscience, it is not so made to appear, nor is it so alleged. No question of the inadequacy of the consideration is raised by the pleadings.

The judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

#### On Rehearing.

PER CURIAM. A rehearing is asked on the ground that in the original opinion it was held: First, that the action was a collateral attack upon a judgment; second, that the judgment in the action grants relief in excess of that prayed for; and, third, that the findings are not supported by the evidence. Upon a re-examination of the matter we agree with the respondent that plaintiff was not precluded from attacking the assignment on the ground of fraud, although the land had been distributed to defendant White in probate proceedings. *Jenner v. Murphy*, 6 Cal. App. 434, 92 Pac. 405, *More v. More*, 133 Cal. 489, 65 Pac. 1044, and other cases now for the first time called to our attention in the case, we think sustain plaintiff's contention. We therefore withdraw from the original opinion all discussion on that branch of the case. The second point or ground was not at any time given serious consideration, and is unnecessary to the decision. The decision was rested entirely on our conclusion that the evidence is sufficient to support the findings, and upon that point nothing in the petition for a rehearing creates, in our minds, a doubt of the correctness of our conclusions.

The petition is denied.

20 Cal. App. 124

#### BOND v. UNITED RAILROADS OF SAN FRANCISCO. (Civ. 995.)

(District Court of Appeal, Third District, California. Oct. 15, 1912.)

#### 1. COSTS (§ 258\*)—ITEMS TAXABLE—PRINTING BRIEFS.

In view of Supreme Court rule 13 (119 Pac. xii), which specifies the items of cost taxable on appeal and by implication excludes the cost of printing briefs through failure to mention same, the cost of printing the winning party's brief could not be taxed as costs to be paid by the losing party.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 978-982; Dec. Dig. § 258.\*]

#### 2. COSTS (§ 3\*)—WHEN RECOVERABLE—STATUTORY NATURE.

Costs are purely statutory, and their allowance depends upon the terms of the statute.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1, 4, 5; Dec. Dig. § 3.\*]

#### 3. COSTS (§ 146\*)—DEFINITION.

In general use, the term "costs" embraces both disbursements and specific sums allowed by statute as indemnity to the prevailing party for his expenses. In a narrower sense, the term excludes disbursements. Giving the term

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

its liberal signification, it would embrace only the taxable costs and disbursements.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 567-569, 572-574; Dec. Dig. § 146.\*

For other definitions, see *Words and Phrases*, vol. 2, pp. 1633-1640; vol. 8, p. 7620.]

#### 4. COURTS (§ 80\*) — RULES — COSTS — ITEMS TAXABLE ON APPEAL—DISCRETION.

In the absence of a statute specifying what shall constitute recoverable costs, the Supreme Court had power to exercise its discretion generally in advance of the trial of any particular case and promulgate rule 13 (119 Pac. xii), which specifies the items of cost taxable on appeal and by implication excludes the cost of printing briefs through failure to mention same.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 282-292; Dec. Dig. § 80.\*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Annie Bond against the United Railroads of San Francisco. From an order granting defendant's motion to retax costs, plaintiff appeals. Affirmed.

See, also, 159 Cal. 270, 113 Pac. 366, Ann. Cas. 1912C, 50.

Sullivan, Sullivan & Roche, of San Francisco, for appellant. W. M. Cannon and Wm. M. Abbott, both of San Francisco, for respondent.

CHIPMAN, P. J. This is an appeal from the order of the superior court in said action granting the motion of defendant to retax the costs. It appears that plaintiff commenced an action in the superior court against defendant. The cause was tried by a jury, and plaintiff had a general verdict for the sum of \$4,500. The jury also returned a verdict on certain special issues. The trial court thereafter entered judgment on the verdict for \$405. Plaintiff moved for an order vacating said judgment and for a judgment in her favor for the sum of \$6,900, or for \$4,500, which motion, by order of the court, was denied. Plaintiff appealed from said order and judgment to the Supreme Court, which resulted in a judgment of the Supreme Court reversing the judgment of the superior court and directing that judgment be entered "upon said verdict in favor of plaintiff and against said defendant for the sum of \$4,500, interest and costs." Upon the going down of the remittitur plaintiff's attorneys duly filed a memorandum of costs and disbursements, among which were the following items: "Printing appellant's points and authorities, 62 pages, \$52.70. Printing appellant's closing brief, 240 pages, \$240. Printing petition for modification of judgment, 7 pages, \$6. Defendant moved to strike out these items on the ground "that said items and each of them were and are not necessary disbursements on the part of plaintiff"; that they are not "legally chargeable as costs" or "proper subject of charge"; that they are not "within the intent and purpose of the statute allowing costs and

disbursements"; and that they "were paid voluntarily by plaintiff for her own benefit." The court made an order granting the motion, and the appeal is from this order.

The statutory provisions relating to costs are found in part 2, title 14, chapter 6, Code of Civil Procedure, sections 1021 et seq. Section 1021 provides that the compensation of attorneys rests with the parties by their agreement express or implied; "but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided." Section 1022 provides: "Costs are allowed of course to the plaintiff upon a judgment in his favor in the following cases." Five different classes of cases are enumerated, including actions for the recovery of money or damages. Section 1025 provides: "In other actions than those mentioned in section 1022, costs may be allowed or not, and, if allowed may be apportioned between the parties, on the same or adverse sides, in the discretion of the court," where recovery is not less than \$300. Section 1027 provides: "In the following cases, the costs of appeal is (are) in the discretion of the court: (1) Where a new trial is ordered; (2) when a judgment is modified." Section 1033 provides: "The party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk \* \* \* a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum must be verified, \* \* \* stating that to the best of his knowledge and belief the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may \* \* \* file a motion to have the same taxed by the court in which the judgment was rendered. \* \* \*" Section 1034 provides: "Whenever costs are awarded to a party by an appellate court, if he claims such costs, he must, within thirty days after the remittitur is filed with the clerk below, deliver to such clerk a memorandum of his costs, verified as prescribed by the preceding section, and thereafter he may have an execution therefor as upon a judgment."

Rule 2, subd. 4, of the Supreme Court (119 Pac. x) reads as follows: "Thirty days after the filing of the transcript the appellant shall file with the clerk his printed points and authorities. \* \* \* Within thirty days after the service of appellant's points and authorities the respondent shall file and serve his printed points and authorities; and within ten days after the service of respondent's points the appellant may file a reply." In directing what printing expenses should be taxable as costs, the Supreme Court, in 1904, adopted: "Rule 13. Cost of Printing. The expense of printing transcripts on appeal in civil cases, and



pleadings, affidavits or other papers constituting the record in original proceedings upon which a case is heard, required by these rules to be printed, shall be allowed as costs in bills of cost in the usual mode." 119 Pac. xii. The foregoing are all of the statutory provisions and rules of the Supreme Court, called to our attention, in the matter of costs, which seem to have any direct bearing on the question. The provisions of the practice act and the early statutes are cited by counsel; but the differences between them and the Code provisions do not appear to cast any light on the subject, and no decisions directly to the point in question, arising under the earlier law, have been found.

[1] The position taken by appellant is that, the filing of a printed brief being mandatory under the rules of the Supreme Court, the cost of printing her brief became a necessary disbursement which the statute requires should be taxed as costs and paid by the losing party. It is also contended that, if rule 13 is to be construed as denying her this right, it is in contravention of the statute and therefore unauthorized and void.

[2] Costs were not recoverable at common law and are only given by statutory direction, and their allowance will depend on the terms of the statute. *Bennet v. Kroth*, 37 Kan. 235, 15 Pac. 221, 1 Am. St. Rep. 248; *Apperson v. Mut. Ben. Life Ins. Co.*, 38 N. J. Law, 388. The right to recover costs is purely statutory, and, in the absence of statute, no costs could be recovered by either party. *Fox v. Hale & Norcross S. M. Co.*, 122 Cal. 219, 54 Pac. 731. "The allowance of costs does not depend on the form or nature of the action, but depends upon the fact whether the case comes within the terms of the statute relating to costs." *Sierra Union M. & M. Co. v. Wolff*, 144 Cal. 430, 77 Pac. 1038. There are seventeen sections in the chapter relating to costs, in but two of which is the term "disbursements" mentioned, namely, sections 1021 and 1033. By section 1021 "parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided." All the sections following deal with "costs" and make no mention of "disbursements" or of "necessary disbursements," except in section 1033 the terms used, in directing what shall be included in the memorandum, are costs and "necessary disbursements." And it will be observed that in that same section "a party dissatisfied with the costs claimed" may "file a motion to have the same taxed by the court." And section 1034, which relates to costs on appeal, makes no mention of disbursements but is confined by its terms to "costs." It will be noticed, too, that section 1021 uses the term "disbursements," while section 1033 mentions "necessary disbursements." If it be insisted that the term

"disbursements," as used in section 1021, means expenses separate and distinct from expenses classed as "costs," the subsequent sections fail to make any provision for the payment of disbursements, and section 1021 authorized costs and disbursements only "as hereinafter provided." Section 1033 provides merely the mode of proceeding by "the party in whose favor a judgment is rendered, and who claims his costs," and by the party who is "dissatisfied with the costs claimed." It is clear to our minds that the term "disbursements" adds no strength to the statute except possibly that its use may justify the court in construing the term "costs" more liberally than it might otherwise feel authorized to do.

[3] "In general use, the term 'costs,' when employed with reference to litigation, embraces both disbursements and specific sums allowed by statute as indemnity to the prevailing party for his expenses. In a narrower sense, the term 'costs' excludes disbursements. Giving the term its liberal signification, it would embrace only the taxable costs and disbursements." *Hegar v. De Groat*, 3 N. D. 354, 56 N. W. 150; *Price v. Garland*, 4 N. M. (Johns.) 305, 20 Pac. 182. The Supreme Court, in *Showers v. Wadsworth*, 81 Cal. 270, 22 Pac. 663, in construing the word "costs" as used in section 2778 of the Civil Code, subdivisions 2 and 3, said that it "is used in an extended sense and includes all things which are necessary in order to make the litigation effectual." That section relates to rules for interpreting agreements of indemnity and provides for agreements indemnifying "against claims, or demands, or costs," and "embraces the 'costs' of defense against such claims," etc. The court obviously had reference to "costs" incurred in some form of litigation in the courts, and its interpretation in that case would seem to apply to the term "costs" used in the Code of Civil Procedure. But who is to determine what things are "necessary in order to make the litigation effectual," and what limit is to be placed to these expenses? The statute does not specify what shall constitute "costs." We have provisions for jury fees, witness fees, and fees for filing certain papers in the action, referee's fees, costs in foreclosure, in partition, in probate proceedings, receiverships, and others that might be mentioned; but we have no general fee bill. When a new trial is ordered on appeal, and when a judgment is modified, the costs of the appeal are in the discretion of the court. Section 1027, supra. But in other cases the plaintiff is allowed his costs "of course," upon judgment in his favor. Section 1022, supra. So that, after all is said, we are brought down to the question: What are "costs" as intended by the use of that term; and, where else can we go but to the courts for an answer?

[4] Our Supreme Court has said that "the

allowance or disallowance of items for expenses and disbursements incurred upon the trial of the action must be left in nearly every instance to the discretion of the judge where the cause was tried." *Miller v. Highland D. Co.*, 91 Cal. 103, 27 Pac. 536. This is necessarily so since the Legislature has failed to do what in some of the states it has done; that is, to specifically enact what shall constitute recoverable costs. If it is true as to expenses incurred in the trial court, it is equally true as to expenses incurred in the appellate court. In the trial courts the question is disposed of on motion to retax the costs, and the items are then and there passed upon; the ruling being subject to review in the appellate court. In the *Hale & Norcross Case*, supra, and in *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158, among many others, will be found illustrations where the Supreme Court reviewed the findings of the trial court on the cost bill. But the Supreme Court made a rule (13) defining precisely the costs allowable to the prevailing party on appeal. The cost of printing briefs is not provided for, and, by the inclusion of the items named, the rule excludes other printing costs. It was competent for the court to make the rule in advance of the filing of the transcript on appeal. It had the same power to decide in advance, by promulgating rule 13, that the expense of printing briefs would not be allowed as costs, as it has to pass upon the question in each case after the hearing. It was an exercise of a discretion lodged in the court which, by reason of the present condition of the statute law, it was forced to exercise and could not be exercised elsewhere.

The practice throughout the United States is by no means uniform. In some states such expenses are provided for by statute; in some others they are allowed as necessary disbursements because the rules of the court so holding require the briefs to be printed, and they treat the compulsory feature of the rule as imposing a burden which the losing party should carry. Appellant has industriously gathered many such cases.

In the Supreme Court of the United States disbursements by counsel for parties for printing briefs have never been allowed. *Ex parte Hughes*, 114 U. S. 548, 5 Sup. Ct. 1008, 29 L. Ed. 281. It has been so held to be the practice in other federal courts. *Lee Injector Mfg. Co. v. Penberthy Injector Co.*, 109 Fed. 964, 48 C. C. A. 760; *Kursheedt Mfg. Co. v. Naday*, 108 Fed. 918, 48 C. C. A. 140. In *Luxfer Prism Patents Co. v. Elkins et al.* (C. C.) 99 Fed. 29, the court, by McPherson, J., said: "The expense of printing the brief is nowhere made by statute a part of the taxable costs, and there is no rule or practice in this circuit permitting it. Neither do I think it a desirable practice to establish, for it would enable the successful party to impose upon the other excessive

charges for printing, or lead to constant disputes about the necessity or propriety of the matter printed." Our own experience leads us to the same conclusion as matter of wise policy. We frequently have so-called briefs that are filled with extended quotations from cited cases and page after page of the testimony of witnesses. Sometimes we have briefs that are lengthy disquisitions on elementary principles of law which need but to be stated to be admitted and often are conceded. Without knowing the facts in the case now here, we venture to think that a closing brief of 240 pages, following an opening brief of 62 pages, was needlessly "long drawn out."

In a Louisiana case a rule of court required the briefs to be printed and it was contended that the expense was a necessary disbursement and taxable as costs. The court said: "The rules of this court require, \* \* \* as a mode of proceeding, a printed brief, in the interest of the parties litigant, to assist it in the examination and determination of controversies; but they do not authorize the taxing of the cost of printing the same among the costs of the suit. This has never been done. There is, indeed, no more reason to have the party cast pay the costs of putting in print the argument of opposite counsel than there would be to have him pay for the oral argument. In the absence of any positive law, or of any authorized rule or line of precedents, supporting the pretension of the plaintiff, this court cannot recognize it, without usurping the powers vested in another branch of the government." *Cline v. Crescent City R. Co.*, 42 La. Ann. 36, 7 South. 67.

The Oklahoma statute reads as follows: "When a judgment on final order is recovered, the plaintiff in error shall recover his costs, including the costs of the transcript filed with the petition in error; and when reversed in part and affirmed in part, costs shall be equally divided between the parties." Comp. Laws 1909, § 6088. In a case arising under the statute the court said: "The foregoing statute is the only rule there is upon the subject. The expense of printing briefs has never at any time within this jurisdiction been held to be a proper item of costs. Our statute nowhere enumerates it as such, and no rule of this court has ever made this expense a proper charge against an unsuccessful litigant. If it ever should be made, and held to be a proper charge, in our judgment it would arise upon a statute or rule (conceding that this court would have the power to make such rule) and not upon a declaration in the first instance, as we are here requested to make." *Combs v. Miller*, 25 Okl. 2, 105 Pac. 322.

The question seems never to have been directly raised in the Supreme Court of this state in a case where the Code sections were noticed and construed. It was passed upon, however, in the case of *Hibernia Sav.*



& L. Soc. v. Behnke, 121 Cal. 340, 53 Pac. 813, where the court said: "The item of \$7 for 'printing points,' etc., was not an obligation of the defendant, and the plaintiff was not authorized to include it in his accounts." To understand the ruling it should be stated that, in *Hibernia, etc., Soc. v. Wackendreder*, 111 Cal. 471, 44 Pac. 168, a foreclosure action, in taxing the costs in the lower court the expense of printing was allowed as costs. It was claimed that, on sale of the mortgaged premises to satisfy the judgment, the indebtedness was represented to be greater than it was in fact and had the effect of keeping away bidders. The action in the Behnke Case was to vacate the sale. The court refused to vacate the sale although it said the item was improperly included in the cost bill. Appellant claims that "the expense of printing brief was not passed upon by either the superior court or the Supreme Court in that case." We cannot understand how the court could have found a place for the statement quoted if the matter had not arisen through a cost bill. However the fact may be, it is beyond dispute that the costs of printed briefs on appeal have never, within the knowledge of any member of this court, been allowed as a legitimate item of a cost bill. Rule 13 was promulgated in 1904, and how long it was the rule in practice before that we do not know, except from our own experience at the bar, which, as to the writer of this opinion, runs back 35 years. The *Hibernia Bank Case* was decided in 1898. Until it is changed by the Supreme Court or by the Legislature it must govern the subject. In Mr. Hayne's valuable work on *New Trial and Appeals* (New Ed.) p. 1711, it is stated that the printing of briefs cannot be taxed as costs. We refer to this as evidence of the prevailing practice.

Appellant relies confidently on *Ryan v. Maxey et al.*, 17 Mont. 164, 42 Pac. 760, for the reason, as is claimed, that in the state of Montana the law governing costs is quite similar to ours. *Bell v. Superior Court*, 150 Cal. 31, 87 Pac. 1031, is cited to show that our Supreme Court followed the Montana court in its interpretation of sections 1033 and 1034; there being corresponding sections in the Montana Code. The question there, however, related to giving notice of the filing of the cost bill. Appellant simply remarks that, if the Montana view of those sections as to the necessity for notice is sound, we should follow the Montana court in the matter of what constitutes taxable costs. In *Ryan v. Maxey*, supra, the question was whether the expense of printing briefs in the Supreme Court was a legal charge as costs. Section 494 of the Montana Code of Civil Procedure (1887), as quoted in the opinion, is as follows: "\* \* \* There shall be allowed to the prevailing party in any action in the Supreme Court,

district courts, and probate courts, his costs and necessary disbursements in the action or special proceeding in the nature of an action." The rules of the Supreme Court of Montana required all briefs to be printed. Said the court: "A printed brief is a necessity. The costs of printing are therefore a necessary disbursement in the action. \* \* \* We are of the opinion that the cost of printing this brief should have been allowed. To allow this expense has been a very general ruling of the district courts in this state." All that can be claimed of this decision is that in that state the terms "costs and necessary disbursements" are held to embrace the expense of printing briefs and to allow this expense in the district courts and probate courts as well as in the Supreme Court. The case goes no further than to hold that the terms used in the statute should be construed to embrace the expense of printing briefs, rather as matter of fairness than as of absolute right. However, our Supreme Court has, in the exercise of what we conceive to be within its powers, made a rule against such an allowance. If a different practice is to be inaugurated, the authority must come from that court.

The order is affirmed.

We concur: HART, J.; BURNETT, J.

20 Cal. App. 276

GLADDING, McBEAN & CO. v. MONTGOMERY. (Civ. 1,101.)

(District Court of Appeal, First District, California. Nov. 1, 1912.)

1. EVIDENCE (§ 441\*)—WRITTEN CONTRACTS—PAROL EVIDENCE.

In an action on a written contract to tile a roof with "No. 2 Mission Tile," which is red tile of certain quality but not of any particular shade, evidence of a prior or contemporaneous agreement to use tile of a certain shade is inadmissible as varying the terms of a written agreement by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2030-2047; Dec. Dig. § 441.\*]

2. EVIDENCE (§ 441\*)—WRITTEN CONTRACTS—PAROL EVIDENCE.

Where there is a written contract to tile a roof with "No. 2 Mission Tile," which may be any shade of red, evidence of a prior or contemporaneous agreement that the tile should be of a certain shade cannot be admitted as an independent collateral agreement under Civ. Code, § 1625, providing that a written contract supersedes all the negotiations concerning its matter which preceded or accompanied its execution.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2030-2047; Dec. Dig. § 441.\*]

3. EVIDENCE (§ 441\*)—ALTERATION OF WRITTEN CONTRACTS.

An agreement by one tiling a roof under a prior written contract to use "No. 2 Mission Tile," which may be any shade of red, that if the color did not suit he would replace it with the shade desired, was an attempt to alter a written contract by parol which cannot be done under Civ. Code, § 1698, providing that a con-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tract in writing can only be altered by a contract in writing or by an executed oral agreement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2030–2047; Dec. Dig. § 441.\*]

#### 4. CONTRACTS (§ 282\*)—SATISFACTION OF A PARTY—CONSTRUCTION.

A contract to perform to the satisfaction of a party only calls for such performance as should be satisfactory to a reasonable person.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1284–1289; Dec. Dig. § 282.\*]

Appeal from Superior Court, City and County of San Francisco; Franklin J. Cole, Judge.

Action by Gladding, McBean & Co. against A. E. Montgomery. Judgment for plaintiff, and defendant appeals. Affirmed.

Reed, Black & Reed, of Oakland, and Metson, Drew & Mackenzie, of San Francisco, for appellant. H. K. Eells, of San Francisco, for respondent.

HALL, J. This is an appeal taken in accordance with the method provided by section 953a, Code of Civil Procedure, from a judgment in favor of plaintiff for the sum of \$825 for work and material performed and supplied by plaintiff in the construction of a tile roof for defendant. The original contract was for the sum of \$790, but this amount was increased by extra work by the amount of \$35, making the total contract price \$825, for which amount judgment was rendered. The agreement was in writing, executed by defendant and by the plaintiff under its seal and the signature of its secretary, and called for the construction of a roof of "No. 2 Mission Tile." The uncontradicted evidence of Oswald Spear, manager of plaintiff, was that "No. 2 Mission Tile" simply meant red tile of a certain kind and quality, but did not indicate any particular shade of red, and that such tile varied in shades of red as the necessary result of its process of manufacture. There is nothing in the written contract calling for tile of any particular shade of red; it is simply described as "No. 2 Mission Tile."

The defense relied on is that there was "a previous or contemporaneous oral agreement that the tile should be of the color of that on certain of the university buildings" at Berkeley, at which place the building of defendant is situate; and that, upon the arrival of the tile, the defendant objected thereto as not as agreed, whereupon the plaintiff insisted that the tile would look all right, and that if the same should not be satisfactory to defendant when the roof was finished plaintiff would at once remove the same and replace it with tile of the desired color. Defendant alleged and claimed that the tile was not satisfactory in that it was not of the desired and agreed color, and accordingly notified plaintiff to remove the same.

[1] The claim of a prior or contemporaneous agreement to the effect that the tile should be of the same color as that used in the buildings of the University of California was clearly an attempt to vary and modify the terms of a written agreement by parol, which is not permitted under the law.

[2] "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." Section 1625, Civ. Code. The conversation relied on was one between Mr. Spear, manager for plaintiff, and Mr. Ratcliff, architect for defendant, in which Mr. Ratcliff asked Mr. Spear if his company supplied the tile for the university buildings, and he replied that it did. Mr. Ratcliff then said that that was the color he had in mind for the Montgomery building, but the written agreement subsequently executed made no reference to the tile on the university building. Under the description of "No. 2 Mission Tile," the contract called for red tile of a certain quality and shape. Under this language plaintiff had the right to supply red tile, and was not confined to tile of any particular shade of red. Any prior or contemporaneous parol agreement as to the shade of red cannot be sustained as an independent collateral agreement. The written contract, in the trade terms of "No. 2 Mission Tile," called for a red tile, and thus dealt with the question of color. The parol evidence relied on clearly contravened the provision of section 1625, Civil Code. Kullman, Salz & Co. v. Sugar Apparatus Mfg. Co., 153 Cal. 725, 731, 96 Pac. 369; Bradford Investment Co. v. Joost, 117 Cal. 204, 48 Pac. 1083.

[3] The attempt of the defendant to support the defense of a subsequent unperformed oral agreement was also clearly an attempt to prove an alteration by parol agreement of a written contract. This may not be done. "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, but not otherwise." Harloe v. Lambie, 132 Cal. 134, 64 Pac. 88; Platt v. Butcher, 112 Cal. 634, 44 Pac. 1060; Henehan v. Hart, 127 Cal. 656, 60 Pac. 426; Mackenzie v. Hodgkin, 126 Cal. 591, 59 Pac. 36, 77 Am. St. Rep. 209. The effect of the evidence was that plaintiff agreed orally that, if defendant was not satisfied with the roof after it was in place, plaintiff would remove the same and replace it with one of the desired color. For this plaintiff was to receive no additional or different consideration than that provided for in the original written contract. Plaintiff complied with the written contract when he supplied a roof of "No. 2 Mission Tile." The testimony of Mr. Spear was that it also stained the tile with oil, and that it had in fact weathered to the color of the tile on the university build-



ing, and that plaintiff had in fact complied with the subsequent oral agreement.

[4] A stipulation in a contract to perform to the satisfaction of one of the parties only calls for such performance as should be satisfactory to a reasonable person. *Keeler v. Clifford*, 165 Ill. 544, 46 N. E. 248; *Doll v. Noble*, 116 N. Y. 230, 22 N. E. 406, 5 L. R. A. 554, 15 Am. St. Rep. 398; *Bowery National Bank v. Mayor*, 63 N. Y. 336. But, however that may be, the evidence as to the subsequent parol agreement to the effect that, if the first roof was not satisfactory, plaintiff would remove it and replace it with one of the desired shade of red was clearly an attempt to alter a written contract by a parol agreement in contravention of section 1698, Civil Code, which may not be done. *Harloe v. Lambie*, 132 Cal. 134, 64 Pac. 88; *Platt v. Butcher*, 112 Cal. 634, 44 Pac. 1060; *Henehan v. Hart*, 127 Cal. 656, 60 Pac. 426; *Mackenzie v. Hodgkin*, 126 Cal. 592, 59 Pac. 36, 77 Am. St. Rep. 209; *Thompson v. Gerner*, 104 Cal. 168, 37 Pac. 900, 43 Am. St. Rep. 81.

It was in no sense a cancellation of the original contract by the substitution of a new contract therefor. No additional compensation was to be paid by defendant. The only effect of the parol agreement was to require plaintiff to furnish a roof of a particular shade of red if the roof first placed in position should not be satisfactory. This was but the alteration of a written contract by an unexecuted parol agreement, and cannot be enforced.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

20 Cal. App. 260

LEAN v. GEAGAN et al. (Civ. 1,099.)

(District Court of Appeal, First District, California. Oct. 30, 1912.)

1. GUARANTY (§ 42\*)—CONSTRUCTION—EXTENT OF LIABILITY.

In a guaranty of payment for goods sold to a third person, the words, "provided the amount due or to become due shall at no time exceed the sum of \$1,000," referred to the liability to be assumed by the guarantor, so that the mere extension of credit beyond that amount did not discharge the guarantor from all liability.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. §§ 51, 52; Dec. Dig. § 42.\*]

2. GUARANTY (§ 27\*)—CONSTRUCTION—PROTECTION OF CREDITOR.

Any ambiguity in a contract of guaranty as to the liability of the guarantor will be resolved in favor of protecting the creditor to the extent of the sum named therein.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 28; Dec. Dig. § 27.\*]

Appeal from Superior Court, Alameda County; N. D. Arnot, Judge.

Action by E. Lean against Lottie P. Geagan and M. V. Geagan, her husband. Judg-

ment for plaintiff, and from an order granting defendants' motion for a new trial, plaintiff appeals. Reversed.

Barnett Lyon, of San Francisco, for appellant. E. A. Holman, of Oakland, Cal., for respondents.

KERRIGAN, J. This is an appeal from an order granting defendants' motion for a new trial, after judgment for plaintiff in an action on an agreement of guaranty had been rendered and entered.

On the 24th day of April, 1908, the defendant Lottie P. Geagan made, executed, and delivered to the Hitchcock-Hill Company, a corporation, a guaranty in the words and figures following: "Guaranty. I hereby request Hitchcock-Hill Company, a corporation, to sell and deliver to W. B. Provan, Colo., county Denver, merchandise as he may from time to time require, and in consideration of such sale and credit extended I hereby guaranty the payment of any and all indebtedness which may hereafter become due from said W. B. Provan to said Hitchcock-Hill Company, provided the amount due or to become due shall at no time exceed the sum of one thousand dollars. \* \* \* This guaranty shall continue until written notice of its revocation is received from said Mrs. Lottie P. Geagan by said Hitchcock-Hill Company." On the 5th day of May, 1909, and at various dates just prior thereto, the Hitchcock-Hill Company, on the faith of the guaranty, had sold and delivered to W. B. Provan merchandise in the sum of \$1,102.69, on account of which \$94.69 had been paid, leaving a balance due of \$1,007.70. M. V. Geagan is the husband of Lottie P. Geagan, and for that reason is made a party defendant. It also appears from the complaint that prior to the commencement of this suit Hitchcock-Hill Company assigned its claim on the guaranty to the plaintiff. The action is for the amount of the guaranty; i. e., \$1,000.

[1] The only plausible theory, and in fact the conceded theory, upon which the trial court acted in granting the motion for a new trial, was that plaintiff's assignor in allowing Provan a credit in excess of \$1,000 breached the proviso contained in the guaranty that "the amount due or to become due shall at no time exceed the sum of \$1,000," and thereby discharged the guarantor from all liability. The court at first took the view that this proviso merely limited the amount for which the guarantor held herself responsible; but subsequently, on motion for a new trial, arrived at the conclusion that it had misconstrued this provision of the guaranty, and that its true meaning and intent was that the guarantor's liability was conditional upon Provan's credit being limited by the Hitchcock-Hill Company to the sum of \$1,000.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

We think the court was right in the first instance, and that the mere extension of credit to Provan beyond the sum named did not exonerate the obligor. In 14 Am. & Eng. Ency. of Law (2d Ed.) p. 1140, par. 4, the general rule on the subject is laid down as follows: "Where the guaranty contains a limitation as to the amount for which the guarantor will be bound, but contains no limitation as to time, and there is nothing in the circumstances surrounding the execution of the contract to evince a contrary intention, it will in general be construed to be a continuing guaranty and operative until revoked, and the guarantor will be held liable to the extent of his guaranty, notwithstanding the principal debtor may have during the existence of the contract contracted debts to an amount equal to or greater than the sum named in the guaranty. The limitation mentioned in the guaranty has reference to the amount of the guarantor's liability, and not to the amount of the dealing between the purchaser and the one who gives the credit."

[2] It is well settled that any ambiguity in a contract of guaranty, concerning the liability of the guarantor, will be resolved in favor of protecting the creditor to the extent of the sum named therein; in other words, that such a provision will be construed as a limitation upon the amount of the guarantor's liability rather than as a condition upon which any liability whatever attaches. In the present case we think the words, "provided that the amount due or to become due shall at no time exceed the sum of \$1,000," refer to the liability to be assumed by the guarantor. The authorities support this conclusion.

In the case of *Fisk et al. v. Stone*, 6 Dak. 35, 50 N. W. 125, the language of the instrument was that, if the amount due should not "at any time" exceed \$300, the guarantor would see that it was paid in full. A credit of about \$400 was given, and this was held not to constitute a breach of the guaranty. In the case of *Pratt v. Matthews*, 24 Hun (N. Y.) 386, the defendants executed an instrument, whereby they agreed with plaintiff's assignors that one Pope, who had purchased or was about to purchase coal of said assignors, should and would pay for all coal delivered to him up to a certain date, and, in default of his so doing, they agreed to pay for the same, provided the amount so in default should not at any time exceed the sum of \$1,000. In the course of the dealings which followed Pope became indebted for more than the amount of the guaranty, and the guarantors contended that the condition of the bond was broken, and that they were not liable for any sum at all. The court, after referring to a rule in that state, which prevails here—I. e., that in interpreting contracts of suretyship the same rules of construction are applicable as

to other contracts (section 2837 Civil Code; *Sather Banking Co. v. Briggs*, 138 Cal. 724, 72 Pac. 352)—held that the fact that the indebtedness due from Pope for coal exceeded at times the sum of \$1,000 did not relieve the guarantors from liability upon the contract. In the case of *Schinasi v. Lane*, 118 App. Div. 76, 103 N. Y. Supp. 127, the language of the guaranty was "providing the amount of credit shall not exceed \$5,000 at any one time." The court held that "the defendant did not intend by his contract of guaranty to deprive or hinder" the debtor "from obtaining credit. \* \* \* There is nothing," says the court, "to show that the defendant deemed a greater credit injurious to the company, or that the guarantor meant to exert through his contract of guaranty a controlling supervision over the indebtedness of the company." The court concluded its opinion with the statement that "the general rule is that such words of limitation in a guaranty are to be construed as intending to limit the liability of the guarantor, and not a condition as to the extent of credit to be given, the breach of which would relieve the guarantor"—citing many cases. See, also, *Crittenden v. Fiske*, 46 Mich. 70, 8 N. W. 714, 41 Am. St. Rep. 146; *Sturges v. Robbins*, 7 Mass. 301.

In the case at bar it does not appear clearly that the guarantor feared that a credit in excess of the amount stated in the instrument would be injurious to her, or that she desired to control the amount of credit which the Hitchcock-Hill Company might extend to Provan; but, on the other hand, it does appear that the form of the guaranty entered into was supplied by the Hitchcock-Hill Company, who may well be presumed not to have intended by the proviso under discussion to confine their protection within the narrow limits contended for by appellants. That that corporation understood the proviso inserted by it to be a limitation not upon the amount of credit to be extended to Provan, but upon the amount of the guarantor's liability, may also be inferred from the fact that said corporation almost immediately extended credit to Provan beyond that sum. Moreover, the guaranty being given for the benefit of the creditor, it should be construed so as best to effect that purpose if it fairly can be. We think the construction we have placed upon it merely holds the guarantor to the extent of her engagement.

We have examined the other grounds upon which the motion for a new trial was based, but find nothing in them which would warrant the court's order granting the motion. Moreover, it appears that the new trial was granted upon the ground that we have just considered.

The order appealed from is reversed.

We concur: LENNON, P. J.; HALL, J.



(20 Cal. App. 288)

EVANS v. NOONAN et ux. (Civ. 962.)

(District Court of Appeal, Third District, California. Nov. 2, 1912.)

**1. HUSBAND AND WIFE (§ 151\*)—WIFE'S SEPARATE ESTATE—"NECESSARIES"—MEDICAL SERVICES.**

Medical services are necessities of life which parents are required to furnish their children, and hence within the purview of Civ. Code, § 171, as amended in 1905 (St. 1905, p. 206), making a wife's separate estate liable for necessities furnished the family while living with her husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 582-595; Dec. Dig. § 151.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4693-4703.]

**2. HUSBAND AND WIFE (§ 151\*)—WIFE'S ESTATE—LIABILITY FOR NECESSARIES.**

Under Civ. Code, § 171, as amended in 1905 (St. 1905, p. 206), providing that the separate property of a wife shall be liable for the payment of debts contracted by the husband and wife for necessities of life furnished to them or either of them while living together, the wife's separate estate can be subjected to the payment of necessities furnished their minor children.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 582-595; Dec. Dig. § 151.\*]

**3. HUSBAND AND WIFE (§ 221\*)—ACTION FOR NECESSARIES—PARTIES.**

Where it is sought to subject the separate estate of a wife to the payment of necessities furnished the family, it is proper to join the wife with the husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 707, 802-806, 968-973, 976½; Dec. Dig. § 221.\*]

**4. HUSBAND AND WIFE (§ 221\*) — WIFE'S SEPARATE ESTATE.**

Where it is sought to subject the separate estate of a wife to the payment of necessities furnished the family, she may in view of Code Civ. Proc. §§ 382, 383, respectively, providing that those united in interest must be joined as plaintiffs or defendants, sureties on notes may be joined as defendants with the principal, be joined in the original action against the husband; it not being necessary to first recover against him, and then in equity proceed to subject her property to the payment of that judgment.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 707, 802-806, 968-973, 976½; Dec. Dig. § 221.\*]

**5. HUSBAND AND WIFE (§ 229\*)—SEPARATE PROPERTY OF WIFE—ACTIONS—PLEADING.**

In an action against a husband and wife, where it was sought to subject the wife's separate estate to the payment of plaintiff's claim, allegations that plaintiff rendered services as physician and surgeon are sufficient to show that such services were necessities.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 816-834, 835, 838, 840-843; Dec. Dig. § 229.\*]

Appeal from Superior Court, Stanislaus County; L. W. Fulkert, Judge.

Action by C. W. Evans against M. H. Noonan and wife. From a judgment for the last defendant and against the one named and an order denying his motion for new trial, plaintiff appeals. Reversed.

E. R. Jones, of Modesto, for appellant. J. B. Jennings, of Modesto, for respondents.

HART, J. The complaint alleges that the plaintiff is a regularly licensed physician and surgeon and, at the times mentioned in the complaint, was engaged in the practice of his profession in the county of Stanislaus. The defendants are husband and wife, and the complaint avers that they "are indebted to the plaintiff in the sum of \$493; the said sum being a balance due plaintiff on an open book account for services rendered by plaintiff to defendants, at their special instance and request, in the capacity of physician and surgeon within the four years immediately preceding the commencement of this action." Judgment is asked for said amount. The defendants filed separate answers, each denying specifically the allegations of the complaint. In addition thereto the defendant Helen E. Noonan denies that she at any time ever employed the plaintiff in the capacity of a physician or surgeon or requested him to perform any of the services referred to in the complaint or agreed or promised to pay said plaintiff for any of the services mentioned in the complaint. The defendant M. H. Noonan, as a special defense, alleges that "within the last four years he has paid the plaintiff on account of such services the sum of \$218, which he alleges upon information and belief is the full value of all the said services so rendered by the plaintiff for the defendant within said time." The action was tried by a jury, and they found in favor of the defendant Helen E. Noonan, exonerating her from any liability under the contract upon which the action is founded, and against her husband and codefendant in the sum of \$229.55. Judgment was entered accordingly.

This appeal is by the plaintiff from the judgment "made and entered \* \* \* in favor of defendant Helen E. Noonan and against said plaintiff, \* \* \* and also from the order denying the plaintiff's motion for a new trial." It was stipulated by the attorneys of the respective parties "that the following facts were proved on the trial of this action, and that they might be considered as true for the purpose of a motion for a new trial: "(1) That at all the times mentioned in said complaint defendants, M. H. Noonan and Helen E. Noonan, were husband and wife and were living together as such. (2) That the medical attendance mentioned in said complaint was furnished to the minor children of said defendants. (3) That said medical attendance was necessary. (4) That all of said medical attendance was furnished by plaintiff at the special instance and request of defendant M. H. Noonan, the husband of said Helen E. Noonan and the father of said minor children. (5) That said Helen E. Noonan did not request plaintiff to render any of said services, and made no promise or agreement to pay for same."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Two questions are submitted for decision by this appeal, viz.: (1) Are medical services counted among the necessities of life? (2) If so, is the wife equally liable with the husband, under the terms of section 171 of the Civil Code, as said section was amended by the Legislature of 1905 (St. 1905, p. 206), for the payment for such services when the same are rendered to and for their minor children at the request of her husband only?

The theory upon which the court below submitted the cause to the jury is that, not having expressly contracted for the services mentioned in the complaint or agreed with or promised the plaintiff to pay for the same, the defendant Helen E. Noonan is not legally liable for the payment of a debt contracted for such services, so that such of her separate estate as may be subjected under said section to the satisfaction of such a debt may be taken therefor. The court instructed the jury in accordance with this theory, and rejected instructions requested by the plaintiff framed in conformity with his construction of the scope and meaning of section 171 of the Civil Code, *supra*, as follows: "The court instructs you that, in case you find from the evidence that the plaintiff at the request of either Mr. or Mrs. Noonan furnished and performed medical services and attendance to and for one of their minor children, it is the same as though the medical attendance was furnished to defendants themselves, for both parents are responsible for the care of their minor children, and necessities of life furnished to a child is deemed to have been furnished to the parents. While ordinarily a wife is not responsible for any debt of her husband, the law makes an exception in the case of necessities of life furnished to either or both of them while they are living together as husband and wife. You are instructed that medical attendance, when furnished to a wife, husband, or minor child, is deemed by law to be necessities of life. Therefore, if you find from the evidence that at the time set forth in plaintiff's complaint the plaintiff furnished medical attendance to defendants, or either of them, or at their request to any of their minor children, and that at said times the defendants were married and living together as husband and wife, it is your duty to find for the plaintiff in whatever amount you may find from the evidence is due to him."

The principles contained in the above-requested instructions stated the law applicable to the case as made by the pleadings and proof, and the action of the court in refusing to submit them to the jury and in instructing the jury in harmony with the theory of the defendant was, in our opinion, prejudicially erroneous.

[1] 1. Whether medical services are "necessaries of life," within the legal meaning

of those terms, is a question which has never been, so far as we are advised to the contrary, presented to and decided by the courts of this state. At any rate, we have been cited to no recorded decisions in which the question has been passed upon. But upon principle we can imagine no reason why medical services should not be so considered. To the contrary, a ruling holding them not to be so would appeal to our minds as barbaric both in its conception and conclusion. It is not possible that any court would hold that the obligation of parents to furnish their minor children with the necessities of life is fully satisfied when they have provided them with food, clothing, and shelter, or, to state the proposition in another form, that parents would not violate their obligation to provide their minor children with the necessities of life by a refusal to furnish them with requisite medical attention when ill. The word "necessaries," as it has been applied by some of the cases in which its legal import has been interpreted, is a relative term and, as so applied, has been restricted or enlarged in the scope of its legal signification according to the circumstances and conditions of the parties. Some of the cases have held that it is not confined in its application merely to what is essential barely to support life, but that it includes many of the conveniences of refined society, such as ornaments of dress, which are usually worn by persons of rank and position. In the present case, however, there is nothing which requires us to go further than to say that, under our law, it most certainly at the least means the common necessities of life, or such things as are proper and requisite for the sustenance of man. With equal certainty these include, besides food, clothing, and shelter, such medical attentions in cases of illness as are absolutely requisite to relieve physical suffering and pain and to overcome or conquer disease, if by such attentions it can be done. But we are not without some eminently respectable authority for the conclusion that medical services are included in those common necessities which it is legally obligatory upon parents to provide for their minor children, and, without further comment upon the proposition, we cite the following cases from other jurisdictions in confirmation of the views above expressed and the conclusion which is the culmination thereof: *Carstens v. Hanselman*, 61 Mich. 426, 28 N. W. 159, 1 Am. St. Rep. 606; *Darling v. Andrews*, 9 Allen (91 Mass.) 106; *Bevier v. Galloway*, 71 Ill. 517; *Tebbets v. Hapgood*, 34 N. H. 420; *Cothran v. Lee*, 24 Ala. 380; *Pearl v. McDowell*, 3 J. J. Marsh. (26 Ky.) 658, 20 Am. Dec. 199; Am. & Eng. Ency. of Law (2d Ed.) p. 876, and cases cited in the footnotes.

[2] 2. The solution of the second proposition must rest upon the ascertainment of the true meaning of section 171 of the Civil Code, which, as amended by the Legislature



of 1905, reads: "The separate property of the wife is liable for her own debts contracted before or after her marriage, but is not liable for her husband's debts: Provided, that such property is liable for the payment of debts contracted by the husband or wife for the necessities of life furnished to them or either of them while they are living together. Provided, that the provisions of this act shall not apply to the separate property of the wife held by her at the time of her marriage or acquired by her by devise or succession after marriage."

Under the above section, prior to the amendment at the time mentioned, all of the wife's separate property was exempted from liability for the debts of her husband, providing, also, however, that her separate property was liable for her own debts contracted either before or after marriage. It will be observed that the section as amended in 1905 excludes from liability her separate property held by her at the time of her marriage and that acquired by her by devise or succession after marriage, and therefore the application of the provisions of the section is necessarily limited to such of her separate property only as she may have acquired after her marriage by any other means than by devise or succession; such property, for instance, as her earnings or that which she might acquire by gift after her marriage. It is probable that the section was put in its present form by the Legislature largely for the purpose of meeting those cases where the husband, in order to render himself execution proof, has by gift transferred to his wife all his property.

But whatever might have been the legislative motive prompting the enactment of the amendment, it is plainly manifest that the intention was thus to make the wife jointly liable with her husband for the payment of debts contracted by either or both for necessities furnished to either or both while they are living together, restricting, however, the wife's liability by limiting the right to take her separate property in execution of a judgment for a debt so contracted to such of her separate property only as she may have acquired after marriage otherwise than by devise or succession. That the liability imposed upon the wife by the amendment was intended to be for debts which might be contracted by the husband alone for necessities furnished to herself or her husband or both while they are living together seems clear not only from the language itself of the amendment, but also from the fact that the section before amended expressly foreclosed any right to take any of her separate property for the extinguishment of her husband's debts. The purpose of the amendment, in other words, seems to have been to authorize the doing of a certain thing to a limited extent which was

theretofore altogether expressly forbidden. The rejected instructions were, as stated, drafted upon the above construction of section 171, as amended. And the first of said instructions construes said section to mean that the furnishing of necessities to a minor child of the husband and wife is the same as furnishing necessities to such husband and wife themselves, and this is obviously the correct view of the section in that respect.

[3] But it is contended by the respondent with apparent earnestness that, where an action is instituted against the husband to recover for necessities contracted for solely by him, it is not necessary to join the wife in such action in order to subject such of her separate property as may be taken for the payment of a debt so contracted to the satisfaction of a judgment obtained in such action. But we can perceive no reason for doubting that, in order to bind the separate property of the wife which may be taken for that purpose by a judgment obtained in an action such as the one at bar, it is necessary to make her a party to such action. While the section does not provide in terms that the wife is personally liable in such a case, we are nevertheless of the opinion, as before stated, that a personal liability to the extent of her separate property which may be subjected to the operation of an execution in a case of this kind is imposed upon her by the statute. In other words, the statute makes her personally responsible for necessities furnished under the circumstances therein specified to the extent that certain of her separate estate is bound for the payment of a debt contracted for such necessities. No other conclusion could logically follow from a reasonable view and consideration of section 171, for it would obviously involve a palpable contradiction to say that she is not thus made liable and at the same time hold, as it must be held, that certain of her separate property may nevertheless be taken upon a judgment recovered for necessities. But in any event it is very plain to our minds that her property should not be bound by a judgment rendered and entered solely against her husband, and that on the contrary, if her separate estate is to be resorted to for the purpose of satisfying such a judgment, her liability should be established by such judgment. There are certain conditions upon which alone her separate property may thus be taken, and these conditions involve issues which must necessarily arise in such an action which are vital to her rights and which manifestly she ought to be accorded an opportunity to meet before her separate property is taken from her. These questions are: (1) Was the debt to recover which the action is instituted contracted for necessities of life? and if so (2) Were such necessities furnished either to

her husband or herself or both while they were living together? Obviously, unless these questions can be and are answered in the affirmative, it follows that none of the wife's separate estate, whenever or howsoever acquired, may be taken to satisfy a judgment obtained in an action to recover upon an alleged contract for necessities. That the wife would be entitled to be heard upon those questions is an obvious proposition and indeed one which, as we shall presently see, counsel for the respondent himself concedes. She is entitled to an opportunity, before her separate property capable of being so taken shall be seized in execution of a judgment obtained for necessities, to show, if she can show, that the conditions prescribed by the statute upon which such property may be so taken do not in fact exist. She, in other words, is entitled to show, if she can, that the "necessaries" were not procured for or furnished either to her husband or herself; or that the articles furnished were not "necessaries" within the meaning of the law; or that, if "necessaries," and were furnished to her husband, were so furnished while she and the former were not living together. If this were not true, then the wife might, as counsel for the appellant very aptly suggests, be made the victim of fraud through connivance between her husband and the creditor, and thus despoiled of a portion of her separate estate. On the other hand, the creditor would be entitled to have the wife's liability fixed by the judgment—that is to say, an adjudication that her separate property which may be taken for that purpose, if any such she has, is subject to execution under such judgment. The right to have such an adjudication would manifestly be very important to the creditor in a case where the husband had no property or effects subject to execution, or where, perhaps, he has transferred all his belongings, reachable by process in his own hands, to his wife. But the sum and substance of this whole proposition is that a person or his property should under no circumstances be bound by a judgment in an action to which he has not been made a party and in which, therefore, he has not been accorded an opportunity to show that neither he nor his property should be so bound.

[4] The suggestion that where the wife is joined with her husband in an action to recover a judgment for necessities, and where such a judgment is obtained against her, her separate property which is by section 171 exempted from execution under such judgment might nevertheless be subjected to the satisfaction thereof is altogether without merit. Her liability is measured and fixed by the statute and would necessarily be measured and fixed by the judgment. There would be no more ground for the apprehension of any such result in a case where she was joined with her husband than where,

having herself expressly contracted for the necessities, she was sued alone and judgment secured solely against her.

The procedure which counsel for the respondent suggests would be the proper one in a case of this character, even if appropriate in any event, would amount in practical effect to a trial in an unusual way of the very issues upon which the wife would be entitled to be heard at some time before her property is taken for a debt contracted for necessities. He, in effect, says that the statute contemplates that all the questions vitally affecting the wife's rights in an action of this kind, where instituted against the husband alone, may be litigated and determined in some other appropriate proceeding after judgment had and execution issued, where it becomes necessary to resort to the wife's separate estate to satisfy the judgment. His position, more explicitly explained, is this: That (assuming that the wife is responsible for necessities furnished to herself and husband where the latter alone contracts for the same) after judgment has been obtained against the husband, and the execution returned unsatisfied, the plaintiff may apply to a court of equity by way of a creditor's bill, making the wife a party, in aid of the execution of the judgment; that in such bill the plaintiff could show that the judgment was for the necessities of life furnished to the husband or wife while they were living together, and that the judgment was unsatisfied; that the wife owned separate property not "held by her at the time of her marriage or acquired by her by devise or succession after marriage," describing the property and praying that the judgment be declared a lien on such property, and that the court order it sold in satisfaction of the judgment. "The wife would then," argues counsel, "be accorded her 'day in court' to traverse the issues thus made by the bill, and the court under its equity jurisdiction would have full power to determine the whole question," etc.

Thus, as heretofore suggested, counsel concedes that there are issues or questions which must arise in this action as to which the wife would be entitled to her "day in court"—that is, that she would be entitled to an opportunity to combat the existence of conditions upon which alone certain of her separate property may thus be seized. But, assuming that the wife in a case of this character is not a necessary but only a proper party, why all such circumlocution involving, as necessarily it must if adopted, a violation of the rule designed to avoid a multiplicity of actions, when all the issues pertaining to the wife's rights may be litigated and adjudicated in an action against her and her husband jointly? Of course, as in any other case where it is claimed that property levied upon is exempt from execution, the question whether her separate property



levied upon in execution of a judgment obtained against her for necessities is or is not exempt under the section may be tried and decided in some appropriate proceeding after execution. This would necessarily be so because that issue could not arise except upon the taking of the property under the execution. But to say that it would be proper in such a proceeding to try the other issues vital to the wife's rights in such a case as this would be the equivalent of holding that a judgment binding upon her property may first be rendered and entered and the issues, the determination of which would be necessary to justify such judgment, could be tried afterwards. Obviously neither the statute upon which this action is founded nor our system of procedure contemplates any such roundabout way of adjudicating rights.

It is further insisted that there is no specific provision in the statute under consideration or in the Code of Civil Procedure authorizing the joinder of the wife with the husband in such an action as this, and that therefore such joinder would be without warrant of law and improper. The reply to this proposition is, however, that no specific provision authorizing a joinder is required in a particular case where, as is true in this instance, such authority is to be found among the general provisions of our procedure. As before declared, an action of this character, whereby it is sought to charge certain of the wife's separate estate with the extinguishment of a debt contracted for necessities is, in effect, one upon an obligation, and it is very clear that under that view of the action the wife may be joined therein with her husband by authority of section 383 of the Code of Civil Procedure, and also under section 382 of the same Code.

[5] The further objection is made that the complaint states no cause of action against the wife because it is not therein alleged that the services alleged to have been rendered by the plaintiff were for "necessaries." The complaint, as we have seen, alleges that the plaintiff is a physician and surgeon by profession, and that the amount sued for is due for services rendered by him for the defendants in his capacity of physician and surgeon. If it be true, as we have held, that medical services are legally included among the necessities of life, then the complaint by the allegations above referred to shows that the services rendered were necessities. The mere statement that they were "necessaries" would involve a legal conclusion and of course could add nothing to the force of the averments in that respect.

For the reasons stated in the foregoing, the judgment and the order appealed from are reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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PEOPLE v. ASHLAND. (Cr. 190.)

(District Court of Appeal, Third District, California. Oct. 22, 1912.)

1. HOMICIDE (§ 22\*)—MURDER—FIRST DEGREE.

Defendant upon receiving his wife's letter informing him of her adultery with deceased, and stating that it was forced upon her by threats, immediately returned home, and 17 hours after his first information called for deceased and said to him, "You talked to my wife," and fired several shots, one after deceased had fallen and his wife was trying to protect him. Held that, unless defendant was insane or so mentally deranged that he could not appreciate the wrongfulness of his act, it constituted murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 35-38; Dec. Dig. § 22.\*]

2. HOMICIDE (§ 40\*)—"MANSLAUGHTER"—SUDDEN "HEAT OF PASSION"—TIME FOR COOLING.

To reduce homicide from the degree of murder to that of manslaughter it must have been committed upon a sudden quarrel or heat of passion, and, where a person who is sufficiently wronged by another to arouse in him that heat of passion which, if life were taken immediately, would make the crime manslaughter, after sufficient cooling time has intervened, kills deceased, the homicide will be deemed the result of deliberation; and where defendant was informed by his wife that she had committed adultery with deceased, the first time under violence, searched for deceased, took a journey by train to his home, and shot him 17 hours after he had been first informed, there had been a sufficient cooling time and his acts could not be said to have been committed in such "heat of passion" as would reduce the homicide to manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 62-64; Dec. Dig. § 40.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3239-3240; vol. 5, pp. 4338-4342; vol. 8, p. 7715.]

3. HOMICIDE (§ 101\*)—"JUSTIFIABLE HOMICIDE"—HEAT OF PASSION.

The killing of a human being in the heat of passion, while reducing the crime to manslaughter, does not constitute justifiable homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 131, 133; Dec. Dig. § 101.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3910-3113.]

4. CRIMINAL LAW (§ 814\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Instructions must be applicable to the facts as proved.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 814.\*]

5. CRIMINAL LAW (§§ 763, 764\*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

An instruction in a murder trial, after defining the two degrees of murder in the language of the Penal Code, that "you will observe that a murder perpetrated by lying in wait or by any kind of willful, deliberate, and premeditated killing is a murder in the first degree," was in effect an instruction that the jury should understand that certain elements constituted murder in the first degree, and the use of the word "observe" was not objectionable as a declaration by the court that the evidence established defendant's guilt of murder in the first degree.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770; Dec. Dig. §§ 763, 764.\*]

### 6. CRIMINAL LAW (§ 815\*)—INSTRUCTIONS—MATTERS OF DEFENSE IN GENERAL.

An instruction in a murder trial that defendant under his plea of not guilty was entitled to put in evidence all matters tending to establish a defense except former conviction or acquittal, and among other defenses allowed that of insanity, modified by striking out the part relating to former jeopardy, taken in connection with an instruction that the plea of not guilty put in issue other allegations of the charge and entitled defendant to put in all matters tending to establish a defense, was not objectionable as limiting the defense under such plea of insanity only.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1922, 1986; Dec. Dig. § 815.\*]

### 7. CRIMINAL LAW (§ 1172\*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Where insanity was the only defense in a murder trial, an instruction, if objectionable as limiting the defense under the plea of not guilty to insanity only, was without prejudice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3154–3163, 3169; Dec. Dig. § 1172.\*]

### 8. CRIMINAL LAW (§ 789\*)—SUFFICIENCY OF EVIDENCE—REASONABLE DOUBT.

Instruction that accused cannot be legally convicted upon suspicion suggested by questions propounded by counsel or otherwise arising, but his guilt must be determined by impartial consideration of the evidence and unless shown to a moral certainty beyond all reasonable doubt, he must be acquitted, and that a preponderance of the evidence is not sufficient to justify a conviction fully covers the question of reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1849, 1904–1922, 1960, 1967; Dec. Dig. § 789.\*]

### 9. CRIMINAL LAW (§ 829\*)—REQUEST FOR INSTRUCTIONS—INSTRUCTIONS ELSEWHERE GIVEN.

Where the propositions presented by requested instructions were clearly explained by the court, the rejection of such instruction was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

### 10. HOMICIDE (§ 27\*)—MURDER—"INSANITY."

A person may be to some degree of unsound mind, or laboring under some delusion or be a monomaniac, and still be fully capable of appreciating the wrongfulness of taking human life; but insanity as a defense must be such that defendant at the time he committed the act did not and could not know the nature and wrongfulness of his act.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 43½, 44; Dec. Dig. § 27.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3635–3644; vol. 8, p. 7688.]

### 11. CRIMINAL LAW (§ 570\*)—EVIDENCE—INSANITY.

Where insanity is a defense, the law only requires the defendant to prove his insanity at the time of the commission of the offense by preponderance of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1285–1288; Dec. Dig. § 570.\*]

### 12. CRIMINAL LAW (§ 834\*)—INSTRUCTIONS—INSANITY—BURDEN OF PROOF.

A modification of a requested instruction as to the burden of proving the defense of insanity by striking out the word "merely" at the end thereof was not erroneous, since the addition or elimination of the word could have

neither given additional force to nor impaired the instruction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2013, 2014; Dec. Dig. § 834.\*]

### 13. HOMICIDE (§ 181\*)—EVIDENCE—GROUNDS FOR RESENTMENT.

Under a plea of insanity in a trial for the murder of a person guilty of adultery with defendant's wife induced by threats, his economical mode of living in order to support his home and family to the degree of sacrificing personal convenience and comforts was admissible as tending to show his attachment for his wife and children and the keenness of his resentment against the conduct of deceased, and hence the probable effect of his wife's confession upon his mind.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 383–385; Dec. Dig. § 181.\*]

### 14. HOMICIDE (§ 295\*)—INSTRUCTIONS—INSANITY.

Where defendant had killed deceased after his wife's confession of acts of adultery with him induced by threats, and set up the defense of insanity, the refusal of a lengthy hypothetical instruction recapitulating the evidence bearing on insanity containing the confession by defendant's wife of her relations with deceased, acts showing defendant's frugal mode of life prior to the homicide in order to support his family and pay for his home was proper, since such facts could have no tendency to prove that degree of insanity rendering one irresponsible for his acts, and could only be important when connected with proof of some degree of insanity, and, so emphasized, might have been construed as an expression of opinion by the court that defendant had become insane by reason of such facts, in consequence of which he did not know the wrongfulness of his acts.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 606–609; Dec. Dig. § 295.\*]

### 15. CRIMINAL LAW (§ 762\*)—INSTRUCTIONS—PROVINCE OF COURT AND JURY.

In a trial for murder where the important questions presented by the evidence were the crime as charged and the defense of insanity, the court's frequent use of the terms "murder" and "murder in the first degree," though not oftener than necessary, was not objectionable as authorizing an inference that the court was of the opinion that defendant was guilty as charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769; Dec. Dig. § 762.\*]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Harry Ashland was convicted of murder, and he appeals. Affirmed.

R. L. Beardslee, of Stockton, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, of Sacramento, for the People.

HART, J. The defendant, by an information filed in the superior court in and for San Joaquin county, was charged with the crime of murder. The jury found him guilty of murder of the first degree and fixed the punishment at imprisonment in the state prison for the term of his natural life. Pen. Code, § 190. This appeal is from the judgment and the order denying the defendant a new trial. No claim is made that the evidence does not support the verdict, but the



contention is that the court committed a number of prejudicial errors in the matter of giving, refusing, and modifying certain instructions.

The facts and circumstances leading to and attending the commission of the homicide are undisputed, and are substantially as follows: The defendant was a married man, whose family consisted of his wife, aged 24 years, and four children, aged, respectively, six, four, and two years, and the youngest eight months. With his wife and family he came to California from Philadelphia in the year 1909, and a short time after his arrival in this state he purchased a 20-acre tract of land near a place called and known as Avena, in San Joaquin county. With his family he settled on this land. He owed something like \$600 on the purchase price of the property and, after trying his hand at farming, he found that he was thus making no headway in the reduction of his indebtedness, and therefore, in the month of June, 1911, went to San Francisco to seek employment, leaving his wife and children on the farm. He remained in and about San Francisco, making in the meantime one visit to his home, until about the 30th day of December, 1911, on which date he received a letter from his wife containing, among other things, the following: " \* \* \* Well, dear, there is a lot of news around here and they are all concerning me. I got myself in all kinds of trouble. Well, I shall tell you when you come home, and then I guess you will get a divorce from me all right. Well, I will take my medicine for my foolishness. I am sorry, but I can't do any more than that. I don't really understand myself; it is not like me at all. I will not ask forgiveness from you. You can judge for yourself when you hear it. Please write soon and tell me when you will come home. \* \* \* I do wish I could see you and speak to you. I feel so miserable." Upon reading the letter Ashland immediately left San Francisco for his home, reaching the latter place at about midnight of the day on which he received and read said letter. His wife then told him that one John Gofield (the deceased), who had for some time been in the community where the Ashlands resided serving in the capacity of a United States squirrel inspector, had had sexual intercourse with her on two different occasions, the first time on the 18th day of December, 1911, and the second time a few days thereafter, or about Christmas day, and only a few days prior to the receipt by the defendant of the letter above referred to. She declared to her husband that the first sexual act with Gofield was forced upon her by threats and violence upon the part of the former, and that on both occasions the acts were committed on a cot situated in a bedroom in the defendant's house and where the children of the defendant were sleeping on both occasions.

It was about two o'clock in the morning when Mrs. Ashland finished detailing the story of the conduct of Gofield toward her. The defendant thereupon left his house and went to the house of a Mr. Gannon, a neighbor residing a distance of about half a mile from the defendant's home. He awoke Gannon and said that he desired to talk with him. Gannon opened the door and allowed the defendant to enter, whereupon the latter inquired whether there was a "squirrel man" boarding at his (Gannon's) house. Gannon replied that there were two "squirrel men" who had boarded with him, but that they had left his home some time prior to that day. Gannon, at the request of the defendant, described the men, and the defendant recognized the deceased as one of the two so described, and declared that he was the man he was looking for. Gannon asked him his reason for seeking Gofield, and the defendant excitedly and in a loud tone of voice replied: "He raped my wife! He raped my wife! Twice, two different times, four days apart." He then asked Gannon whether he was telling him the truth when he said that the deceased was not in his (Gannon's) house at that time. Gannon assured the defendant that Gofield had gone to his home in Stockton and allowed him to go into the bedroom to assure himself that the deceased was not then in any of the rooms. Gannon then advised the defendant to go to the sheriff and explain his trouble to that official. The defendant, tapping his breast, replied: "If I find him before the sheriff finds him the sheriff will have to do with me and not with him. California is not big enough to hide him." The defendant then returned to his home, reaching there after 2 o'clock in the morning. At the hour of 9 o'clock he went to the home of a Mr. Relph, another neighbor, whose home is situated about half a mile from that of the defendant. He excitedly told Mr. Relph the story of the disgrace of himself and children by the conduct of his wife, and shortly thereafter returned to his home. At about 11 o'clock on the morning of the same day (December 31, 1911), the defendant took the train at Avena, about half a mile distant from his house, and went to the city of Stockton. Arriving at Stockton, he immediately proceeded to make inquiries as to the location of the residence of Gofield and asked several persons whether they had seen him lately and where. Eventually he was given information as to the street and block in which Gofield's residence was situated, and he immediately repaired to that neighborhood. This was about 5 o'clock p. m. He inquired of several persons whether they could point out to him the house of the deceased. It happened that a young son of the deceased overheard the defendant inquiring for Gofield, and he thereupon volunteered to take the defendant to his father's house. The lad, upon reach-

ing the house, followed closely by Ashland, opened the door and stepped inside, closing the door as he did so, but the defendant immediately opened the door and stepped into the hallway. The boy told his father that there was a man on the outside who desired to see him. The deceased, who was sitting at this time, arose and put on his coat and went into the hallway, meeting Ashland. The former asked Gofield if he was the "squirrel man," and the latter answered affirmatively. Thereupon Ashland took Gofield by the arm and together they walked out on the porch. After reaching the porch, Ashland asked the deceased if his name was Gofield, and the latter replied that it was. Ashland then said, "You talked to my wife," and the deceased replied, "Do you know who you are talking to?" Again Ashland said, "You talked to my wife," and at the same time fired a shot.

Mrs. Gofield, wife of the deceased, was at her husband's side when the fatal shots were fired. In her language may best be told what occurred following the first shot: "My husband kind of sank back and over again, and I was over my husband, and this man Ashland lowered the revolver and put it between my arm and side and shot my husband in the back, and I was down over him. \* \* \* My husband turned and ran in the house and I turned to go, too, and Ashland ran between myself and husband. \* \* \* My husband was running in the house, and I started to follow, and just as we got in the hall we met my husband's mother—she was living with us—and she caught my husband and they both staggered back into the dining room, and he sank on the floor." Gofield died shortly thereafter, not having uttered a word after being shot.

After the shooting Ashland fled from the house and was followed by Gofield's father-in-law, who was at the former's house when the shooting occurred, and by one F. J. Murray, a policeman, living near by, who had heard the shots and hastened to Gofield's house to learn the cause and the result of the shooting. Ashland ran down several streets, followed by Murray, who ordered him to stop, and fired several shots in the air for the purpose of thus stopping him. Ashland, however, kept on running until he reached the office of the chief of police, located in the courthouse, into which he ran and there surrendered himself to the chief. The defendant was in a high state of excitement when he reached the police office, and upon entering said that he was looking for the chief. The latter, who was standing in the office, told Ashland that he was the chief, and the defendant excitedly threw his arms about the officer, exclaiming that he had shot the "squirrel man," Johnnie Gofield, and explained that he did the act because Gofield had ruined his wife and broken up his home. He delivered the weapon with

which he did the shooting to the chief, and for some time thereafter was in an exceedingly nervous and somewhat hysterical condition, crying and moaning, and otherwise acquitting himself as one keyed up to a highly nervous state. A physician was called in and treated the defendant, and finally restored him to comparative tranquility.

The foregoing statement embraces the principal and most important facts brought out at the trial, and, as stated, stand in the record uncontradicted. The defense set up at the trial was that of insanity; the claim and the theory being that the defendant's mind was so wrought upon by the revelations of his wife's unfaithfulness that it gave way to that degree that he was legally not responsible for his act in killing Gofield. As stated, the objections urged against the judgment of conviction are founded entirely on what counsel for the defendant conceive to be errors seriously prejudicing the rights of the accused growing out of the instructions as given, refused, and modified by the court.

[1] 1. First among these assignments of errors is the criticism of the action of the court in refusing to give the instructions upon manslaughter requested by the defendant, and thus restricting the jury to the consideration of the question whether the defendant, under the evidence, was guilty of murder of the first degree or of no crime whatsoever. It is vigorously contended that the defendant was not only entitled to have the jury enlightened by the court upon the elements constituting the crime of manslaughter, but that he was furthermore entitled to an instruction stating that that offense is included within the crime charged by the information, and that it was within the legal province of the jury, under the evidence, to find him guilty of the lesser offense, if they were convinced beyond a reasonable doubt that he was guilty thereof, and entertained a reasonable doubt of his guilt of either of the degrees of murder. We cannot assent to this contention. The court was perfectly justified, under the evidence, in limiting the jury to the return of a verdict of murder of the first degree, if they were sufficiently convinced that the defendant committed any crime at all. The evidence conclusively established the fact that, unless Ashland was, at the moment he killed Gofield, insane to a degree that he was without intelligent volition or was mentally deranged to an extent that he could not appreciate or know the nature and quality and wrongfulness of his act in killing Gofield, such act was most unquestionably preceded by and the result of deliberate premeditation, and therefore constituted murder.

[2] To have reduced the defendant's act in killing Gofield from the grade of murder to that of manslaughter, it must have been made to appear that the homicide was com-



mitted upon a sudden quarrel or heat of passion. Obviously, under the evidence, the act was not perpetrated upon a sudden quarrel within the legal import of that phrase as used in connection with the law of homicide. Nor can it be said that it was committed in that "heat of passion" which will reduce an unlawful or felonious homicide from murder to manslaughter, for the act of killing did not take place while the deceased was actually engaged in having sexual relations with the wife of the defendant, but was committed some 17 hours after the defendant had been told by his wife that Gofield had had such relations with her. Undoubtedly he became very angry and perhaps much beside himself upon receiving this information, and undoubtedly he remained in a high state of anger up to the time that he gratified his resentment of Gofield's acts by killing him. And it is very probable that, had he not met the deceased after hearing of his wife's infidelity, he would for many years thereafter and perhaps for the remainder of his life have been aroused to a state of intense passion whenever the acts of Gofield recurred to him; yet no one would say that he could avenge the wrong committed against him by Gofield by killing the latter at any time he might happen to meet him after learning of such wrong and after the lapse of plenty of time for his passion to give way to the normal tranquility of his judgment, and that the killing under such circumstances would be deemed to be the result of that "heat of passion" which prevents felonious homicide from transcending the grade of manslaughter. The law expects and indeed demands that a person sufficiently wronged by another to arouse in him that "heat of passion" which, if life were taken immediately upon the happening of the provocation, would make the crime manslaughter, shall, if he does not slay him who is guilty of the provocation at the instant it is given, permit his passion, thus aroused, to subside, and where in such case sufficient "cooling time" intervenes between the act of provocation by the deceased and the act of killing by the defendant the latter act, although prompted by the provocation, will be deemed to have been the result of deliberate premeditation or predetermination to take life. If Ashland was in possession of his reason so as to be responsible for his act, ample time had elapsed for his passion to subside—that heat of passion which will reduce unlawful homicide from murder to manslaughter—between the time at which he received the confession of his wife and the time when, after persistent and relentless search for Gofield and the making of threats against his life, he found and slew him.

Under these circumstances, while the fact that the defendant had been told and believed that the deceased had had sexual relations with his wife might tend to support

the theory that he had, by reason thereof, temporarily lost his reason or had been so affected thereby as that his power of realizing and knowing the wrongfulness of his act at the time of its commission was destroyed, yet, if his knowledge of the wrong that Gofield had perpetrated against his marital rights had no greater or further effect than to arouse his passion, such knowledge would neither excuse his act nor reduce the homicide, committed some 17 hours after obtaining that knowledge, to the grade of manslaughter, or, as this precise proposition is stated in the case of *People v. Hurtado*, 63 Cal. 288, 296, "it could not tend to neutralize the effect of the circumstances which tended to establish that the killing was done with the express malice or predetermination to take life which constitutes murder of the first degree." Or as is said in *People v. Arnold*, 116 Cal. 686, 48 Pac. 803: "While 'the sight of adultery committed by his wife' may be, as suggested by Mr. Rice (3 Rice's Evidence, § 475), provocation to the husband which will justify that 'heat of passion' which is sufficient to reduce murder to manslaughter, the knowledge of such fact must be \* \* \* so recent as to preclude the idea of cooling time or premeditation."

The case of *People v. Halliday*, 5 Utah, 467, 17 Pac. 118, is very similar to the present case with regard to the facts. In Utah, at the time that that case arose, among the acts prescribed by law justifying homicide was where the act of killing was committed in a sudden heat of passion caused by an attempt to defile a female relation of the defendant, or when the defilement had been actually committed. The evidence disclosed that the defendant was informed on Saturday, while away from home, of the adultery, and Sunday evening following he went around to the house of the deceased, a considerable distance, and, without any provocation at the time, shot the deceased while the latter was in bed, killing him. The Supreme Court of Utah held the killing to have been unjustifiable, saying: "The provision of law quoted justifies a homicide committed by the husband in a sudden heat of passion caused by the attempt of the man slain to defile his wife, or caused by her defilement. But the killing must be without deliberation after knowledge of the fact. The law will not permit the husband to say that he slew the defiler of his wife in a sudden heat of passion after deliberating upon the defilement for 24 hours." See 2 Bish. Crim. Law (2d Ed.) § 708.

[3] In this state the killing of a human being in heat of passion does not constitute justifiable homicide, but merely has the effect of reducing the crime to manslaughter, and no particular cause for such heat of passion is expressly prescribed by our law. The principle, however, stated and applied in the Utah case is applicable to our law of

homicide, and simply means, as we have shown, that, while the taking of life in the heat of passion will make the crime manslaughter, it will be conclusively inferred that the homicide was not committed in the heat of passion from the fact of the intervention of a long period of time between the provocation and the act of killing. In other words, as is said by the Utah court in the Halliday Case, the law will not permit the defendant to deliberate upon his wrong and, avenging it by killing the wrongdoer, set up the plea that his act was committed in the heat of passion. There being, then, not the slightest element developed by the evidence which would give plausible color to the theory that the killing was committed in the heat of passion in the sense of that phrase as it is used in our law upon homicide or under such circumstances as to make the crime manslaughter, the court, as before declared, was right in refusing to define the crime of manslaughter or to tell the jury that, under the evidence, the accused might properly be found guilty of manslaughter.

[4] Instructions must be applicable to the facts, and it is not error to refuse instructions which have no application to the facts as proved. *People v. Carroll*, 128 Pac. 4; *People v. Turley*, 50 Cal. 469; *People v. Chavez*, 103 Cal. 408, 37 Pac. 389; *People v. Chaves*, 122 Cal. 140, 54 Pac. 596.

[5] 2. Counsel makes the further complaint that the court in effect declared to the jury that the defendant was guilty of first-degree murder in the following statement made by the court after defining, in the language of the Penal Code, the two degrees of murder: "From the foregoing provisions which I have read to you from the statutory law of this state, you will observe that a murder perpetrated by lying in wait or by any other kind of willful, deliberate, and premeditated killing is murder of the first degree." The specific criticism of the foregoing language is directed against the word "observe," which, counsel seems to imagine, took on some such sinister or subtle meaning in the connection in which it was therein used as to have necessarily carried with it and thus to the jury a declaration by the court that the evidence established the defendant's guilt of murder of the first degree. But we are unable to discover an erroneous or a harmful use of the word in the connection in which it was there employed. The court thus simply in effect said to the jury that they would "take notice" or "understand" from the provisions of the Code read to them that certain elements constituted murder of the first degree, and in so doing made no misstatement or said nothing that it had no legal right to say.

[6, 7] 3. The defendant requested the court to give the following instruction: "I charge you that, when a defendant in a criminal case has pleaded not guilty to the charge

contained in the information, he is entitled to give in evidence all matters of fact tending to establish a defense, *except former conviction or acquittal of the offense charged or once in jeopardy, and among other defenses allowed to him is the defense of insanity.*" The court modified said instruction by striking out the words italicized and, as so modified, read it to the jury. It is contended by the defendant that the effect of the modification of the instruction as indicated was virtually to tell the jury that the plea of not guilty entitled the defendant to establish the defense of insanity *only*. We do not so understand the instruction and cannot conceive that it found its way to the minds of the jurors as counsel construes it. We perceive nothing in the language of the instruction as it was given by the court which limited the right of the defendant to a consideration by the jury of any defense which the evidence might have developed. The truth is that insanity was the only defense made by the defendant, and, if his construction of the instruction were correct, the act of the court in giving it in the modified form would, under the circumstances, be without prejudice to the defendant. Moreover, the court elsewhere in its charge told the jury that the defendant's plea of not guilty put in issue every allegation of the information and charge, and that under that plea "all matters of fact tending to establish a defense may be given in evidence." Thus the court very plainly instructed the jury that *any* defense might be established under a plea of not guilty.

[8, 9] 4. It is next objected that the court erred by its disallowance of the following instruction, requested by the defendant: "The jury are instructed that mere probabilities are not sufficient to warrant a conviction; nor is it sufficient that the greater weight or preponderance of evidence supports the allegations of the information; nor is it sufficient that upon the doctrine of chances it is more probable that the defendant is guilty. To warrant a conviction of the defendant he must be proved to be guilty beyond reasonable doubt, and that there is no reasonable theory upon which he can be innocent when all the evidence in the case is considered together." The foregoing instruction, which is frequently given in criminal cases, is only a somewhat amplified form of explaining the rule of reasonable doubt, which must be applied in criminal cases. In other words, the proposed instruction merely contains a statement of certain conditions which may arise from the evidence and thus find lodgment in the minds of the jurors which do not measure up to that degree of proof justifying a conviction. But it was unnecessary to allow and read it to the jury, since in its charge the court explained the meaning of "reasonable doubt" in the language of Judge Shaw in the Webster Case, and clearly instructed the jury that the defendant could not be le-



gally convicted upon suspicions suggested by any questions propounded by counsel to the witnesses or otherwise arising, but that his guilt must be determined upon the evidence and by a fair and impartial consideration thereof; that the jury were not at liberty to go outside of the evidence in determining the question of the guilt or innocence of the accused; that the defendant could not justly be convicted except by evidence proving his guilt to a moral certainty and beyond all reasonable doubt, and that in case of a reasonable doubt of his guilt he must be acquitted; that the presumption of innocence was with the defendant during the entire trial and until a verdict of guilty was arrived at; that a preponderance of the evidence was not sufficient to justify a conviction. Thus it will be observed that the court, in its charge, fully covered the principle stated in the rejected instruction. The case of the People v. Murphy, 146 Cal. 502, 80 Pac. 709, does not hold that said instruction should be given in a case where, as here, the law involved therein is elsewhere stated in the charge of the court to the jury.

5. The propositions enunciated in instruction B, submitted by the defendant and disallowed by the court, involved the rules as to the presumption of innocence and the privilege of the defendant to refuse to testify, if he so elected, without jeopardizing his legal rights. Both these propositions were clearly explained to the jury by the court, and the rejection of said instruction was therefore not improper or erroneous.

[10] 6. The act of the court in refusing to allow instruction No. 49, proposed by the defendant, is assigned as prejudicial error. Said instruction reads: "To constitute unsoundness of mind, it is not necessary that the person of unsound mind be a raving maniac; it is sufficient if a person of unsound mind has a delusion or mania and acts upon such delusion or mania. If you believe from the evidence in this case that, at the time of the killing charged in the information, the defendant was of unsound mind by reason of any such delusion or mania, then it is your duty to, and you must, acquit the defendant." The instruction omits the most important element of the law applicable to insanity as a defense to crime, viz., that the defendant, at the time he committed the act, was so mentally deranged that he did not and could not know the nature and quality of his act in slaying the deceased and its wrongfulness. People v. Hubert, 119 Cal. 216, 51 Pac. 329, 63 Am. St. Rep. 72; People v. Barthleman, 120 Cal. 11, 52 Pac. 112. A person may in a sense or to some degree be of unsound mind, or he may be laboring under some delusion or be a monomaniac upon some subject, and still be fully capable of appreciating and knowing the nature and quality of wrongfulness of the act of wantonly taking human life. The instruction falls far short of embracing a cor-

rect statement of the law upon the subject to which it relates, and the court properly disallowed it.

[11, 12] 7. It is next insisted that the modification of the following instruction by striking out the word "merely" at the end thereof and reading it to the jury in its modified form constituted error prejudicial to the rights of the defendant: "While the law insists and compels the prosecution to prove the guilt of a defendant of the crime charged beyond a reasonable doubt and to a moral certainty, the law only requires the defendant, whose insanity is one of his defenses, to prove his insanity at the time of the commission of the offense with which he is charged by a preponderance of evidence *merely*." The instruction in the form in which the court submitted it to the jury accurately stated the rule as to the degree of the burden cast upon the defendant in the proof of insanity as a defense to crime. The addition of the word "merely" could have added no force to the statement of the rule, nor did its elimination from the instruction detract from or impair the force thereof. The law upon that subject is precisely as the court declared it to be, and there is no case which holds that the word "merely," as used in the instruction in the form in which it was requested by the defendant, or any other word of like import, is essential to a correct statement of the rule. Indeed, the animadversion upon the action of the court in striking the word from the instruction is extremely hypercritical.

[13, 14] 8. It is lastly contended that the substantial rights of the defendant were grievously invaded by the course of the court in rejecting a lengthy hypothetical instruction purporting to recapitulate the testimony addressed to the theory or defense of insanity, and concluding with the statement that, if the jury believed that the preponderance of the evidence upon that question showed that the defendant, by reason of the facts set forth in said instruction, was mentally so deranged at the time he committed the act of killing that "he did not know the nature or the quality of the act he was doing, or that he did not know that he was doing what was wrong," a verdict of acquittal should follow. We think the court very properly disallowed the instruction. It was based upon a hypothetical question propounded to and answered by a physician and contains, in addition to the fact of the confession to him by his wife of her relations with the deceased, a statement of some of the acts of the defendant with regard to his frugal mode of living for a long time prior to the homicide in order to enable him the better to support his family and pay his debts, which facts, in themselves, would have no tendency to prove that degree of insanity which renders one altogether irresponsible for his acts and conduct, and which could

only be regarded as important in the proof of any degree of insanity, where they were connected with proof of circumstances more potently pointing to insanity. Under the plea of insanity, the defendant's economical mode of living for the purpose of supporting his family and paying for his home—economical, it appears, to the sacrifice of personal conveniences and comfort—were, of course, properly receivable in evidence as tending to show his attachment for and devotion to his wife and children, and thus tending to disclose the keenness of his resentment against the conduct of the deceased with his wife, and therefore the probable effect of the latter's story upon his mind; but to have emphasized these particular facts to the jury by rehearsing them in an instruction and saying in connection therewith that if the jury believed therefrom and that by reason thereof the defendant was insane to the degree of irresponsibility when he killed Gofield might have been construed by the jury, as must generally be true where hypothetical instructions contain the substance of the evidence addressed to a particular theory of a criminal case, as an expression of an opinion by the court that, as a matter of fact, the defendant had become insane by reason of such acts and facts, and that as a consequence his mental condition was such, when he committed the homicide, that he did not know or realize the nature, quality, and wrongfulness of his act. The danger in giving such instructions is obvious. Unless the facts directed to the theory upon which the instruction is founded are accurately stated, or in case the language of the instruction is not sufficiently explicit to show that it merely proceeds upon the assumption that the facts therein stated must be proven satisfactorily to the jury themselves, it is apt to be misleading and to produce mischief rather than promote justice or to bring about a proper consideration of the case and a just result. The better practice is, as was adopted by the court in this case, viz., to state the law fully and lucidly upon the subject of the defendant's defense, and let the jury apply it to the evidence disclosing all the facts tending to establish such defense. The evidence received for the purpose of showing the mental condition of the defendant was not complicated; to the contrary, it involved a plain recital of the defendant's mode of living up to the time of the homicide and of the confession to him by his wife of her infidelity. These facts were all that were shown to establish the defense of insanity, and the jury, presumably men of average intelligence, could not have failed, under the clear instructions of the court upon that defense, to have given these facts just and intelligent consideration.

[15] Counsel interposes a general complaint that the terms "murder" and "murder of the

first degree" were used so frequently throughout the court's charge that the jury must have inferred that the court was of the opinion that the evidence disclosed the defendant's guilt of the crime charged. There is no merit to this complaint. The important questions presented by the evidence were the crime as charged and the defense of insanity submitted by the defendant, and there was little else of importance upon which it was proper for the court in its charge to address the jury as to the law of the case. We cannot see that the court used the terms referred to oftener than was necessary, and nowhere were they so used as to indicate that the court had any opinion one way or the other upon the effect of the evidence.

The defendant seems to have been accorded a perfectly fair trial, and, finding no prejudicial error in the record, the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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164 Cal. 332

**COOKE v. MESMER. (L. A. 2,949.)**

(Supreme Court of California. Dec. 12, 1912.  
Rehearing Denied Jan. 10, 1913.)

**1. APPEAL AND ERROR (§ 1011\*)—FINDINGS—CONCLUSIVENESS.**

A finding on conflicting evidence and sustained by evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

**2. PRINCIPAL AND AGENT (§ 179\*)—KNOWLEDGE OF AGENT—NOTICE TO PRINCIPAL.**

The rule that knowledge possessed by an agent while executing the authority conferred on him is notice to his principal, though acquired before the creation of the agency, is subject to the qualification that knowledge acquired by an agent before the agency is not notice to the principal, unless the knowledge was present in his mind when he acted for the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 685-688; Dec. Dig. § 179.\*]

**3. BANKS AND BANKING (§ 116\*)—KNOWLEDGE OF BANK—NOTICE TO OFFICER.**

A bank taking from payees notes of third persons as collateral for a loan is not charged with notice of the agreement between the payees and third persons as to the limit of their liability, where the only notice imputed to the bank arose from the fact that one of the third persons was its president when the loan was made and the notes taken as collateral, but had no connection with the bank at the execution of the notes and the signing of an authorization to pledge the notes, and having no memory of the agreement at the making of the loan.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 282-287; Dec. Dig. § 116.\*]

**4. BILLS AND NOTES (§ 357\*)—LIABILITY OF MAKERS.**

A bank taking notes after maturity as collateral takes them subject to any defenses which the maker could make against the payee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 909-912, 961; Dec. Dig. § 357.\*]



### 5. GUARANTY (§ 35\*)—PAYMENT OF NOTE—LIABILITY.

Where payees of past-due notes executed by third persons for use by the payees as collateral for money loaned to a corporation deposited them as collateral for a loan evidenced by a note signed by the corporation by one of the payees, and the payees indorsed the notes, guaranteeing the payment with "all costs of collection including reasonable attorney's fees," etc., the guaranty was not one for collection within Civ. Code, § 2800, but was an unconditional guaranty within section 2806, and the payees were liable, though the third persons, if sued, could avail themselves of defenses, and thereby limit their liability, notwithstanding section 2809, declaring that the obligation of a guarantor must be neither larger nor more burdensome than that of the principal, since the payees represented to the bank the enforceability of the notes against the third persons to the full amount apparently due thereon.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 37; Dec. Dig. § 35.\*]

### 6. GUARANTY (§ 36\*)—PAYMENT OF NOTE—LIABILITY.

An action on a guaranty of the payment of a note with costs of collection, including reasonable attorney's fees, is an action on the independent contract of the guarantor with which the principal debtor has nothing to do, and the liability of the guarantor depends on his guaranty.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 38-45; Dec. Dig. § 36.\*]

### 7. GUARANTY (§ 36\*)—PAYMENT OF NOTE—CONSTRUCTION—COSTS.

A guaranty of the payment of a note "with all costs of collection including reasonable attorney's fees" does not include any attorney's fees that may be paid in a suit on the guaranty; the quoted words referring to an action on the note, or any attempt to collect it.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 38-45; Dec. Dig. § 36.\*]

Department 1. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Thomas F. Cooke against Joseph Mesmer. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

D. K. Trask, of Los Angeles, for appellant. Miller & Miller, D. Z. Gardner, and J. W. McKinley, all of Los Angeles, for respondent.

ANGELLOTTI, J. This is an action by the assignee of the Traders' Bank of Los Angeles against Joseph Mesmer and Winfield Scott as the guarantors of 36 promissory notes executed by as many different persons and payable to said defendants, which had been deposited with said bank by the payees as security for money loaned by said bank to the Los Angeles Press, a corporation. The action was to recover of said guarantors so much of the amount due on said notes, according to the terms thereof, as would discharge the obligation of said Los Angeles Press to the bank. Defendant Scott defaulted, and the findings were in favor of plaintiff as against Mesmer for the full amount claimed. Judgment was given in favor of plaintiff against both defendants

for such amount. This is an appeal by Mesmer from said judgment and from an order denying his motion for a new trial.

There is no question in the case as to the correctness of the claim of plaintiff's assignor against the Los Angeles Press. The claim was evidenced by certain promissory notes executed by said Los Angeles Press to said Traders' Bank for money loaned. The first of these notes was one for \$10,000, payable one day after date, given and dated October 19, 1908, being for \$10,000 loaned on that date. It was signed by said Los Angeles Press by defendant Mesmer as president of such corporation and by the secretary thereof. It was in the usual printed form in general use among banks, and contained in the printed form the words, "And I hereby deposit or pledge as collateral security for the payment of this note or any other liability, present or future, to the Traders' Bank of Los Angeles," followed by the written words in a space left for insertion, "thirty-nine notes of a total of forty thousand dollars." Other notes were subsequently given to the bank by the Los Angeles Press for money loaned, one of \$5,000 on October 19, 1908, one of \$2,000 on July 19, 1909, one of \$400 on July 29, 1909, and one of \$500 on April 19, 1909. No mention was made of security in any of these subsequent notes. All of these notes were due at the time this action was commenced, and the aggregate amount due thereon according to their terms at the time of judgment was \$21,156.15, for which sum, together with \$1,000 attorney fees, judgment was given.

It is not disputed, that at the time of the giving of the \$10,000 note to the Traders' Bank, Mesmer, who negotiated the loan on behalf of the Los Angeles Press, delivered to the bank as security the 39 notes referred to. It is claimed by Mesmer that they were delivered only as security for the payment of the \$10,000 note, and cannot be considered security for the payment of any of the other notes. These 39 notes, with the exception of one which was for \$2,000, were for \$1,000 each. With the exception that the maker in each case was a different person and that the notes were dated variously from July 8, 1908, to September 28, 1908, the notes were identical in form. The payees named in each note were Joseph Mesmer and Winfield Scott, and the notes were all payable one day after date. The following, being a copy of the note of J. Harvey McCarthy, will serve as a sample of all: "1000.00. Los Angeles, Cal. July 11, 1908. One day after date, for value received, I promise to pay to the order of Joseph Mesmer and Winfield Scott, at Merchants' National Bank of Los Angeles, the sum of One Thousand Dollars, without interest. I further agree to pay a reasonable amount as attorney's fees and to pay costs of suit in case suit is brought on this note to compel payment thereof. J.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Harvey McCarthy." At the time these notes were delivered to the Traders' Bank by Mesmer, each bore on its back the following indorsement, namely: "For value received, I guarantee the payment of this note, with all costs of collection, including reasonable attorney's fees, and authorize extension of time to maker, and same shall not affect my liability. Demand, notice of nonpayment and protest waived. Joseph Mesmer. Winfield Scott." Three of these \$1,000 notes, namely, those of Carl Leonardt, J. Myrick, Jr., and C. A. Canfield, were, subsequently, at Mesmer's request, redelivered to him by the bank, \$250 being paid on the indebtedness of the Los Angeles Press to the bank on the withdrawal of each of said notes. This action is on the guaranty on the remaining 36 notes.

The 39 notes were in fact given by the makers to Mesmer and Scott solely for the purpose of being used as collateral security for the payment of money to be borrowed for and on account of the Los Angeles Press, which was to publish a newspaper in Los Angeles to be known as the Evening News. It may be conceded that it was the general understanding between Mesmer and Scott on the one hand, and each of the makers on the other, that such notes should not be used in such a way as to render any maker liable for a sum in excess of one-fourth of the amount of his note, with interest. After the delivery of the notes to Mesmer and Scott, writings were signed by each of the makers purporting to authorize said payees to pledge the same to the Merchants' National Bank, as security for the payment of two notes, one for \$1,250 and one for \$8,750. No other written authorization to pledge was ever signed by said makers. The Merchants' National Bank notes were taken up with the money loaned by the Traders' Bank, and, the collateral security notes having been redelivered to Mesmer and Scott, the same were delivered by them to the Traders' Bank as already stated.

The Traders' Bank had no notice of any of the circumstances under which the 39 notes had been given to Mesmer and Scott, or of any understanding between them and the makers, as to the purpose for which they were to be used or the limit of liability thereon, except such notice or knowledge as must be imputed to it by reason of the knowledge of Phillip L. Wilson, its president at the time the loans were made and the notes taken as collateral security. Wilson was the maker of one of the \$1,000 notes. His note was dated July 11, 1908, and he had signed the written authorization to pledge the notes to the Merchants' National Bank for an aggregate indebtedness of \$10,000, which was evidenced by notes given during September, 1908. The note given by Wilson was not, in fact, his own obligation. He had declined to personally take part in the matter, and gave the note as agent for

an undisclosed party, who did not want to be known in the matter. Wilson was in no way connected with the Traders' Bank at the time of the giving of his \$1,000 note or at the time of the signing of the written authorization to pledge the notes to the Merchants' National Bank. The court expressly found that the Traders' Bank had no notice or knowledge of any of the circumstances we have referred to. It further found that while Wilson was the president of the Traders' Bank, and the official of said bank who had authority to and who did represent said bank in said loan transactions, he was in no way connected with said bank at the time of signing his note, and that he never communicated any knowledge that he possessed in regard to the matter to the Traders' Bank, "and that at the time of the transactions with respect to the making of the loans by said Traders' Bank to the said Los Angeles Press, set out in the amended complaint, said Wilson had forgotten and did not have in his mind any knowledge or memory of the aforesaid agreement whereby each of the makers of said promissory notes was liable for and was to pay only twenty-five per cent. of the principal sum expressed on the face thereof." The portion of the finding that we have quoted is earnestly assailed by learned counsel for Mesmer as not being sustained by the evidence.

[1] While the evidence on this point is of such a nature that we would not feel warranted in saying that a different conclusion on the part of the trial court would not have been held by us to have been sufficiently supported by the evidence, or even that we might not have come to a different conclusion ourselves were the question presented to us as triers of the facts, we are satisfied that it cannot properly be held as matter of law that the conclusion of the trial court has not sufficient support in the evidence. The testimony of Wilson himself as to absence of knowledge or memory on his part is clear and positive, and there are some circumstances disclosed by the evidence that tend to corroborate this testimony. It cannot be said that it is impossible in the nature of things that he should have altogether forgotten the conversations between himself and Mesmer and Scott as to any limitation of liability on the note signed by him as agent for an undisclosed principal, as well as the writing expressly authorizing the pledging of the notes to the Merchants' National Bank, a writing which, by the way, did not in terms expressly purport to limit the authority of Mesmer and Scott to otherwise pledge the same. We have in this matter the usual case of mere conflict in evidence, where the appellate court under its well-settled rule is not authorized to interfere with the determination of the trial court.

[2, 3] In view of what we have said on



this point, it is clear that the finding that the Traders' Bank had no notice or knowledge of any of these circumstances is sustained by the evidence. While the decided weight of authority is in favor of the rule that knowledge possessed by an agent while he occupies that relation and is executing the authority conferred upon him, as to matters within the scope of his authority, is notice to his principal, although such knowledge may have been acquired before the agency was created, it is universally recognized that this rule is subject to the qualification that "knowledge acquired by an agent before the commencement of the agency is not notice to the principal unless it is shown or appears that knowledge was present in his mind at the time he acted for the principal." 1 Clark & Skyles on Agency, § 482. In *Christie v. Sherwood*, 113 Cal. 526, 45 Pac. 820, in discussing the question whether knowledge acquired by the cashier of a bank while he was acting as agent for another was notice to the bank in a subsequent transaction, this court said: "But whether it is notice to the bank depends upon whether the previous transaction was present in his mind at the time the loan was made by the bank." See, also, *Wittenbrock v. Parker*, 102 Cal. 93, 102, 103, 36 Pac. 374, 24 L. R. A. 197, 41 Am. St. Rep. 172. It being conceded that the only notice to the bank was such as it must be held to have had in view of the knowledge of its agent, Wilson, it is thus seen that, in view of the finding as to the lack of knowledge and memory on Wilson's part at the time of the transactions with the Los Angeles Press, it must be held that the finding as to lack of knowledge or notice on the part of the bank is fully sustained by the evidence. There can be no doubt that the findings substantially to the effect that the 39 notes were pledged as collateral security for not only the \$10,000 loan to the Los Angeles Press, but also for all the subsequent loans to that corporation, and that such subsequent loans were made by the Traders' Bank on the faith of such pledge, are sufficiently sustained by evidence.

[4] The 39 notes were all notes payable one day after their date, and were pledged to the Traders' Bank after maturity. It must be conceded that the bank therefore took them subject, so far as the makers were concerned, to any defenses which might have been successfully made by the makers against the payees, Mesmer and Scott. We may concede solely for the purposes of this decision that, by reason of the circumstances attendant upon the giving of these notes to such payees, they could not enforce payment thereof against the makers for any sum in excess of one-fourth of the amount thereof, and that the same would be true as to any assignee or indorsee of such notes and as to any action brought against the makers thereof.

[5] But this is no such action. It is an

action against Mesmer and Scott on their absolute and unconditional guaranty, indorsed on the back of each note. We have already set forth a copy of this guaranty, and it is not necessary here to repeat it. Plainly, it is what we have just stated it, an absolute and unconditional guaranty of the payment of each note in full accord with its terms. The words, "with all costs of collection, including reasonable attorney's fees," are words of extension rather than of limitation, and in no degree imply that the guaranty was to be effective only in the event that the plaintiff was unable to collect from the makers.

[6] It is thoroughly settled that an action on such a guaranty is one upon an independent contract of the guarantor, with which the principal debtor has nothing to do. The liability of the guarantor depends entirely upon the terms of his contract of guaranty, and "there is no privity, or mutuality, or joint liability between the principal debtor and his guarantor." *Adams v. Wallace*, 119 Cal. 67, 51 Pac. 14. See, also, *Kinsel v. Bal-lou*, 151 Cal. 762, 91 Pac. 620. Such contract of guaranty in this case was made by the guarantors personally with the Traders' Bank when they delivered the notes payable to themselves to the bank, with their guaranty written and signed on the back thereof, as security upon the terms and conditions stated in the \$10,000 note for the payment of said note "or any other liability, present or future, to the Traders' Bank of Los Angeles." According to both allegations of the complaint and findings, sufficiently supported by the evidence, they personally negotiated the loan, knew the terms upon which said notes were to be deposited as security, as stated in the \$10,000 note, and deposited the pledged notes in accord with the understanding so expressed. The bank took them, as we have seen it must be held here, without notice of any fact not appearing on the face of the notes, and made its loans to the Los Angeles Press, relying thereon. Under such circumstances, the liability of the guarantors to the bank appears to be clear, whatever may be the fact as to the liability of the makers on the notes by virtue of any arrangement between themselves and the payees. We are not here concerned with the latter question. Learned counsel for Mesmer relies strongly on section 2809, Civil Code, which provides that "the obligation of a guarantor must be neither larger in amount nor in other respects more burdensome than that of the principal, and if in its terms it exceeds it, it is reducible in proportion to the principal obligation," as relieving the guarantors here from the necessity of paying anything on their guaranty that the makers could not be compelled to pay on their notes. This section affords no protection to the guarantors under the circumstances of this case. The facts alleged and found sufficiently show a

representation to the bank by Mesmer and Scott personally of the enforceability of the notes against the makers to the full amount apparently due thereon, going to the full extent of their guaranty, upon the faith of which the bank acted in making the loans to the Los Angeles Press, and, regardless of any other possible answer to the claim, upon well-settled principles Mesmer and Scott are estopped from asserting in an action on their guaranty any defense tending to reduce the amount of such apparent liability on the part of the makers. While it is true that they were acting in a representative capacity in giving the note of the Los Angeles Press to the Traders' Bank, they were clearly acting in their individual capacity in delivering over and allowing the pledging of their notes as collateral security for the loans. As said in *St. John v. Roberts*, 31 N. Y. 441, 88 Am. Dec. 287, in a somewhat similar case: "Such act of theirs was a representation of their liability on the note and they are now estopped in good faith and sound morals, from denying such liability." It certainly would be a most peculiar rule of law that would allow a payee of a note, who guarantees the payment of the same to another to whom he pledges it as security for another obligation, to interpose successfully as a defense when sued on his guaranty, some private understanding between himself and the maker of the note, of which the third party had no notice or knowledge. Although Mesmer and Scott did not personally receive the money loaned to the Los Angeles Press, there can be no question of the sufficiency of consideration for their undertaking of guaranty.

The 39 notes had theretofore been pledged to the Merchants' National Bank as security for loans made by that bank to Mesmer and Scott on notes executed by Scott. The obligations in favor of such bank were extinguished by payment with the aid of the money borrowed from the Traders' Bank, and the pledged notes were thereupon released from such pledge and returned to the payees named. It is urged that the payment of the Merchants' National Bank notes extinguished the obligation of the makers of the 39 notes, and consequently the obligation of the guarantors. What we have already said on the subject of estoppel is a sufficient answer to this claim.

We are satisfied that the fact that the 39 notes were past due when pledged to the Traders' Bank should not be held to force the construction that the guaranty was one merely of collection (see section 2800, Civ. Code), rather than an absolute and unconditional guaranty of payment. Under our statute, "a guaranty is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor." Section 2806, Civ. Code. See *Pierce v. Merrill*, 128 Cal. 464, 469, 470, 61 Pac. 64, 79

Am. St. Rep. 56. So far as the Traders' Bank is concerned, the guaranty here must be deemed to have been made when the notes on which the same was indorsed were delivered by Mesmer and Scott to such bank. There is nothing in the terms of the guaranty, or in the facts and circumstances of the case, to import any condition precedent to the liability of the guarantors. It is not disputed that, if the guaranty was an absolute and unconditional guaranty of payment, no effort to collect from the makers was essential as a prerequisite to liability on the part of the guarantors. See *Pierce v. Merrill*, supra; *Adams v. Wallace*, supra.

We cannot say that the trial court abused the discretion committed to it by the law in denying the motion for a new trial, in so far as the same was based on the ground of the alleged newly discovered evidence of Mr. Price.

[7] As we have said, the judgment awarded plaintiff \$1,000 as and for attorney's fees in this action on the guaranty. We are satisfied that this portion of the judgment cannot be upheld. It is based entirely, of course, on the language of the guaranty on each of the 39 notes, "I guarantee the payment of this note, with all costs of collection, including reasonable attorney's fees." We are of the opinion that it should be held that the reasonable attorney's fees therein referred to are such attorney's fees as may be expended in attempting to collect the note, and do not include any fee that may be paid in a suit on the guaranty. The words "with all costs of collection" manifestly refer to the words "this note." As we have seen, this is in no sense an action on the notes or any attempt to collect the same.

There is no other matter requiring special mention. We find nothing in any of the points made warranting anything more at our hands than a modification of the judgment by eliminating therefrom the amount allowed for attorney fees.

The judgment is modified by striking therefrom the words, "also the further sum of one thousand dollars as and for attorney's fees herein," and, as so modified, it is affirmed. The order denying the motion for a new trial is affirmed.

We concur: SLOSS, J.; SHAW, J.

164 Cal. 327  
AMERICAN LAW BOOK CO. v. SUPERIOR  
COURT IN AND FOR SANTA CLARA  
COUNTY et al. (S. F. 15,831.)

(Supreme Court of California. Dec. 11, 1912.  
Rehearing Denied Jan. 10, 1913.)

1. CERTIORARI (§ 64\*)—SCOPE OF PROCEEDINGS  
—JURISDICTION.

On certiorari to the superior court to review its judgment in a case brought before it on appeal by defendant from the justice court,



the jurisdiction of the justice court over the person of the defendant could not be inquired into.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 174, 175; Dec. Dig. § 64.\*]

## 2. JUSTICES OF THE PEACE (§ 147\*)—PROHIBITION (§ 10\*)—JURISDICTION—ATTACK.

Jurisdiction of a justice court over the person of a defendant who defaults may be attacked either by appeal to the superior court or, after a motion to set aside the default has been erroneously denied, by a writ of prohibition to restrain the enforcement of the judgment.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 493-501; Dec. Dig. § 147;\* *Prohibition*, Cent. Dig. §§ 37-56; Dec. Dig. § 10.\*]

## 3. CERTIORARI (§ 64\*)—ESTOPPEL TO QUESTION JURISDICTION.

Where the petitioner for certiorari had appealed to the superior court from a default judgment rendered against him in justice court, he could not on certiorari question the power of the superior court to entertain such appeal.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 174, 175; Dec. Dig. § 64.\*]

In Bank. *Certiorari to Superior Court, Santa Clara County*; John E. Richards, Judge.

*Certiorari by the American Law Book Company against the Superior Court of Santa Clara County to require that court to certify a transcript of the proceedings and records in an action by E. V. Burke against the petitioner. Writ discharged.*

H. C. Schaertzer, of San Francisco, for petitioner. R. C. McComish and Will M. Beggs, both of San Jose, for respondents.

MELVIN, J. A writ of certiorari was issued by this court directed to the superior court of Santa Clara county, requiring that court to certify a transcript of the proceedings and records in the case of E. V. Burke v. American Law Book Co. That case was appealed from the justice's court of San Jose township. It was an action for damages for breach of contract, the sum demanded being \$299, and in a second count for money had and received the same amount was also prayed for. Summons was issued and was duly signed by John T. Wallace, justice of the peace of said San Jose township, and to said summons there was attached a certificate of the county clerk of Santa Clara county, under seal, duly setting forth the qualifications of said Wallace as a justice of the peace. The summons was served by the delivery of a copy thereof with a copy of the complaint thereto attached to the Secretary of State, but the return to this writ shows that the copy of the clerk's certificate to the official character of the justice of the peace had no seal indicated thereon. The return of the sheriff of the county of Sacramento certified that the American Law Book Company was a foreign corporation doing business in the state of California, and that said corporation had not designated any resident of

this state as a person upon whom process might be served. Thirty days after the service of summons as shown by the return above described, the justice of the peace entered judgment for \$299 in favor of plaintiff, as defendant had made no appearance. Fifteen days following the entry of said judgment defendant appealed to the superior court. It does not appear either from the petition or the return whether this appeal was formally upon questions of both law and fact, but the record does show that petitioner's attorney declared at the hearing in the superior court, in answer to a question by the judge, that it was taken upon questions of law alone. At this hearing the appellant offered certain oral and documentary evidence which, under stipulation, was admitted by the court, subject to a future ruling, but the court thereafter made no ruling on the admissibility of this evidence, which consisted of (1) a copy of the summons, complaint, and certificate served upon the Secretary of State, showing the absence of a seal from the said certificate; (2) the testimony of the officer who served the summons on the Secretary of State that his knowledge of defendant's failure to designate a resident agent to receive service of process in California was based upon his examination of the records in the office of the Secretary of State; and (3) testimony of an employé of the corporation defendant that the company's method of doing business was to take orders in California for books and to send such orders for approval to defendant's office in New York, and that upon approval of the orders the books were sent by freight or express directly to the purchasers. Upon this showing the superior court affirmed the judgment, but a partial satisfaction having been made a new judgment for \$270 was entered.

Petitioner contends that the superior court never obtained jurisdiction over its person because the judgment in the justice's court was a nullity. The contention is that the sheriff's return to the summons declaring the defendant to be a "foreign corporation doing business in this state" was insufficient as a conclusion and as a statement not based upon positive knowledge; that the service was void by reason of the absence of a description of the seal from the copy of the clerk's certificate; that the evidence in the justice's court was not sufficient to show the failure of the defendant to designate a resident Californian upon whom process might be served; and that sections 405 and 410 of the Civil Code are unconstitutional as applied to this petitioner.

[1] It will be seen that many of these objections are to the jurisdiction not of the superior court, but of the justice's court. This attack must be confined to the jurisdiction of the superior court over the person of the petitioner.

[2] One method of attacking the jurisdiction of the justice's court is by appeal to the superior court. *Tucker v. Justices' Court*, 120 Cal. 514, 52 Pac. 808. After such appeal, no further attack may be made upon the judgment given in the justice's court. As was said in *Olcese v. Justice's Court*, 156 Cal. 86, 103 Pac. 318: "This court has never recognized the right of a petitioner to writ of certiorari to review the judgment of a justice's court after appeal taken and determined in the superior court." Respondent contends, and we think correctly, that by its appeal to the superior court the petitioner submitted the question of want of jurisdiction of its person to the superior court, and that the tribunal to which the appeal was thus prosecuted had the right to decide that question incorrectly as well as correctly. This court said in the opinion in the *Matter of Hughes*, 159 Cal. 363, 113 Pac. 686: "The Supreme Court has jurisdiction in certiorari to review a judgment of the superior court only in a case where that court has exceeded its jurisdiction (Code Civ. Proc. § 1068), and in such cases only for the purpose of inquiring whether or not the judgment sought to be reviewed was in excess of jurisdiction, or, as the Code expresses it, 'the review upon this writ cannot be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer.' Code Civ. Proc. § 1074. If such tribunal has regularly pursued its authority, our inquiry stops. We cannot consider or correct errors of law committed by the inferior court in the exercise of its authority on the merits of the cause it has jurisdiction to entertain and decide. No matter how erroneous that decision may be, even on the face of the record, we have no power to change, annul, or reverse it in this proceeding, if that court had jurisdiction to act in the matter before it."

[3] But petitioner insists that it only appeared for the purpose of questioning the jurisdiction of the justice's court, that it never submitted itself generally to the superior court, and that the method followed by it was the only one available. Undoubtedly an appeal to the superior court is one method and an appropriate manner of attacking the jurisdiction of the justice's court. *Tucker v. Justices' Court*, *supra*. But it is not exclusive. For example, it does not appear that petitioner had no opportunity to make a motion to set aside the default. When such a motion has been denied erroneously, the moving party may by a writ of prohibition restrain the enforcement of the judgment. In *Sanborn v. Superior Court*, 60 Cal. 425, the application was for a writ of prohibition. Petitioner, who was defendant in the action in the justice's court, after unsuccessfully combating the jurisdiction of that court, took an appeal to the superior

court. The Supreme Court characterized as "novel and singular" the action of a party appealing in asking that the court should be restrained from trying the appeal which he was prosecuting. In *Armantage v. Superior Court*, 1 Cal. App. 130, 81 Pac. 1033, the justice's court had lost jurisdiction through the improper service of the notice of trial. An appeal was taken and judgment was rendered, after trial, against appellant. There, as here, it was contended that the superior court had no jurisdiction on the appeal to do anything except reverse the judgment and order the case back to the justice's court as appellant demanded, but the district court said: "Let it be conceded, without deciding the question, that, under the statute as heretofore construed by the Supreme Court, the superior court should have sustained the objection of the appellant to trying the case and should have granted his request to reverse the judgment of the justice and send the case back, yet the refusal was only error. If these objections had not been made, or if the appellant had failed entirely to appear after his appeal was perfected, and a trial, after the five days' notice, had been had in his absence in the superior court, there could have been no question as to the validity of the judgment following such trial. The court had the same jurisdiction to overrule appellant's objections that it had to sustain them, or to proceed to judgment in the appellant's absence. Jurisdiction is the power to decide—wrong, as well as right." A rehearing of this case was denied by the Supreme Court. In other states there is abundant authority for the rule above announced. In *Fee v. Big Sand Iron Co.*, 13 Ohio St. 563, judgment by default had been entered in the court of common pleas. Defendant appeared, however, and gave notice of appeal. This was held a submission to the jurisdiction of the court. The above-cited case has been followed in many jurisdictions. The following cases are also authority for the same rule: *K. C., S. & Memphis R. R. v. Summers*, 45 Ark. 296; *Briggs v. Humphrey*, 1 Allen (Mass.) 372; *McCubrey v. Lankis*, 74 Minn. 302, 77 N. W. 144; *Gant v. C., R. I. & P. R. R.*, 79 Mo. 503; *Gage v. Maryatt*, 9 Mont. 266, 23 Pac. 337; *Perry v. McKinzie*, 4 Tex. 155; *Ruthe v. Green Bay, etc., Co.*, 37 Wis. 346; *Standle v. Arnov*, 13 Fla. 368; *St. Louis & S. F. Ry. Co. v. McBride*, 141 U. S. 130, 11 Sup. Ct. 982, 35 L. Ed. 659.

Petitioner having submitted its person to the jurisdiction of the superior court cannot now by certiorari question the power of that court to hear and determine the appeal from the justice's court.

It follows that the writ must be discharged, and it is so ordered.

We concur: HENSHAW, J.; LORIGAN, J.; ANGELLOTTI, J.; SHAW, J.; SLOSS, J.



164 Cal. 332

**SAN JOAQUIN & KINGS RIVER CANAL & IRRIGATION CO., Inc., v. JAMES J. STEVENSON et al. (Sac. 1986.)**

(Supreme Court of California. Nov. 20, 1912.  
On Denial of Rehearing, Dec. 20, 1912.)

**1. EMINENT DOMAIN (§ 7\*)—RIGHT OF CONDEMNATION—STATUTE.**

No person or corporation can exercise the power of eminent domain, even in aid of a recognized public use, unless there is a statute expressly or impliedly conferring upon them that power.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 24, 26; Dec. Dig. § 7.\*]

**2. EMINENT DOMAIN (§ 28\*)—CONDEMNATION—PUBLIC USE.**

The use of water for sale, rental, and distribution to the public generally is a public use within the purview of condemnation statutes.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 75; Dec. Dig. § 28.\*]

**3. EMINENT DOMAIN (§ 29\*)—CONDEMNATION—SUPPLYING OF WATER.**

Under Code Civ. Proc. § 1238, providing that the right of eminent domain may be exercised in behalf of canals, ditches, dams, flumes, aqueducts, and for the purpose of irrigation, and supplying water to mines and for farming in neighborhoods, condemnation is authorized to supply water in a system of canals to the inhabitants of several counties to be used for irrigation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 76; Dec. Dig. § 29.\*]

**4. EMINENT DOMAIN (§ 191\*)—CONDEMNATION—COMPLAINT—SUFFICIENCY.**

A complaint in a suit to condemn water to be used for irrigation purposes is sufficient, though not particularly describing the boundaries of the territory which is to be served; the very nature of a system of irrigation prohibiting the fixing of absolute boundaries, as in the case of a railroad.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 509-518; Dec. Dig. § 191.\*]

**5. EMINENT DOMAIN (§ 58\*)—CONDEMNATION—WATER.**

The power of eminent domain cannot be invoked to divert water for the sole purpose of wasting it.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 147-160; Dec. Dig. § 58.\*]

**6. STATUTES (§ 181\*)—CONSTRUCTION.**

Where a statute is fairly susceptible of two constructions, one inevitably leading to mischief or absurdity, and the other consisting of sound sense and wise policy, the latter should be adopted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.\*]

**7. STATUTES (§ 181\*)—CONSTRUCTION.**

A construction of a statute which will lead to a conclusion not contemplated by the Legislature should be avoided.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.\*]

**8. EMINENT DOMAIN (§ 29\*)—CONDEMNATION—IRRIGATION WORKS—EXTENT OF SUPPLY.**

In view of Code Civ. Proc. § 4, providing that all statutes shall be liberally construed, section 1238, subd. 3, authorizing appropriation of property when necessary for the establishment of canals, aqueducts, flumes, ditches, etc., for the use of inhabitants of any county, and

all public uses for the benefit of any county, authorizes the condemnation of water which is to be used for irrigation purposes generally by a part of the inhabitants of several counties, although, owing to the topography of the country and the nature of the irrigation system, water cannot be furnished to every inhabitant of the county; the furnishing of water to only part of the inhabitants being a public use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 76; Dec. Dig. § 29.\*]

**9. EVIDENCE (§ 10\*)—JUDICIAL NOTICE.**

The court will take judicial notice that owing to the topography of the country there is no county in the state in which it is practicable to serve all of its inhabitants with water by means of one system of works.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 9-14; Dec. Dig. § 10.\*]

**10. EMINENT DOMAIN (§ 195\*)—PROOF—VARIANCE.**

In a proceeding for condemnation of water to be used for purposes of irrigation, there is no material variance between allegations that the water is to be devoted to sale and distribution to the inhabitants of several counties, and proof that the water would be furnished only to the lands lying in the western part of the several counties.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 524; Dec. Dig. § 195.\*]

**11. WATERS AND WATER COURSES (§ 232\*)—WATER COMPANIES—POWERS—ACTS AUTHORIZED.**

A corporation empowered and authorized to construct canals for the carriage of passengers and freight, and for the purpose of irrigation and supplying water to the inhabitants of cities and towns, is authorized to carry water in its canals to be devoted to public uses for the purposes of irrigation and commerce.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 321, 322; Dec. Dig. § 232.\*]

**12. EMINENT DOMAIN (§ 10\*)—WHO MAY EXERCISE POWER—FOREIGN CORPORATIONS—"PERSON."**

Under Civ. Code, § 1001, authorizing any person to acquire private property for any use specified in Code Civ. Proc. § 1238, a foreign corporation falls within the term "any person" and may condemn land for any of the purposes authorized, the right of foreign corporations to do business within the state having been recognized since 1870, and this right is not reduced by act of 1880 (St. 1880, p. 21), Civ. Code, § 407, expressly authorizing foreign corporations doing business as common carriers to exercise the right of eminent domain, the act merely increasing the powers of foreign corporations, and not purporting to reduce them.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 35-48; Dec. Dig. § 10.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5322-5335; vol. 8, p. 7752.]

**13. STATUTES (§ 231\*)—EMINENT DOMAIN (§ 10\*)—INCLUSION OF STATUTE IN CODE—WHO MAY EXERCISE POWER OF EMINENT DOMAIN.**

The incorporation of a statute in a Code has no greater effect upon its meaning than an amendment thereto would have had, and hence the incorporation in 1905 (St. 1905, p. 631) of act 1880 (St. 1880, p. 21), authorizing foreign corporations acting as common carriers to condemn land, into Civ. Code, as section 407, does not by implication diminish the powers of con-

demnation given foreign corporations by other sections of the Code.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 312; Dec. Dig. § 231;\* Eminent Domain, Cent. Dig. §§ 35-48; Dec. Dig. § 10.\*]

**14. EMINENT DOMAIN (§ 195\*)—VARIANCE—AMENDMENT.**

In a proceeding to condemn water for irrigation, where it was shown that it was not necessary to public use save during a part of the year, the filing of an amended complaint wherein the taking of water is limited to the season when actually required cures the variance involved in the original complaint seeking an unlimited appropriation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 524; Dec. Dig. § 195.\*]

**15. EMINENT DOMAIN (§ 58\*)—CONDEMNATION—AMOUNT OF APPROPRIATION.**

Loss by seepage and evaporation being inevitable in water transported for irrigation, condemnation of water for that purpose cannot be limited because of such loss.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 147-160; Dec. Dig. § 58.\*]

**16. EMINENT DOMAIN (§ 171\*)—CONDEMNATION PROCEEDINGS—DEFENSE.**

That an irrigation company already entitled to appropriate a large flow of water devotes that flow to a use other than a public use is no defense to a proceeding for the condemnation of other water, which is to be devoted to a public use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 468, 469; Dec. Dig. § 171.\*]

**17. EMINENT DOMAIN (§ 178\*)—CONDEMNATION—PARTIES—INTERVENTION.**

Under Code Civ. Proc. § 387, authorizing any person who has an interest in the matter in litigation to intervene, persons claiming by adverse appropriation to have the right to a flow of water as against a lower riparian owner cannot intervene in a proceeding by an upper owner to condemn the rights of the lower riparian owner to a flow of water, as their rights cannot be affected by a judgment against the lower owner and are not based on the ownership of the land.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 479, 484-487; Dec. Dig. § 178.\*]

Sloss, J., dissenting in part.

On Denial of Rehearing.

**18. EMINENT DOMAIN (§ 177\*)—CONDEMNATION PROCEEDINGS—PARTIES.**

Code Civ. Proc. § 1244, requires the complaint in a condemnation suit to state the names of all owners and claimants of the property as defendants. Section 1246 provides that any person claiming any interest in the property to be condemned may defend as to his own interest, and section 1247 gives the court power to determine all adverse claims to the property sought to be condemned. *Held*, that under such provisions a person is not a proper party to condemnation proceedings unless he has some interest in or right to the property sought to be condemned.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 478, 480, 481, 483, 485; Dec. Dig. § 177.\*]

**19. WATERS AND WATER COURSES (§ 49\*)—"RIPARIAN RIGHT"—INTERFERENCE WITH STREAM.**

A "riparian right" is parcel of the land to which it attaches. It is local in its nature, and enables the owner to enjoin any injurious

interference with the stream, but only when such interference affects the river where it passes his land.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 39, 40; Dec. Dig. § 49.\*]

For other definitions, see Words and Phrases, vol. 7, p. 6244.]

**20. EMINENT DOMAIN (§ 177\*)—CONDEMNATION PROCEEDINGS—PARTIES.**

Where plaintiff sought to condemn all right to a part of the flow of a river equal to 500 cubic feet per second, attached to the land of S., such proceeding did not affect the riparian or other rights of persons owning land on the stream below the land of S., and hence such owners were not proper or necessary parties to the proceeding.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 478, 480, 481, 483, 485; Dec. Dig. § 177.\*]

In Bank. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by the San Joaquin & Kings River Canal & Irrigation Company, Incorporated, against James J. Stevenson (a corporation) and others. From a judgment for defendants, plaintiff appeals. Reversed.

Frank H. Short, of Fresno, F. G. Ostrander, of Merced, and Edward F. Treadwell, of San Francisco, for appellant. J. C. Campbell, of San Francisco, James F. Peck, of Oakland, H. A. V. Torchiana, of San Francisco, W. B. Bunker, of Oakland, and F. J. Solinsky and Page, McCutchen, Knight & Olney, all of San Francisco, for respondents.

SHAW, J. This is an action to condemn property for public use. The plaintiff has been diverting water from the San Joaquin river and carrying it to lands in the San Joaquin valley to be used for irrigation. It desires to divert an additional flow of 500 cubic feet per second from the river into its canals for the same public use. This suit is begun to condemn the interest of the defendants in this additional quantity of water. At the close of the plaintiff's case the defendant moved for a nonsuit, and the same was granted by the court. Judgment was rendered thereon, and from this judgment plaintiff appeals.

1. The first ground of the motion for nonsuit was that the use to which the water proposed to be condemned and taken is to be devoted is not one of the public uses in behalf of which, under section 1238 of the Code of Civil Procedure, the right of eminent domain may be exercised.

[1] It is conceded by plaintiff that the power of eminent domain is vested in the state, and that no person or corporation can avail himself or itself of that power, even in aid of a recognized public use, unless the state has granted to such person or corporation a right to exercise the power for the particular use proposed. There must be a statute conferring the power, either expressly or by necessary implication, and the pro-



posed use must be one which comes within the terms of the grant. *Southern P. R. Co. v. Southern C. R. Co.*, 111 Cal. 227, 43 Pac. 602; *Moran v. Ross*, 79 Cal. 160, 21 Pac. 547.

[2] It is settled that the use of water for sale, rental, and distribution to the public generally is a public use. The only question for decision under this point is whether or not the statute confers the right of eminent domain upon a person who desires to condemn property to be devoted to such use.

[3] The complaint alleges, and the proof shows, that the plaintiff owns two large canals leading out of the San Joaquin river into the country lying west of the river and extending from the county of Fresno through the county of Merced into the county of Stanislaus. One of these canals is 72 miles long, and the other 52 miles long. It also has distributing canals leading therefrom to the lands in the vicinity, for convenience of distribution, and it maintains a dam in the river to divert the water therefrom into the canals. By this means it has been diverting water from the river and carrying the same into canals and selling it for irrigation, watering of stock, and domestic uses "to the inhabitants of the counties of Fresno, Merced, and Stanislaus," as it alleges. It also appears that it desires to divert from said river into said canals an additional flow of 500 cubic feet per second and to carry the same in said canals and devote it to the same public use in the same manner, and that along its canals there is sufficient land upon which irrigation is necessary, the owners of which desire to use said water, to consume said additional quantity. The point where the canals begin and their present terminus are described with substantial accuracy. The canals are themselves permanent landmarks, and, consequently, the termini being described, the situation and location of the canals, the place of use of the water to be condemned, and the territory to be served therewith are all thereby for all practical purposes properly pleaded.

We think this sufficiently shows that the plaintiff desires to take the water rights sought to be condemned in behalf of the public use indicated by subdivision 4 of section 1238 by the words "supplying mines and farming in neighborhoods with water." While there is a general allegation in the complaint that the water is to be "sold to the inhabitants" of the three counties named, the specific facts alleged as to the method by which the water has been diverted, carried, and distributed and by which it is proposed to take, carry, and distribute the additional water, the place of use designated in the complaint and shown by the evidence, and the purposes to which it is to be applied, show with reasonable certainty that the water is, in point of fact, to be supplied to farming neighborhoods, or "to farming in neighborhoods," as the last amendment to the section expresses the idea. The fact

that there may be several separate farming neighborhoods along the very extensive canals of the plaintiff does not destroy its right. That a person engaged in supplying several such neighborhoods should have the right of eminent domain to obtain property therefor was evidently the object contemplated by the last amendment inserting the word "in" in the phrase "farming in neighborhoods." It may be that without this word the right to condemn for more than one neighborhood would have existed; but the insertion of this word implies that the main idea was the supplying of farming operations with water, and that more than one neighborhood might receive water from the same system of works.

[4] The law does not require, in order to maintain an action to condemn water for public use, that the boundaries of the territory to which it is to be dedicated shall be alleged and proven with absolute certainty. The nature of the use is such that this could not be done. A railroad, a highway, or a public building, has a fixed location to which all who desire to use them must come. It is not so with water devoted to public use. In that case the public service consists in conducting the water to the consumers, or to some convenient place where they can obtain it. Main canals are built from the source of supply to and through the territory to be supplied, and both the landowners whose lands abut thereon and those who can run a private ditch thereto are allowed to have the water at the fixed rates. The territory is also usually enlarged by means of lateral distributing canals, which are also available for use in the same way. Not every landowner who could do so may apply for the water. Those who take it one year may not do so the next, and their portions may be furnished to others. It is also the fact that, after the lower levels are saturated by a few years continuous irrigation, such land will require much less water than before, and the same quantity of water may then be distributed over a much larger territory. For these reasons it is impossible to say in advance, or at any particular time, precisely what will be the boundaries of the territory served or to be served with the water. The interests and protection of the persons whose water rights are to be condemned for public use do not make it necessary to give such precise description. The location of the proposed canal being shown, the situs of the proposed use is thereby fixed with sufficient accuracy.

[5] It is perhaps unnecessary to add that a right to divert water to be allowed unnecessarily to run to waste cannot be acquired, even by a judgment of condemnation. Such judgment, when given, would afford no protection for such a taking.

[6-8] We think also that the use described in the complaint is one for which the right of eminent domain is given in subdivision 3

of said section, as "canals, aqueducts, reservoirs, tunnels, flumes, ditches, or pipes for conducting or storing water for the use of the inhabitants of any county, \* \* \* and all other public uses for the benefit of any county, \* \* \* or the inhabitants thereof, which may be authorized by the Legislature."

This language necessarily implies, not only that property may be condemned for the canals and conduits mentioned, but that water may also be taken to be carried in the canals and ditches. This precise question was decided in *Northern, etc., Co. v. Stacher*, 13 Cal. App. 409, 109 Pac. 896, by the Third District Court of Appeal. The question is elaborately and ably discussed, and the decision received the approval of this court, as is evidenced by the fact that it denied an application for a rehearing thereof. It follows from this decision that water may be condemned and taken for public use by any person or corporation proposing to apply it "to the use of the inhabitants of any county."

The defendants claim that this subdivision does not confer the right of eminent domain for the use mentioned unless the person in charge of the use proposes to supply all of the inhabitants of the county, and that, if the taking is for the use of a particular district or territory of the county only, it is not authorized under this subdivision. There can be no doubt that the furnishing of water generally to the inhabitants of a particular section of the county is a public use. It is not even necessary, in order to constitute a public use, that the water should be obtainable by all the inhabitants of the immediate territory to which it is taken. It may be a public use, although all persons within that territory cannot enjoy it. It is sufficient if all who are capable of enjoying it have an equal right to it. For example, it has been held that water devoted to the use of all the landowners within a specified territory, on equal terms to all, and open to all, for the irrigation of their lands, is devoted to a public use. *Fallbrook Irr. D. v. Bradley*, 164 U. S. 161, 17 Sup. Ct. 56, 41 L. Ed. 369; *Merrill v. Southside I. Co.*, 112 Cal. 426, 44 Pac. 720.

Where a statute "is fairly susceptible of two constructions, one leading inevitably to mischief or absurdity, and the other consisting of sound sense and wise policy, the former should be rejected and the latter adopted." In *re Mitchell*, 120 Cal. 386, 52 Pac. 800. "A construction should not be given to a statute, if it can be avoided, which will lead to absurd results, or to a conclusion plainly not contemplated by the Legislature." *Merced Bank v. Casaccia*, 103 Cal. 645, 37 Pac. 649. The section is also subject to the rule that its provisions are to be liberally construed, with a view to effecting its objects and to promote justice. Code Civ. Proc. § 4.

[9] It is a fact, of which the court may well take judicial notice, that there is no county in the state in which it is practicable to serve all of its inhabitants with water by means of one system of works. The topography will not permit it. The city and county of San Francisco, if it should be classed as a county, is perhaps an exception. But it is classed separately in the subdivision referred to. If this part of the statute is to be given the effect here claimed, the result is that it will be wholly ineffectual. In the entire history of the state, it is safe to say, no person or corporation has ever seriously and in good faith proposed to supply all of the inhabitants of any county with water through one system of works or from one source. No such proposition ever will or can be honestly made. The result of this interpretation therefore will render the statute wholly ineffectual as well as absurd. In considering a statute it is necessary to assume that the Legislature intended it to have some effect. There must have been some purpose in view which led to its enactment. The obvious purpose of this section as a whole was to confer the right of eminent domain upon persons engaging in public service for the various purposes described. This particular clause was intended to encourage and assist those proposing to establish systems of waterworks for the supplying of the public. It was to facilitate the transportation of water from a source where it was comparatively useless to places where it would be useful and would promote the general welfare and prosperity and of furnishing it at such places to those in need of it. In order to further this object, the statute should have such interpretation as will make it effectual for that purpose if it is reasonably possible to do so. It will be noted, therefore, that the clause does not use the word "all" in connection with the word "inhabitants." The phrase is "for the use of the inhabitants of any county." According to a well-recognized usage this description would be filled by one who supplied water for the use of the inhabitants of a considerable part of the county although he did not or could not supply it to all the inhabitants thereof. The language may be as well applied if the word "inhabitants" is taken as descriptive of the character or status of the beneficiaries as it would be if the word is taken as designating the number to whom it is to be supplied or the area to which the use must extend. But a more obvious purpose in the use of the phrase is seen when the clause is taken in connection with the preceding clause of the subdivision. The two clauses together read as follows: "Public buildings and grounds for the use of any county, incorporated city, or city and county, village, town or school district; ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes, ditches or pipes for con-



ducting or storing water for the use of the inhabitants of any county, incorporated city, or city and county, village or town." The uses mentioned in the clause preceding the semicolon are those for organized public corporations and are for purely public purposes; those in the second clause are for the individual members of the community for their individual private use and for the benefit of their persons or their property. It was to distinguish private individuals from public corporations that the word "inhabitants" was used in the second clause, and not for the purpose of expressing the idea that the takings mentioned in the second clause were to be limited to cases where all the inhabitants were to be the beneficiaries. It was intended to distinguish between a taking for the organized public and a taking for persons as members thereof. In view of these considerations, we think it should be held to be a sufficient compliance with the terms of this subdivision if the proposed use of water is for a part of the inhabitants of a county comprising a sufficiently large proportion of the inhabitants capable of using it in the particular territory "as to destroy its character as a private use," as was said in *Lindsay v. Mehrrens*, 97 Cal. 678, 32 Pac. 802. The proof shows that the plaintiff proposes to distribute the water generally to the inhabitants of a very large area of the three counties mentioned, chiefly for the irrigation of their lands and also for domestic uses and for the watering of stock and incidentally to some towns and villages which have grown up along the routes of its canals. It is one of the largest irrigation enterprises in the state and serves water to over 150,000 acres of land. We think the use it proposes to make of this water is one for which it is authorized to exercise the right of eminent domain under section 1238.

[10] It is further suggested in this connection that the nonsuit was properly granted because there is a fatal variance between the allegations as to the extent of the use proposed and the proof thereof, in this: That the allegation is that the water is to be devoted to sale and distribution to the inhabitants of Fresno, Merced, and Stanislaus counties, whereas the proof shows that it can be sold and distributed only to inhabitants along the lines of its canals and wholly in the territory west of the river. While there is a general allegation to this effect, as before stated, the specific facts alleged show clearly enough that the water is to be taken only to the lands on the west side. There is no substantial variance.

[11] 2. The plaintiff is a Nevada corporation. The defendants contend that its articles of incorporation do not designate the application of water to public use as one of its corporate powers, and, further, that a foreign corporation cannot, under the laws of this state, exercise the power of eminent

domain. For these reasons they contend that the nonsuit was properly granted.

The articles state that the plaintiff corporation is formed and empowered to construct canals in California leading from the San Joaquin river, for the carriage of passengers and freight, and for the purpose of irrigation, and to supply water to the inhabitants of cities and towns in California. These powers are sufficient to authorize it to carry water in its canals to be devoted to public use for the purposes of irrigation, navigation and commerce.

[12] The words "any person," in section 1001 of the Civil Code, includes any public or private corporation, as well as any natural person, and by the terms of the section any such person may, "without further ratification," acquire property by condemnation for any public use specified in section 1238, Code of Civil Procedure, and in doing so becomes "an agent of the state" and a "person in charge of the use" for that purpose. *Pasadena v. Stimpson*, 91 Cal. 248, 27 Pac. 604. The state may authorize foreign corporations to exercise this right. *Gilmer v. Lime Point*, 18 Cal. 255. Foreign corporations have always been allowed to enter this state and do any business therein that is within their corporate powers. Their right to do so has been recognized and sanctioned by our statutes ever since April 4, 1870 (Stats. 1869-70, p. 881). For all purposes of every business within their capacity they are classed with domestic corporations, provided they comply with the statutes allowing them to do business here, and a statute which by necessary construction confers powers upon corporations in general is to be understood to confer that power upon foreign corporations doing business here as well as domestic corporations. The aforesaid section would therefore appear to give them the right of eminent domain on the same terms as other persons and corporations. There would be no doubt of this proposition were it not for section 407 of the Civil Code, expressly authorizing foreign corporations doing business as common carriers to exercise the right of eminent domain. The defendants claim that by the operation of the maxim, "*Expressio unius est exclusio alterius*," this section, by implication, takes away such right from all other foreign corporations. The part of the section relating to this subject is as follows: "Every railway or other corporation organized for the purpose of carrying freight or passengers under or by virtue of the laws of the United States, or of any state or territory thereof, may build railroads, exercise the right of eminent domain, and transact any other business which it might do if it were created and organized under or by virtue of the laws of this state, and has the same rights, privileges, and immunities, and is subject to the same laws, penalties, obligations, and burdens as if created or organized

under and by virtue of the laws of this state." The effect of this provision was considered by the District Court of Appeal for the Third District in *Western Union Tel. Co. v. Superior Court*, 15 Cal. App. 679, 115 Pac. 1091, 1100, an application for a writ of review. That court reached the conclusion that the right to exercise the power of eminent domain was not thereby withheld from foreign corporations which were not common carriers. Upon petition for rehearing, this court declined to express any opinion on that question, saying that it did not affect the jurisdiction of the superior court, and that therefore it could not be material in certiorari. Upon considering the question more fully, we agree with the District Court that section 407 was not intended to prevent other corporations than those described therein from exercising the right of eminent domain.

The section is a mere revision and codification of section 1 of the act of 1880 (Stats. 1880, p. 21). The codification was made in 1905 (Stats. 1905, p. 631). Some verbal changes are made, but it is essentially the same, and the particular provision in question is not altered at all. Section 1001 of the Civil Code and section 1238 of the Code of Civil Procedure were enacted in 1872. Their effect, as we have seen, was to confer this right upon all corporations, foreign or domestic, public or private, for the particular uses designated in section 1238. The act of 1880 did not purport to take away any right of this character. It was an entirely independent enactment, and it is clear that prior to its codification it would have no effect whatever upon the construction of sections 1001 and 1238 aforesaid. The maxim *expressio unius, etc.*, is not of universal application. "What is expressed is exclusive only when it is creative, or in derogation of some existing law, or of some provision in the particular act. The maxim is applicable to a statutory provision which grants originally a power or right. In such cases the power or right originates with the statute and exists only to the extent plainly granted." 2 Lewis, *Suth. Stat. Const.* § 491. If this statute had been the only one on the subject, there would be good reason for saying that no other corporations would have the power, for the power would remain in the state except as granted by statute. But as the power had been given to all other corporations by statutes of which this was not an amendment, the reason for the application of the maxim is altogether wanting.

[13] Furthermore, the incorporation of the statute in the Code cannot be said to have a greater effect upon its meaning than an amendment thereof would have had. Where a statute is amended, the parts which are not altered are to be considered as having been the law from the time when they were enacted. *Pol. Code*, § 325. Hence the mean-

ing and effect of the statute of 1880 would not be changed by putting it in the Code, and, if it did not repeal or modify the pre-existing law before its codification, it would not have that effect afterward.

[14] 3. The objection that the proof showed that the water was not necessary to public use, except for a portion of the year, if it ever was of any force, was removed by the filing of an amended complaint wherein the taking of the water is limited to the season when it is actually required; the dates being specifically stated.

[15] 4. There is no merit in the proposition that the plaintiff cannot condemn the full quantity asked for because a part of it would be lost in transmission to the place of use by seepage and evaporation. Some loss in this way is inevitable, and it must be considered a part of that which is necessary to be taken to supply the actual use proposed. There was evidence to the effect that there would be no loss of this character which could be prevented by reasonable care or precaution.

[16] 5. One ground of the motion was that it appeared that the plaintiff's intention was to devote the water to be condemned, or a part of it, to private use. There seems to be no real foundation for this claim. Prior to the beginning of this action the plaintiff was, and for many years had been, diverting from the river a flow of 760 cubic feet per second into its canals and selling the same for irrigation and other purposes. To this quantity it had acquired a right. A part of it was delivered to Miller & Lux annually for a fixed price under a contract made in 1871 with its predecessor in interest, whereby said predecessor was paid some \$30,000 for the building of the canals and acquired from Miller & Lux rights of way therefor. There were subsequent changes therein, not important to the question. The plaintiff and its said predecessor had also been taking for several years the 500 cubic feet per second the right to which is here sought to be condemned and had been devoting the same to public use, but neither of them had acquired any right to do so as against the defendants. This suit was begun to obtain that right. Conceding but not deciding that the water delivered to Miller & Lux, under the contract of 1871, was taken for private use, it does not follow that the 500 cubic feet here in controversy is to be taken for that purpose. The contrary is asserted by the plaintiff, and there is nothing to show that it is not stated in good faith. The plaintiff is already bound by the contract of 1871 to furnish the Miller & Lux water, and it has done so out of the 760 cubic feet to which it had a right. The present proposed taking is an altogether distinct appropriation of an additional quantity. This claim seems to be partly founded on the fact that the water is to be mingled together in the canals. This fact seems to be im-



material. It does not affect the public use of the 500 cubic feet. If, after taking it, the plaintiff should convert it from public to private use, such conversion could be prevented. But as there is no evidence of such intent, and it cannot be anticipated in this way, the mere assertion that plaintiff may in the future wrongfully do so cannot defeat its right to the condemnation.

[17] 6. We think the lower court erred in permitting J. R. Adams, W. D. Adams, and the East Side Canal & Irrigation Company to become defendants to the action and to file answers to the complaint, and in refusing to strike out such answers on motion of the plaintiff. Perhaps such an error would not, in every case, be sufficient to require a reversal of the judgment. It might be that no substantial injury would ensue therefrom. We need not say whether it would be sufficient in this case or not, since the judgment must be reversed for other reasons. The complaint alleged that the property sought to be condemned was the interest of the Stevenson Company, as riparian owner of certain lands, in the 500 cubic feet of water which plaintiff proposed to take for public use. The other original defendants had or claimed some lien upon the land of the Stevenson Company and claimed under that company. The above-named intervening defendants did not claim under the Stevenson Company. They each claimed adversely to it. Their claim was that they had, apparently by continuous adverse use, acquired from the Stevenson Company the right to divert from the river, at a point below plaintiff's dam and above the Stevenson land, the identical 500 cubic feet of water which plaintiff proposed to take and for which it proposed to condemn the Stevenson right. Calling it the same does not make it so, nor does the fact, if it be a fact, that the water is the same—that is to say, that if plaintiff did not take it, the same would be diverted by said interveners and would not reach the Stevenson land—make it the same right. The condemnation of this water right of Stevenson for the protection of plaintiff's diversion would not give plaintiff any right whatever against any other person, and it would not at all affect the rights of the interveners. The plaintiff's taking had been interfered with by the Stevenson Company, or its predecessor in ownership of the land. Plaintiff desired to prevent such interference in the future by condemning the right in virtue of which the interference was made. The interveners had no interest in the Stevenson land, or in the riparian rights pertaining thereto, which, alone, the plaintiff sought to condemn. It was this riparian right which was the subject-matter of the litigation. The action was not a suit in equity to determine the title to the water, generally, or one in which a general adjudication of such title could be made. It was a special proceeding for a particular

purpose, namely, to condemn the Stevenson right for the benefit of the plaintiff as the purveyor of the public use. In such a controversy, third persons not interested in the land in subordination to or in common with the person whose right was sought to be taken, but claiming adversely, have no right to intervene under section 387 of the Code of Civil Procedure.

We have considered all the grounds stated in the motion for a nonsuit. As none of them is sustained, it follows that the court erred in giving judgment for the defendants.

The judgment is reversed.

We concur: HENSHAW, J.; MELVIN, J.; LORIGAN, J.; ANGELLOTTI, J.

SLOSS, J. I dissent. In my opinion the nonsuit was properly granted on the first ground stated in the motion, viz., that the purpose for which condemnation is sought is not one of the public uses in behalf of which, under section 1238 of the Code of Civil Procedure, the right of eminent domain may be exercised.

The majority of the court has reached the conclusion that the plaintiff's claim may be sustained under either subdivision 3 or subdivision 4 of section 1238. With respect to subdivision 4 ("the supplying of mines and farming [in] neighborhoods with water"), it may be said that the plaintiff itself makes no contention that its complaint stated or that its proof established a right under this subdivision. The complaint plainly shows that it was framed with the intent of making a case under subdivision 3, and the briefs of the appellant virtually concede that a claim of right to condemn under subdivision 4 was not presented and is not involved. Under these circumstances, this point may be passed with the statement that I believe the concession to have been no more than was required by the state of the record.

The question, then, is whether the proof supported the allegations of the complaint that plaintiff intends to devote the water in question to the purposes of sale, rental, and distribution to the inhabitants of the counties of Fresno, Merced, and Stanislaus. It appears that plaintiff has been furnishing water and intends to continue to furnish it to a large part of the territory and a considerable number of the inhabitants on the west side of the San Joaquin river. There is no pretense that it has brought the water, or intends, or is able to do so, within the reach of the extensive territory and large population on the other side of the river, within the counties named. Without going any further into particulars, it may be said that the territory which plaintiff is able to furnish with water constitutes far less than one-half of the area of each county named, indeed, far less than one-half of the irrigable lands of any of said counties. On this state

of facts, I think that the District Court of Appeal for the Third Appellate District, in which this appeal was originally pending, was right in expressing the view that, in order to make out a case under subdivision 3 of section 1238, "the canals and other contrivances used by plaintiff should be so located and constructed and its business so conducted as to make the water available generally to the inhabitants of these counties for the purposes stated."

The language of the statutory provision under consideration is this: "Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses: \* \* \* (3) \* \* \* Ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes, ditches or pipes for conducting or storing water for the use of the inhabitants of any county, incorporated city, city and county, village or town. \* \* \*" The contention of the appellant, sustained by the majority opinion, is, in effect, that a public service corporation engaged in the sale, rental, and distribution of water within one or more counties, which is ready to furnish, and has canals and works sufficient to furnish, such water to so great a number of the inhabitants of such county or counties as to make the character of the use public rather than private, is engaged in the sale, rental, and distribution of water "for the use of the inhabitants of any county." In other words, the statute, thus construed, authorizes the condemnation of property in behalf of ponds, lakes, canals, etc., for constructing or storing water for the use of any number of people residing upon any number of parcels of land anywhere within the state, provided only that the use be of a public character, for, since the entire area of the state is divided into counties, it is apparent that canals or other conduits devoted to supplying water to any of the inhabitants of the state are used for the inhabitants of one or more counties. This construction seems to me to make meaningless most of the language in the part of the subdivision under consideration. If all that was intended to be required was that the use should be public, there would have been no need of inserting the words "incorporated city, or city and county, village or town," or, indeed, the word "county." This is, of course, contrary to the well-settled rule requiring a court in construing a statute to give meaning and effect to every word contained in it, if reasonably possible.

Section 1238 does not provide that the right of eminent domain may be exercised in behalf of every public use. What it does is to enumerate certain public uses, and to declare that the power of eminent domain may be exercised in behalf of the particular uses enumerated. That the corporation plaintiff is in the control of a public service is not conclusive upon the question of its right to exercise the power of eminent domain. It must appear in addition that the statute has

authorized the exercise of this power for the particular purpose for which it is sought to be exercised.

It must be assumed that the Legislature had some purpose in limiting the right of eminent domain to the public use of conducting or storing water "for the use of the inhabitants of any county, incorporated city, or city and county, village or town." The idea in the minds of the lawmakers evidently was that the right of eminent domain in aid of the furnishing of water was not to be granted in every case of a public use, but only where the water was for the use of the inhabitants of the governmental subdivisions enumerated. It is of the essence of a public service that the service shall be compellable (to the extent of its capacity and subject to reasonable restrictions) by all the members of the community to whose use the subject of the service is appropriated. Wyman on Pub. Serv. Corp. §§ 273, 344; *Lux v. Haggin*, 69 Cal. 269, 306, 4 Pac. 919, 10 Pac. 674. When, then, the statute speaks of furnishing water to the inhabitants of a county, city, city and county, village, or town, it contemplates a service available to the inhabitants, generally, of the respective governmental territories, not a service to such part of the territory as may be selected by a water company. The inducing cause for granting the right was the benefit of the public to be served, rather than the advantage of the individual or corporation seeking to supply water. The existence of the right, by the language of the statute, was made to depend upon the extent of the public to be so served. This mode of measurement is totally destroyed, and much of the language of the subdivision deprived of any meaning, by holding that the statute authorizes the exercise of eminent domain in behalf of canals, etc., for supplying water to the inhabitants of any part, so extensive as to escape the objection that the use is private, of a county, a city, a village, or a town. Let us test the question by supposing a complaint in which the plaintiff alleges that it is engaged in furnishing water to the inhabitants of a supervisorial district and that it desires to condemn certain private water rights in order to supply such use. Assuming the service to be such as to constitute the use a public one, could it be contended that because the inhabitants of the district are inhabitants of a county, the right of eminent domain is conferred by the statute under consideration? It seems to me that the question carries its own answer, and that answer is one that requires the affirmance of the order appealed from.

On all the other matters discussed in the main opinion I agree with the views therein expressed.

#### On Denial of Rehearing.

SHAW, J. In a petition for rehearing, the respondents claim that the part of the opinion of the court herein relating to the ad-



mission of the East Side Canal & Irrigation Company and others as defendants, being the part numbered 6, is contrary to the provisions of sections 1244, 1246, and 1247, of the Code of Civil Procedure. We deem it advisable to restate the position of the court more at length.

[18] Section 1244 requires the complaint in a condemnation suit to state "the names of all owners and claimants of the property" as defendants. Section 1246 provides, in substance, that any person occupying or having or claiming any interest in the property sought to be condemned may appear, plead, and defend as to his interest. Section 1247 provides that in such actions the court shall have power to hear and determine all adverse or conflicting claims to the property sought to be condemned.

It is obvious from this language that these provisions do not contemplate or authorize the admission of a person as a party who does not show that he has some interest in or right to the property sought to be condemned, or of a person whose statement of his right shows that he has no such interest.

All that these parties had, or claimed to have, was the right to divert from the stream of the San Joaquin river, at a point about 30 miles below plaintiff's dam and 20 miles above the Stevenson land, a flow of water equal to 500 cubic feet per second. They claim that this right was paramount and superior to the riparian rights of the Stevenson land in the river passing that land. If this is true, then it follows, necessarily, that the right or interest of those parties constituted no part of the riparian rights of the Stevenson land in the river. Their diversion took it out of the river above, it was consumed by use in irrigation, it never again reached the river, and it formed no part of the river passing the Stevenson land, to which the riparian rights attached.

[19] The riparian right is parcel of the land to which it attaches. It is local in its nature. It enables the owner to enjoin an injurious interference with the stream, but it does so only when such interference affects the river where it passes by his land. If he cannot show this, he cannot complain of the interference. A use of the stream above, if it does not affect it where it passes his land, is no violation of his right. The intervening defendants having, as they say, a paramount right to take out the water above, such water ceases to be a part of the river which rightfully reaches the Stevenson land, and its riparian rights do not extend to or include it. To say that the riparian right of the Stevenson land does include it would be to admit that the right claimed is not paramount to the riparian right. The right of these defendants is therefore a right of property entirely separate, distinct from, and unconnected with the riparian rights of the Stevenson Company in the river, which latter

constitutes the property sought to be condemned.

[20] The argument of these parties is based upon the idea that the plaintiff is seeking to condemn absolutely all rights to a part of the flow of the river equal to 500 cubic feet per second. Hence they claim that every person having or claiming any interest in the stream is interested in the property sought to be condemned and may become a party defendant. Every other appropriator of water from the river and every owner of land riparian thereto from Firebaugh to Antioch, a distance of something over 100 miles, could, upon this theory, insist upon becoming a party to the action. We need not determine whether this would be so or not, for this is not such a case. The property sought to be condemned is not the general or particular right of any and every person to 500 cubic feet per second of the water of the San Joaquin river at plaintiff's dam, but is merely the riparian right attaching to the Stevenson land, so far as it may affect, or be affected by, the proposed diversion of that quantity by the plaintiff. The suit affects nobody and interests nobody except persons having some right or interest in the Stevenson land. The facts stated by these parties show that they have no such right or interest. Hence they were not proper parties to the action.

The petition for rehearing is denied.

We concur: ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

164 Cal. 300

In re PURCELL'S ESTATE.

GARNER et al. v. PURCELL et al.

(L. A. 3,268.)

(Supreme Court of California. Dec. 10, 1912.

Rehearing Denied Jan. 8, 1913.)

1. WILLS (§ 158\*)—VALIDITY—"UNDUE INFLUENCE."

The undue influence which vitiates a will must be so exerted as to affect the terms of the will, and mere proof of opportunity to exercise undue influence is not sufficient.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 385, 386; Dec. Dig. § 158.\*]

2. WILLS (§ 157\*)—VALIDITY—UNDUE INFLUENCE—CONFIDENTIAL RELATIONS.

The fact that one charged with procuring a will by undue influence had been since the death of the husband of testatrix her business adviser and manager does not show undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 383, 384; Dec. Dig. § 157.\*]

3. WILLS (§ 163\*)—VALIDITY—UNDUE INFLUENCE—BURDEN OF PROOF.

The fact that one charged with procuring a will by undue influence had been since the death of the husband of testatrix her business adviser and manager does not cast on him the burden of proving the absence of undue influence at the time of the execution of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 388-402; Dec. Dig. § 163.\*]

**4. WITNESSES (§ 268\*)—CONTESTS—EVIDENCE—ADMISSIBILITY.**

Where, in a suit to revoke a will on the ground of undue influence, the testimony of the attorney who drew the will was offered to prove facts justifying the inference that the one charged with exercising undue influence was unduly active in procuring the execution of the will, and endeavored to influence testatrix in his favor, it was proper, on his cross-examination, to show what actually occurred during his consultation with testatrix to rebut such inference.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948; Dec. Dig. § 268.\*]

**5. WILLS (§ 55\*)—CONTESTS—MENTAL INCAPACITY—EVIDENCE—SUFFICIENCY.**

Evidence in a suit to revoke the probate of a will held not to show testamentary incapacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-161; Dec. Dig. § 55.\*]

**6. EVIDENCE (§ 571\*)—CONTESTS—MENTAL INCAPACITY—SUFFICIENCY.**

The opinion of a physician that as a matter of medical science the mind of testatrix, whose will was contested was not physically unsound, and had a slight impairment of memory due to old age, which led her to rely on others more than she otherwise would, but that she was able to think, talk, and act rationally and manage such of her affairs as she had in hand with reasonable prudence and judgment, does not show want of testamentary capacity.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2395-2398; Dec. Dig. § 571.\*]

**7. EVIDENCE (§ 570\*)—OPINION EVIDENCE—HYPOTHETICAL QUESTIONS.**

An opinion given by an expert on assumed facts variant from those shown by the uncontradicted evidence, and on a misconception of the effect of some other facts, cannot be given any probative force.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2395; Dec. Dig. § 570.\*]

**8. WILLS (§ 47\*)—TESTAMENTARY CAPACITY.**

A will of an aged and infirm person, sick in mind and body, is upheld, provided testamentary capacity is shown; and, insanity to show testamentary incapacity, must either be of such a broad character as to establish mental incompetency generally, or some specific form of insanity from which testator suffers, and that the will was the product of hallucinations or delusions.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 94; Dec. Dig. § 47.\*]

**9. EVIDENCE (§ 226\*)—ADMISSIONS BY CO-LEGATEE—ADMISSIBILITY.**

Admissions by a residuary legatee charged with procuring the execution of the will by undue influence against the validity of the will are inadmissible in a suit to contest the will.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 815-821; Dec. Dig. § 226.\*]

**10. WITNESSES (§ 321\*)—IMPEACHING OWN WITNESS.**

A party may not impeach his own witness, unless he first shows that he has been misled, or surprised by the testimony given.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1094, 1099-1100; Dec. Dig. § 321.\*]

**11. JUDGMENT (§ 22\*)—RENDITION—VALIDITY.**

A ruling granting a motion of nonsuit as shown by the minutes of the daily proceedings

of the court is not a judgment, and the court has jurisdiction to thereafter render a formal judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 75-88; Dec. Dig. § 22.\*]

**12. COSTS (§ 199\*)—APPLICATION FOR COSTS—“DECISION.”**

The “decision” referred to in Code Civ. Proc. § 1033, declaring that the party in whose favor judgment is rendered and who claims costs must deliver to the clerk and serve on the adverse party within five days after the verdict or notice of the decision of the court memorandum of costs, means a judgment entered on a motion, and, where the court rendered judgment on a motion of nonsuit, cost bill filed five days after the judgment was signed is within the time prescribed.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 762; Dec. Dig. § 199.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1897-1902; vol. 8, p. 7629.]

Department 1. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by James F. Garner and others against Charles A. Purcell and others to revoke the probate of the will of Mary B. Purcell, deceased. From a judgment for defendants, contestants appeal. Affirmed.

Ball & Ball, Thomas Ball, and Murphey & Poplin, all of Los Angeles, and Park Henshaw, of Chico, for appellants. Valentine & Newby, E. A. Meserve, Ward Chapman, and Hunsaker & Britt, all of Los Angeles, for respondents.

SHAW, J. Mary B. Purcell died testate on May 15, 1910. Her last will was executed on June 18, 1909, and was admitted to probate on June 1, 1910, on the petition of Charles A. Purcell and two other persons, all of whom were named therein as executors. Within a year thereafter the present proceeding was begun by certain of her heirs to revoke the probate of her will. The grounds alleged were, first, that it was procured by the fraud and undue influence of Charles A. Purcell and others in collusion with him; second, that at the time of its execution the testatrix did not have testamentary capacity; and, third, that it was not duly executed. Upon the trial, after hearing the evidence offered by the contestants, the court, on motion of the defendants, directed a nonsuit, and thereupon rendered judgment against contestants, dismissing and denying their petition for revocation. From this judgment the contestants appeal. They afterwards moved to strike out the cost bill filed by the defendants. This was denied, and they appeal from the order denying said motion.

1. The court was justified in holding that there was no substantial evidence of fraud or of any defective execution of the will. The rulings upon these points are not seriously attacked, and we need not discuss the subjects.

[1] 2. The undue influence consisted of the



alleged domination and control of Charles A. Purcell, assisted by Hannah D. Burke and Fannie Mayer, whereby they induced her to make a will in their favor contrary to her own wish and inclinations. Purcell was a brother, and Mrs. Burke a sister, of the deceased husband of the testatrix. Fannie Mayer was her housekeeper, who, with Mrs. Burke, had lived for many years in the same house with the testatrix. The estate in question was worth over \$400,000, and was chiefly derived from her deceased husband, who died in 1901. Charles A. Purcell had been her business adviser and manager ever since the death of her husband. The most that can be said of the evidence on this branch of the case is that it shows that they had the opportunity to exercise undue influence upon her in the matter of the making of this will, and might have done so if they had been so disposed, and had possessed such influence. This, however, is not sufficient. The undue influence must actually exist, it must be actually exerted, and it must be so exerted as to affect the terms of the will. There is no substantial evidence of either of these conditions.

[2, 3] The fact that the confidential relation of attorney and agent existed between the testatrix and Purcell does not in itself prove that the will was procured by undue influence arising from that relation, nor cast upon him the burden of proving the absence of such influence at the time of its execution. *Estate of Morcel*, 121 Pac. 733; *Estate of Ricks*, 160 Cal. 461, 117 Pac. 532; *Estate of Langford*, 108 Cal. 621, 41 Pac. 701; *In re Calkins*, 112 Cal. 301, 44 Pac. 577. There is no evidence that either of them suggested to her any of the provisions contained in the will.

[4] 3. In this connection it is proper to consider the claim that the court improperly allowed the cross-examination of L. H. Valentine to proceed upon matters beyond the scope of the examination in chief. Valentine was the attorney who drew the will and supervised its execution. Upon the examination in chief, he testified that he had known Charles A. Purcell for about a year and a half prior to the execution of the will; that his residence was in Los Angeles about 300 feet distant from that of Mrs. Purcell; that on June 17, 1909, the evening before the will was executed, at about 7 o'clock, Charles A. Purcell came to his residence, and stated that Mrs. Purcell had requested him, Purcell, to go to the house of the witness, and ask witness to come to her house and see her about making a will; that Purcell did not sit down upon delivering this message, but left immediately; that in about half an hour, in response to the request, witness went to Mrs. Purcell's house, and was admitted by either Mrs. Mayer or Mrs. Burke, and was directed to go upstairs to Mrs. Purcell's room; that he had no other conversation there, and saw no one else; that he proceed-

ed alone to Mrs. Purcell's room, and there found Mrs. Purcell, Miss Smith, the nurse, and either Mrs. Burke or Mrs. Mayer; that the other persons except himself and the testatrix left the room and closed the doors; that he and Mrs. Purcell remained in the room from about 7:30 until after 10 o'clock. He then made an appointment with her to come to his office the next morning to execute the will which he was to prepare, and he went from her house directly to his own house, seeing no person on the way. He next saw Mrs. Purcell on the following morning before 10 o'clock at his office. She was accompanied by Charles A. Purcell and Miss Smith as far as the reception room. She then went into his inner office, and remained there at least an hour while she was executing the will. He saw Charles A. Purcell again that week on the street and again in May, 1910, at the time of her death, and he again saw Mr. Purcell in August, 1910.

On the cross-examination he was allowed to relate in detail all the conversation that occurred in the two interviews between him and Mrs. Purcell at her house and in his office. This evidence disclosed a prolonged conversation between them that evening, in which she discussed at length her affairs, her previous wills, her wishes concerning her relatives, and the disposition of her large estate, and in which she exhibited a familiarity with them and a fairly complete and accurate comprehension of all these subjects. It also tended to show that the will was the result of her own volition, and not of suggestions by Mr. Purcell or any other person. The matters disclosed by the examination in chief were not relevant to the issue of mental incapacity. The evidence was offered by the contestants on the issue of undue influence. In this connection it is necessary to note that other evidence showed that Mr. Valentine had never before been consulted by her and that Mr. Murphey, attorney for the contestants, had drawn a former will; also, that there was some other evidence tending to create an inference that Mr. Valentine and Mr. Purcell were together in a room at Mrs. Purcell's house on the evening of and just preceding the consultation, no one else being present. The purpose of proving the few incidents related upon the examination in chief obviously was to show that Charles A. Purcell was instrumental in procuring the services of the attorney who prepared the will, that he and Mrs. Burke were in or about the house at the time of the consultation, and that Mr. Purcell accompanied her to the attorney's office the next day when she went there to sign the will. The object was to prove facts which might cause the jury to infer that Mr. Purcell was unduly active in the matter, and that he was endeavoring to influence the testatrix in his favor, and from these facts to infer that the will was the product of his influence.

This being its purpose and effect, so far

as it had any effect, it was proper for the other party on the cross-examination to show what actually occurred during the consultation, and at the interview at the office, in order to rebut the inference, sought to be raised by the contestants from the facts brought out in the examination in chief, that Purcell or Mrs. Burke were in some way instrumental in directing or controlling the provisions of the will. The evidence on cross-examination did tend to rebut such inference, and it was, therefore, within the discretion of the court, to allow it to be given. *People v. Rozelle*, 78 Cal. 84, 20 Pac. 36; *People v. Teshara*, 141 Cal. 638, 75 Pac. 338; *Jackson v. Feather R. W. Co.*, 14 Cal. 23; *Graham v. Larimer*, 83 Cal. 180, 23 Pac. 286; *People v. Buckley*, 143 Cal. 388, 77 Pac. 169; *People v. Gallagher*, 100 Cal. 475, 35 Pac. 80.

[5] 4. We now come to the question whether or not there was evidence to support a verdict that the testatrix was of unsound mind at the time of the execution of the will if the case had been submitted to the jury. The will was made in anticipation of and shortly before a severe surgical operation upon the testatrix. She was then 71 years of age. There is some evidence which, if taken separately and apart from the qualifications and explanations which accompanied it, would tend to prove mental incapacity. For example, the surgeon who performed the operation upon the testatrix testified that from his observation and conversations with her during the two months from June 12 to August 11, 1909, it was his opinion that she was not of sound mind on June 18th, the date of the will. But in explanation and on examination in chief he said that she was affected only by a general enfeeblement of all the mental faculties, called by physicians "senile dementia"; that this begins as soon as a person's memory begins to fail because of age; that it was of varying degrees; and that it did not necessarily or immediately destroy the capacity to transact business. It further appeared from his examination that it did not cause him to hesitate to enter into an engagement with her to perform the serious operation which she underwent. On cross-examination he said that the testatrix was during that time rational, both in appearance and in conversation; that she was not insane, and did not appear to be insane; that she had no delusions; and that what he meant by saying that she was of unsound mind was that there was some failure of memory or judgment. These were not made as statements inconsistent with statements made on the examination in chief. He evidently regarded the respective statements as entirely consistent with each other. His theory appears to have been, as some of the medical witnesses stated it, that her unsoundness of mind was of a medical nature; that her brain was not perfect because of the deterioration of age. Being asked for de-

tails showing mental unsoundness, he said that her mind was slow; that she did not grasp things quickly, and had to take time for reasons and answers; that she would not decide about having the operation without advising with her brother-in-law, Charles A. Purcell; that she said she had always relied on Purcell to transact her business; that she talked about founding a hospital, asked the witness about the cost of a hospital, and seemed to rely on the opinions of the witness and others about it, but that in all she said she was rational both in manner and in the reasons she gave, and her ideas, though expressed slowly, were expressed well and clearly.

[6] It is clear from all this that, although the physician was of the opinion that as a matter of medical science her mind was not physically entirely sound, all that he meant by that opinion was that she had a slight impairment of memory due to old age which led her to rely on others more than she otherwise would, but that she was nevertheless able to and always did think, talk, and act rationally, and manage such of her affairs as she there had in hand with reasonable prudence and judgment. The witness himself appeared to believe that she should have decided about the operation without consulting her brother-in-law, who had been for years her trusted business manager. The medical profession may describe such a condition as senile dementia and declare such a person mentally unsound, but it does not constitute the sort of incompetency or insanity which, in the estimation of law and of men of ordinary sagacity and prudence, renders a person incapable of executing contracts or making a will. Her conduct and conversation, as detailed by the physicians, rather tended to show that she herself was aware of her failing memory of recent events, and that she prudently chose to rely upon others in whom she had confidence in her business affairs, and that in all other respects she had at least ordinary wisdom, judgment, and mental capacity.

[7] There was also the testimony of three physicians who had never known the testatrix, given in answer to a hypothetical question, to the effect that, assuming that the facts stated in the question were true and fairly described her condition, she was of unsound mind at the time she executed the will; that senile dementia had affected her so that her memory was defective, her will weakened and her former judgment impaired sufficiently to make her incompetent. The question put did not state the case fairly, nor fairly describe her condition. It included every statement contained in the evidence which tended in the least to show senile dementia, or which by any possibility could be construed to have that tendency, and it excluded the explanations, qualifications, and modifications accompanying those statements, as given by the witnesses who made them. In this



way it presented a distorted and inaccurate description of the condition of the testatrix, as shown without conflict by the evidence as a whole. For example, the question stated that she appeared to the physicians at the hospital as an infirm, feeble old lady with her mental faculties impaired, enfeebled and breaking down and suffering from a loss of memory, but it did not state their testimony that at the same time she was not insane, but was sane and rational, and that the reasons she gave for what she was doing appeared to be good, sound, and rational. Again, the question included a passage from the will in which she declared that she had always desired to devote a large part of her property to charity, but that under the "exigencies of this will" she was not then "able to designate the particular charities" to which she desired to extend her bounty, that Charles A. Purcell knew her desires in that regard, and that she left the matter wholly to him, without imposing upon him any duty or trust in regard thereto. This passage was taken by these physicians as evidence that her memory was at that time so bad that she could not recollect her wishes on the subject or the charities she had previously had in mind, and their opinions were, in part, based upon this supposed fact. In truth, however, the evidence showed, without conflict, that she was correctly advised by her attorney that under the laws of California she could not by her will give more than one-third of her estate to charity; that for that reason she could not make the charitable bequests that she desired, and that this clause was inserted for the purpose of informing her acquaintances that she had not entirely forgotten the charitable intention she had so often expressed to others in her lifetime; and that the language of the clause was chosen by her attorney to accomplish that object and at the same time to avoid creating a precatory charitable trust, which trust would likewise have been invalid as to the excess over one-third of the estate. The passage did not at all indicate the want of memory or feebleness of mind which the physicians attributed to it. One at least of these physicians based his conclusion in part on facts not given in the hypothetical question. An opinion given by an expert upon assumed facts so variant from those shown by the uncontradicted evidence and upon such misconceptions of the effect of some of them cannot be given any probative force, even in the absence of the other evidence already stated explanatory of the mental condition of the testatrix.

There was also the testimony of some acquaintances, more or less intimate, that they were of the opinion that she was of unsound mind shortly before she made this will. But of these witnesses Hallett said that she always talked rationally and coherently, knew all about her relatives, talked intelligently on whatever was the subject of conversation,

and was rational every time, and seemed to know what she was talking about, and that he could not say she was insane. His reasons for thinking her of unsound mind were that she had changed in her actions; that after telling a thing she would sometimes repeat it in 20 minutes; that her mind was not "concentrated" particularly; and that she thought a good deal about her death. Mrs. Jeannette A. Garner was of a like opinion because the testatrix was so forgetful that "she could not remember anything she said or did 10 minutes before." On cross-examination she said that she could not say that the testatrix was insane, but that she was not of a strong mind; that, after the operation, the testatrix gave her a small table and asked her to pick it out herself, and the witness thought the fact that the testatrix asked her to select it indicated that she was not of very strong mind; also, that she borrowed \$500 from the testatrix in September after the operation, and that she did not at that time think anything about the testatrix being of unsound mind, and did not know anything about it; that she would not term it an unsound mind, but not a very strong mind; and that she got the explanation of the term "unsound mind" from the doctors. Evidently what the witness meant by stating that the testatrix was of unsound mind was that she had some impairment of the mental faculties usual to old age. It is significant, also, that these acquaintances did not hesitate to deal with the testatrix, and none of them ever seemed to have contemplated such a proceeding as having her declared incompetent and put under guardianship, notwithstanding the fact that she had such a large estate subject to her disposal.

The testimony of Mr. Valentine is not, strictly speaking, in conflict with any evidence of the witnesses as to her mental condition. He spoke of the time when she was actually making her will. He gave at length the conversations between him and her regarding it. These conversations, not only showed an entire absence of influence of any other person at that time, but it also showed that the testatrix was at that time entirely sane and capable of understanding her affairs, of remembering her relatives and formal connections, and of making a testamentary disposition of her estate. A reading of this testimony is convincing to the effect that there is no foundation for the idea that she was then so lacking in mental capacity, or that there was then such a failure of memory that she was incapable of executing a will. If there were times when she was incapable of transacting business, the time when she executed the will was clearly one of her lucid intervals. A careful reading of the whole evidence brings us to the same conviction as that which actuated the trial judge in granting a nonsuit, a conviction that on the whole case no reasonable person could believe that she had not sufficient

mental capacity to make the will in question.

[8] Questions of this character have often been presented to this court. In *Estate of Chevallier*, 159 Cal. 168, 113 Pac. 133, it is said: "It is important, preliminarily, to observe that it is not every form of insanity, not every mental departure from the normal, which destroys an otherwise valid testamentary act. The rule of law is not that no person who is insane may make a valid will, but that the will of no person who by reason of insanity is incapable of making valid testamentary disposition shall be upheld. Thus, the wills of aged and infirm people, of people sick in mind, as well as in body, are always upheld, if, notwithstanding their enfeeblement, testamentary capacity is shown. So, again, it may be well and perhaps soundly reasoned that all persons who commit crime and that all persons who commit suicide are aberrant, abnormal, and therefore insane. But such is not the insanity which the law has in mind. It must be an insanity of one of two forms, either insanity of such broad character as to establish mental incompetency generally, or some specific and narrower form of insanity, under which the testator is the victim of some hallucination or delusion. And even in the latter class of cases it would not be sufficient merely to establish that a testator was the victim of some hallucination or delusion to avoid the will. The evidence must go further and establish that the will itself was the creature or product of such hallucination or delusion, or, in other words, that the hallucination or delusion bore directly upon and influenced the creation and terms of the testamentary instrument." In *Estate of Dole*, 147 Cal. 191, 81 Pac. 535, we said: "Even in old age, if the testator knows his property and the manner in which it is invested, and his relatives who are the object of his bounty, he may make a valid will. It is not necessary that his memory be perfect. The aged person often fails to remember the details of business and the names of his friends, but this is often the case with persons in the prime of life. The memories and reasoning powers of people, even in the prime of life, differ as the features of each individual differ in a multitude of ten thousand." In *Estate of Redfield*, 116 Cal. 637, 48 Pac. 794, the judgment of the court below was that the testatrix made the will in question while she was of unsound mind. The facts shown by the evidence are related at length and make fully as strong a case as that disclosed in the case at bar. Nevertheless, the court held that it was insufficient in law to support the judgment and reversed the case for that reason. For these reasons, we conclude that there was no error in directing a nonsuit upon the issue of mental incapacity.

5. A number of rulings upon the admission and exclusion of evidence are assigned as error. Many of them were cured by the sub-

sequent admission of the evidence thus excluded. These we will not mention.

[9] That the court correctly excluded testimony of a statement claimed to have been made by Charles A. Purcell, the residuary legatee, to the effect that "he wrote the will and Valentine put it in legal form," is settled by the decisions of this court in *Estate of Dolbeer*, 149 Cal. 245, 86 Pac. 695, 9 Ann. Cas. 795, and *Estate of Dolbeer*, 153 Cal. 662, 96 Pac. 266, 15 Ann. Cas. 207. The excluded statement was no more than an admission tending in some degree to prove undue influence. Being an admission of one of several legateses against the validity of the will, it was incompetent, under the rule established by those cases.

[10] The testimony of Mrs. Garner as to statements made by the witness L. H. Valentine was properly rejected. Valentine was contestants' own witness, the evidence offered was incompetent, except for the purpose of impeaching him, and this contestants could not do unless they first showed that they had been misled or surprised by the testimony he gave. They made no attempt to show such deception or surprise. The ruling would have been harmless even if it had been erroneous. The statements imputed to Mr. Valentine by the question put to Mrs. Garner, so far as they were material at all, related wholly to the issue of undue influence, and, if admitted, they would not have strengthened the contestants' other evidence on this branch of the case sufficiently to have established it.

[11] 6. The appeal from the order refusing to vacate the judgment for costs and strike out the cost bill is without merit. The minutes of the daily proceedings of the court of January 9, 1912, state that the motion for nonsuit was "renewed by defendants in the presence of the jury and motion granted by the court." On January 10th, in pursuance of this ruling, a formal judgment of nonsuit, including judgment in favor of defendants for their costs, was drawn and signed by the judge presiding in the case. On January 12th this formal judgment was filed and entered in the judgment book. The record so designates this book, but it was evidently intended to refer to the "minute book" in which probate orders and decrees are required to be entered. Code Civ. Proc. § 1704. The ruling granting the motion for a nonsuit was not, as the appellants claim, the judgment of the court. The judgment upon that ruling was not made until at least the following day when the judge signed the draft of the form therefor, and was not filed or entered until January 12th. The court had not lost jurisdiction of the case, and its judgment entered on January 12th was the only judgment in the cause. The cost bill was filed on January 15, 1912, five days after the judgment was signed. This was within the time allowed by law.



[12] Code Civ. Proc. § 1033. No findings are necessary to such a judgment, and hence the "decision" referred to in the section just cited must be understood in such cases to mean a judgment entered upon a motion.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

(164 Cal. 312)

In re JOBSON'S ESTATE.

JOBSON v. JOBSON. (Sac. 1,927.)

(Supreme Court of California. Dec. 10, 1912.)

1. DESCENT AND DISTRIBUTION (§ 11\*)—STATUTES—CONSTRUCTION.

The statute of succession makes no distinctions based upon the channel through which property may have come to the decedent, and the question of inheritance is purely a matter of statutory regulation.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 40-44, 47, 180, 184; Dec. Dig. § 11.\*]

2. ADOPTION (§ 1\*)—STATUTES—REGULATION OF RIGHTS.

The subject of adoption and rights springing therefrom is purely a matter of statutory regulation.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. § 15; Dec. Dig. § 1.\*]

3. ADOPTION (§ 22\*)—SUCCESSION—PARENT AND CHILD.

By the adoption of a child the foster parent and the child, as provided by Civ. Code, § 228, "sustain towards each other the legal relation of parent and child, and have all the rights and are subject to all the duties of that relation." *Held*, that the natural relationship between the child and its parents by blood is superseded, and is not reviewed by the death of the foster father, and that, on the death of the adopted child after the death of the adopting father, the widow of the latter shall inherit; the child leaving no issue.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. § 41; Dec. Dig. § 22.\*]

Shaw and Lorigan, JJ., dissenting.

In Bank. Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

In the matter of the estate of Frederick Cox Jobson, deceased. E. C. Jobson against Sue C. Jobson. From an order overruling a petition for partial distribution, E. C. Jobson appeals. Affirmed.

Louis O'Neal and Owen D. Richardson, both of San Jose, and O. G. Hopkins, of Sacramento, for appellant. George & Hinsdale, of Sacramento, for respondent.

SLOSS, J. Appeal from an order denying a petition for partial distribution.

The decedent, Frederick Cox Jobson, was the legitimate child of E. C. Jobson, the appellant, and Jennie A. Jobson, his wife. In April, 1889, Frederick Cox Jobson, then three years of age, was adopted by his maternal grandfather, Frederick Cox. The adoption proceedings, which took place in the county

of Sacramento, where all of the parties concerned resided, were regular and valid, having been conducted in strict conformity with the requirements of the Civil Code. Sections 221 to 230. Both the father and the mother duly consented in writing to the adoption, as did the wife of Frederick Cox. Thereafter Frederick Cox Jobson became, and until his death remained, a member of the family of said Frederick Cox and his wife, Jennie Cox. On March 25, 1906, Frederick Cox, the adopting father, died testate, having bequeathed a legacy of \$10,000 to his adopted son. In June, 1909, Frederick Cox Jobson, the adopted son, died intestate, owning no property except a portion of the legacy which had been bequeathed to him by Frederick Cox. He left surviving a widow, Sue C. Jobson (the respondent herein), his father in blood (the appellant), his mother in blood, Jennie A. Peltier, formerly Jennie A. Jobson, and Jennie Cox, the widow of Frederick Cox, the adopting parent. He left no issue. The father, E. C. Jobson, filed his petition for partial distribution, contending that he was entitled to one-fourth of the estate of the decedent. And such was clearly his right (Civ. Code, § 1386, subd. 2), if, in contemplation of law, he was the "father" of Frederick Cox Jobson at the date of the latter's death. On the other hand, the respondent takes the position that the adoption proceedings terminated the legal, as distinguished from the natural, relation of father and child between the respondent and the decedent, and that, under subdivision 4 of section 1386, she, the widow, was entitled to the entire estate. This was the view taken by the court below.

[1] It may properly be observed, at the threshold of the inquiry, that the rights of the parties are not affected by the circumstance that the estate in dispute was derived entirely from the adopting parent. The source from which the property came may well influence one's notions of the natural equity of the appellant's claim. But our statute of succession in providing for the disposition of the separate property of one dying intestate makes no distinctions based upon the channel through which the property may have come to the decedent. "Succession to estates is purely a matter of statutory regulation which cannot be changed by the court." In re Ingram, 78 Cal. 586, 588, 21 Pac. 435 (12 Am. St. Rep. 80). See, also, McCaughey v. Lyall, 152 Cal. 615, 617, 93 Pac. 681.

[2] The case turns, then, upon the meaning and effect of the sections of the Civil Code relating to adoption. As the right of inheritance is purely a matter of statutory regulation, so is the subject of adoption and the rights and obligations springing therefrom. Ex parte Chambers, 80 Cal. 219, 22 Pac. 138; Ex parte Clark, 87 Cal. 641, 25

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Pac. 967; Estate of Johnson, 98 Cal. 536, 33 Pac. 460, 21 L. R. A. 380.

[3] The sections important to be considered here are 227, 228, and 229 of the Civil Code. Section 227 as it read at the time of the adoption in question provided for the making of an order by the judge (the word "court" has since been substituted for "judge"), declaring "that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting." Section 228 reads: "A child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation." Section 229 is as follows: "The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it." These sections do not in terms provide for the inheritance by the adopted child from the adopting parent, or vice versa. Whatever the rule may be with respect to the right of succession, it must apply to both parties alike. The language defining the relationship created by the adoption is applicable to both alike, and it is difficult, therefore, to see how any discrimination can be made between the party adopting and the child adopted. "After adoption," says section 228, "the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation." If, therefore, the act of adoption confers upon the child the right to succeed to the estate of the adopting parent in like manner as a child of the blood, it must follow that, upon the death of the child, the adopting parent is entitled to inherit as a parent. The decisions of this court establish beyond the possibility of dispute the proposition that the adopted child is entitled to so inherit. Estate of Newman, 75 Cal. 213, 16 Pac. 887; Estate of Evans, 106 Cal. 562, 39 Pac. 860; Estate of Williams, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163. In Estate of Newman, the court, referring to the provisions of sections 227 and 228, said: "The language is general and comprehensive. \* \* \* If the adopted child is by virtue of its status to be 'regarded and treated in all respects as the child of the person adopting' and is to 'have all the rights and be subject to all the duties of the legal relation of parent and child,' the right to succeed to the estate of the deceased parent must be included." There are other decisions which may be cited as exemplifying the disposition of the court to treat the act of adoption as creating a relation which produces as between the parties the legal results flowing from the natural relationship of parent and child. Thus in Es-

tate of Taylor, 131 Cal. 182, 63 Pac. 345, it was held that, on an application for the appointment of a guardian, the residence of the adopting parent was to be regarded as the residence of the child adopted. Adopted children of the daughter of a testator have been held to be included within the term "any lineal descendant" of the decedent, and thus exempted from the burden of a collateral inheritance tax. Estate of Winchester, 140 Cal. 468, 74 Pac. 10. An adopted child is a "child" within the meaning of section 1365 of the Code of Civil Procedure, and thus entitled to letters of administration of the estate of the adopting parent. Estate of Camp, 131 Cal. 470, 63 Pac. 736, 82 Am. St. Rep. 371; Estate of McKeag, 141 Cal. 404, 74 Pac. 1039, 99 Am. St. Rep. 80. In *Younger v. Younger*, 106 Cal. 377, 39 Pac. 779, a decree of divorce granted to the wife had given her the custody of a minor child. Thereafter the child was adopted by its grandparent. Thereby, as this court held, the court which had rendered the divorce decree was ousted of jurisdiction to modify the portion of the decree relating to the custody of the child. "By the adoption proceeding," it was said, "the status of the child was wholly changed. It became ipso facto the child of another, and ceased to sustain that relation, in a legal sense, to its natural parents."

These various rulings seem to establish the doctrine that the effect of an adoption under our Civil Code is to establish the legal relation of parent and child, with all the incidents and consequences of that relation, between the adopting parent and the adopted child. This necessarily implies that the natural relationship between the child and its parents by blood is superseded. The duties of a child cannot be owed to two fathers at the same time. If the decedent, Frederick Cox Jobson, had died intestate, leaving surviving both his natural father and his foster father, Frederick Cox, it cannot be doubted that the latter would have been entitled to inherit such portion of the decedent's estate as, under our statute of distribution, descended to the father. The appellant, E. C. Jobson, the natural father, would have been entitled to nothing, for the reason that he had, by virtue of the adoption proceeding, ceased to sustain the legal relation of father to the decedent. Is his situation altered by the fact that the foster father died before the adopted child? We do not see that it is.

There is nothing in the statute which limits the effect of the adoption to the period of the lives of the adopting parent and the adopted child. To sustain the appellant's contention, we should have to hold that, although the relation of parent and child existing between him and the decedent was supplanted by the new relation created by the adoption, it was again revived by the death of the foster parent. Such a holding



would be to make, rather than to construe, a statute. Once we have reached the conclusion that the effect of an adoption under the Code is to substitute the adopting parent for the parent by blood, we must give to that conclusion its logical results. From the time of the adoption, the adopting parent is, so far as concerns all legal rights and duties flowing from the relation of parent and child, the parent of the adopted child. From the same moment, the parent by blood ceases to be, in a legal sense, the parent. His place has been taken by the adopting parent.

It should perhaps be added that the case before us presents no question of the effect of adoption upon the rights of any persons except the natural parents, the child, and the adopting parent inter sese. There is no occasion to express any opinion and we express none, upon the existence of rights that might be claimed collaterally by either party to the adoption; that is to say, as against the natural kin of the other. It would no doubt be possible to suggest contingencies in which the views we have expressed would lead to embarrassing and difficult problems. But we think the same may be said of any other view that might be adopted.

We have not deemed it necessary to discuss at any length the decisions in other jurisdictions. The statutes of other states differ materially from ours, and the cases on the subject therefore afford no great aid to us. For example, in such cases as is *In re Namaun*, 3 Hawaii, 484, *White v. Dotter*, 73 Ark. 130, 83 S. W. 1052, *Hole v. Robbins*, 53 Wis. 514, 10 N. W. 617, *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802, and *Upson v. Noble*, 35 Ohio St. 655, in which it was held that the adopting parent could not inherit from the child, the statute or adoption agreement in each instance contained language which either expressly or by implication limited the right of inheritance to the child. On the other hand, in *Indiana*, where the statute more closely resembles the provision of our Civil Code, the court, after first denying the right of the adopting parent to inherit (*Barnhizel v. Ferrell*, 47 Ind. 335), has, upon a later review of the question, reached the contrary conclusion. *Humphries v. Davis*, 100 Ind. 275, 50 Am. Rep. 788. See, also, *Calhoun v. Bryant* (S. D.) 133 N. W. 266.

On the whole case, we are satisfied that the court below correctly ruled that the appellant was not entitled to share in the estate of the decedent.

The order appealed from is affirmed.

We concur: ANGELLOTTI, J.; HENSHAW, J.; MELVIN, J.

SHAW, J. I dissent.

In my opinion the true principles governing the construction and application of statutes providing for the adoption of children is that the natural relation, and the laws governing it, are thereby altered and affected

only so far as the statute of adoption by its terms declares or provides, either expressly or by necessary implication, and no farther. Like an invading force upon a hostile domain, it prevails and controls only so far as its lines extend. Beyond those limits all remains under the original control.

The *Newman Case*, 75 Cal. 213, 16 Pac. 887, declaring that an adopted child inherits from the adopting parent, the *Johnson Case*, 98 Cal. 536, 33 Pac. 460, 21 L. R. A. 380, holding that such child is entitled, as an heir, to administer on the adopting parent's estate, and the *Winchester Case*, 140 Cal. 468, 74 Pac. 10, that the child's share is exempt from inheritance to the same extent as that of a natural child, all depending on the same principle of heirship, go to the extreme verge of the invading force of the adoption statute. The reason for these decisions is plain, and is found in the statute itself. The descent is cast at the moment of death and the persons on whom the estate then falls are determined by their relation or kinship to the decedent the instant before his death. The adoption makes the one legally a child and the other legally a parent at the time of death. This establishes the status of legal kinship at that time and the results stated by these decisions necessarily follow. These cases, however, do not carry the effects of the adoption to a period after the death of the parent.

The whole purpose and object of the adoption statute is to create, artificially, the relation of parent and child, to provide a status controlling them for their joint lives. That relation cannot last longer than the lives of the two parties to it. When either dies, the relation ceases, and there remains nothing upon which the statute under which it was created can operate. The relation has served its purpose and has terminated. It has not, as has the natural relation, blood connections through which it may continue to work after it has itself ceased to have a present existence. There is not in the adoption statute a word to the effect that, where the adoption has served its purpose by prevailing over the natural relation during the joint lives of the two parties and has ended by the death of one of them, it shall thereafter continue for any purpose, or that there is to be thereafter any legal or constructive kinship, or mutual rights of inheritance, between the adopted child and the natural kin of the deceased foster parent, or between the foster parent and the natural kin of the deceased child. So far as the statute goes, and while the new statute lasts, the natural relations are altered, removed, or suspended. But they are not utterly destroyed. The natural inclinations and affections must remain. The statute cannot destroy them. Beyond the limits of the changes effected by the adoption, and after it has terminated, the natural relations should prevail and control, since there are then, in that field, none other.

The result should be and would be that, after this termination of the mutual relation, the inheritance from the survivor, upon his subsequent death, will be controlled by the general law of descent and the natural relationship will prevail. There will be then no artificial relation existing to cause a different course of descent from that to the natural kin.

So far as unjust or inequitable consequences may properly affect the question, it seems to me that the doctrine of the prevailing opinion, including, as it does, the doctrine that the adoption completely and forever removes the adopted child from legal relationship to his blood kin and destroys the mutual relations and rights of each arising therefrom, practically transplanting him into another family, without his consent or wish, unless he happens to be over 12 years old, will cause many more undesirable consequences than the doctrine that the adoption does not affect conditions arising after death has terminated it. If the child is an infant when adopted and the foster parent should presently die, the natural parents would have no legal right to its custody. It would be a waif, a legal orphan. If it should, in after life, accumulate property, and thereupon die without issue or wife surviving, the property would not go to its own kin, but to the family of the long since deceased foster parent. The children of such child would bear no legal relationship to their blood kin, but would belong to the family of the foster parent, and would, presumably, inherit from the collateral relatives of that family. The consequences cannot all be foreseen, but these I have mentioned suggest that much confusion and injustice will arise from the rule announced by the court.

LORIGAN, J. I concur in the views expressed by Justice SHAW in the foregoing dissenting opinion.

164 Cal. 321

SCOTT v. BOYLE, City and County Auditor.  
(S. F. 6,210.)

(Supreme Court of California. Dec. 10, 1912.)

**1. MANDAMUS (§ 102\*)—ACTS OF PUBLIC OFFICERS—ISSUE OF WARRANT FOR CLAIMS.**

Mandamus is the appropriate remedy to compel an auditing officer to issue a warrant for the compensation of employes of a municipal corporation or state, where the act of auditing is merely ministerial in character.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 217-219, 221, 222; Dec. Dig. § 102.\*]

**2. COURTS (§ 207\*)—PROCEEDINGS—JURISDICTION OF SUPREME COURT.**

The Supreme Court has original jurisdiction in mandamus proceedings, which is not divested because the same questions are involved in an appeal.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 207.\*]

**3. WEIGHTS AND MEASURES (§ 2\*)—SEALERS—CONSTITUTIONAL INHIBITION.**

Act March 18, 1911 (St. 1911, p. 384), adopting a standard of weights and measures, and in sections 4 and 5 providing that the respective counties and municipalities of the state may appoint sealers of weights and measures, is not invalid under Const. art. 11, § 14, providing that no state office shall be continued or created in any county or municipality for the inspection of any merchandise; the statute in question being merely a general law authorizing the appointment by municipalities of such sealers.

[Ed. Note.—For other cases, see Weights and Measures, Cent. Dig. § 2; Dec. Dig. § 2.\*]

**4. WEIGHTS AND MEASURES (§ 2\*)—STATUTES—POLICE POWER.**

Act March 18, 1911 (St. 1911, p. 384), authorizing counties and municipalities to appoint sealers of weights and measures under an adopted standard, is valid under Const. art. 11, § 11, providing that any county or municipality may make and enforce all such local, police, sanitary, and other regulations which are not in conflict with general laws.

[Ed. Note.—For other cases, see Weights and Measures, Cent. Dig. § 2; Dec. Dig. § 2.\*]

**5. WEIGHTS AND MEASURES (§ 2\*)—OFFICIAL SEALERS—CONSTITUTIONAL PROVISIONS.**

Const. art. 11, § 14, adopted on October 10, 1911, providing that the Legislature may by general and uniform laws provide for the inspection, measurement, and graduation of merchandise and manufactured articles, did not repeal Act March 18, 1911 (St. 1911, p. 384), authorizing counties and municipalities to appoint sealers of weights and measures, for the amendment did not in terms repeal section 11 of article 11, which extends the police power to municipalities; its only effect being to remove the inhibition of the general power of the Legislature given by article 4, § 1.

[Ed. Note.—For other cases, see Weights and Measures, Cent. Dig. § 2; Dec. Dig. § 2.\*]

**6. CONSTITUTIONAL LAW (§ 63\*)—DELEGATION OF POWER OF LEGISLATURE.**

While Const. art. 11, § 5, providing that the Legislature shall regulate the compensation of all officers in proportion to duties, applies to ordinary county officers and inhibits the delegation of such legislative power to municipalities, it does not apply to those officers whom the county or municipality is authorized to appoint under its police powers, and whom the Legislature was originally inhibited from providing for, and hence, though sealers of weights and measures be county officials, Act March 18, 1911 (St. 1911, p. 384), is not invalid, though authorizing counties and municipalities to fix the wages of such officials.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 108-114; Dec. Dig. § 63.\*]

**7. STATUTES (§§ 72, 101\*)—VALIDITY—SPECIAL LEGISLATION.**

Act March 18, 1911 (St. 1911, p. 384), which authorizes all counties and municipalities to appoint sealers of weights and measures, is uniform in its operation as to all such bodies, and hence is not a special law within the inhibition of Const. art. 1, § 11, or article 4, § 25, subds. 9, 28, 29.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 72, 113; Dec. Dig. §§ 72, 101.\*]

**8. MUNICIPAL CORPORATIONS (§ 131\*)—ORDINANCES—DELEGATION OF LEGISLATIVE POWER—WHAT CONSTITUTES.**

San Francisco Ordinance August 29, 1911, which adopted the provisions of Act March 18, 1911 (St. 1911, p. 384), authorizing municipal corporations to appoint city sealers, is not in-



valid because vesting in the mayor the appointment of a sealer; such appointment being in its nature an executive act, and not a delegation of the legislative power of the board of supervisors.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 305, 378; Dec. Dig. § 131.\*]

In Bank. Original proceeding in mandamus by M. P. Scott against Thomas F. Boyle, as auditor of the city and county of San Francisco. Writ issued.

John L. McNab, of San Francisco, for petitioner. Edward F. Moran, of San Francisco, for respondent.

SHAW, J. This is an original proceeding in mandamus in this court to compel the defendant, as auditor, to draw a warrant in favor of the plaintiff for the amount due him on his salary as deputy sealer of weights and measures of the city and county of San Francisco. The auditor claims that no such office exists, and that the plaintiff's appointment thereto is void.

[1] Mandamus is an appropriate remedy to compel an auditing officer to issue a warrant for the compensation of the employes or officers of a city, county, or state, where the amount thereof is so fixed by law, ordinance, or otherwise that the act of auditing the same and drawing a warrant accordingly is merely ministerial in character. *Fowler v. Peirce*, 2 Cal. 167; *People v. Whitman*, 6 Cal. 659; *People ex rel. McCauley v. Brooks*, 16 Cal. 46, 63; *Carroll v. Siebenthaler*, 37 Cal. 195; *Lawrence v. Booth*, 46 Cal. 189; *Kelso v. Teale*, 106 Cal. 477, 39 Pac. 948; *Bannerman v. Boyle*, 160 Cal. 203, 116 Pac. 732.

[2] This court has original jurisdiction of such cases. The fact that the same questions are involved in an appeal which has been taken in this court has no bearing upon the question of jurisdiction.

[3,4] The office in question appears to have been created by and under the act of March 18, 1911. Stats. 1911, p. 384. This act adopts the United States' standards of weights and measures as the standards of this state, and provides that duplicates thereof shall be kept in the office of the Secretary of State. Section 4 authorizes the respective counties and municipalities of the state to appoint sealers of weights and measures. Section 5 declares that the jurisdiction of such sealers shall extend over the limits of the particular county, except the part within the municipalities that have appointed or may appoint sealers under the act, and that the jurisdiction of such municipal sealers shall extend throughout such city, or city and county, and that the particular city or county shall also have power to provide deputies for such sealer and fix the compensation of the sealer and his deputies. The sealers are required to keep duplicates of the standard weights and measures, and to see

that all weights and measures used by dealers or kept for sale within such territory accurately corresponds with such standards. Every sealer shall twice each year inspect and test the weights and measures kept or used within his jurisdiction. Penalties are provided for the use or sale of false or inaccurate weights, or measures. On August 29, 1911, the city and county of San Francisco duly adopted an ordinance under this act providing that the mayor should appoint a sealer of weights and measures and that such sealer might appoint, with the approval of the board of supervisors, a chief deputy, and such additional deputies as should be required to properly perform the duties of the office, such additional deputies each to receive an annual salary of \$1,500 in monthly installments. A sealer was duly appointed, and on November 22, 1911, he, with the approval of the supervisors, appointed the plaintiff herein a deputy sealer. He immediately entered upon and has ever since continued the discharge of the duties of said office. The claim is that this statute and the ordinance of the city in pursuance thereof are in conflict with the Constitution.

At the time said act was passed, the Constitution provided that "no state office shall be continued or created in any county, city, town, or other municipality, for the inspection, measurement, or graduation of any merchandise, manufacture, or commodity; but such county, city, town, or municipality may, when authorized by general law, appoint such officers." Article 11, § 14. Conceding that this language applies to such an office as a sealer of weights and measures having the duties provided by this act, the statute seems to be clearly within the power to authorize by general law the appointment of such officers, which this section expressly confers. We think the language of section 14 embraces the subject-matter of the act, but, if it did not, the ordinance would be clearly valid as an exercise of the police power conferred on municipalities and counties by section 11 of said article: "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

[5] The principal contention of the defendant is, however, that, although the statute and the ordinance may have been valid at the time each respectively was adopted, they were both repealed, or ceased to exist as valid provisions of law (article 22, § 1), upon the adoption on October 10, 1911, of an amended section 14 of article 11 of the Constitution. This is as follows: "The Legislature may by general and uniform laws provide for the inspection, measurement and graduation of merchandise and manufactured articles and commodities, and may provide for the appointment of such officers as may be necessary for such inspection, measure-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ment and graduation." We perceive nothing in this section that is inconsistent with the aforesaid statute, nor anything that evinces an intention to repeal or extinguish it. It does, indeed, remove the previous prohibition taking from the Legislature the power, which it would otherwise have had under section 1 of article 4, to establish state offices for such purposes. It also omits the special authorization to counties and municipalities to do so when authorized by general laws. But counties and municipalities undoubtedly would have and still have this power, under section 11 aforesaid, in the absence of a general law inconsistent with its exercise by them. The amended section 14 does not purport to repeal section 11, and it is not inconsistent therewith. Neither does it prescribe any special method for the exercise by the Legislature of the power expressly mentioned, the power to "provide for the appointment of such officers as may be necessary for such inspection, measurement and graduation." The former prohibition against the creation of state officers for that purpose being removed by the amendment, the Legislature may now, under the general power granted by section 1 of article 4, and also under the power specially described in said amended section 14, provide either a state system for such purpose, administered by state officers, or a local system administered by the respective counties, cities, or cities and counties, through officers which they may appoint under the authority of the general statute. The statute, therefore, remains in force as fully as if the amendment had not been made. There is no statute providing such state system, and we are therefore not called upon to determine what effect such a statute might have upon a previously established local system. We need only say that until there is a state system in force, or until the repeal of the act of 1911, the provisions of the latter prevail and the officers appointed under it are de jure officers.

[6] It is further suggested that they are county officers, that section 5, art. 11, provides that the Legislature shall regulate the compensation of all such officers in proportion to duties, and consequently that it cannot delegate to the board of supervisors of a county or city and county the duty of fixing the salaries of such officers, instead of doing so itself. It is true that the general principle is that, when the people by their Constitution impose an express duty of this kind on the Legislature, that body cannot in general delegate such duty to any subordinate body. *Dougherty v. Austin*, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161. That case decided that said section 5 confided to the Legislature itself the duty to regulate and fix the compensation of county officers, and that it could not delegate this duty, or any part of it, to a county board of supervisors. We are of the opinion that the

provision of that section requiring the Legislature to regulate the compensation of the officers referred to therein does not apply to offices created by the Legislature, under said section 14, to exercise a part of the police powers of the state which the provisions of the latter section, both in its original form and as amended, recognize as something distinct from the general political functions of counties and cities and the general scheme of county or municipal government.

[7] The act applies throughout the state to all the counties, cities, and municipalities thereof. It is therefore uniform in its operation. The fact that it does not make it compulsory upon the respective counties and municipalities to appoint such sealers does not render it lacking in the uniformity necessary to a compliance with section 11 of article 1 of the Constitution, nor make it a special law within the meaning of subdivisions 9, 28 and 29 of section 25, article 4.

[8] We see no force in the point that the ordinance is void because it vests in the mayor the power of appointing the sealer. Such appointment is in its nature an executive act. Conferring it upon the mayor is not a delegation to him of the legislative power of the board of supervisors. The act provides that the sealer may be appointed by the city and county. An appropriate method of accomplishing this is that here followed, namely, by an ordinance authorizing the mayor to do so. He is the executive officer of the city and county.

Let the writ issue as prayed for.

We concur: ANGELLOTTI, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.; SLOSS, J.

(164 Cal. 343)

#### WORK v. CAMPBELL. (Sac. 1,938.)

(Supreme Court of California. Dec. 13, 1912.  
Rehearing Denied Jan. 10, 1913.)

#### 1. HUSBAND AND WIFE (§ 325\*)—ACTION FOR ABDUCTION OR ENTICEMENT.

Under Civ. Code, § 49, subds. 1, 2, providing that the rights of personal relation forbid the abduction of a husband from his wife, or the abduction or enticement of a wife from her husband, a wife may sue for damages for the abduction or enticement from her of her husband.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1119; Dec. Dig. § 325.\*]

#### 2. HUSBAND AND WIFE (§ 330\*)—ACTION FOR ABDUCTION OR ENTICEMENT—PARTIES.

In an action by a wife for the abduction or enticement from her of her husband, the husband is not a necessary party.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1122; Dec. Dig. § 330.\*]

#### 3. HUSBAND AND WIFE (§ 209\*)—ACTION BY WIFE—INTERFERENCE WITH MARITAL RELATION—LIABILITY—"DECEIT."

A complaint in an action by a wife for damages for the separation of herself from her husband, which alleges that the separation was caused by her harsh and cruel treatment of him, that her attitude and conduct toward him

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



were induced by false statements knowingly made to her by defendant concerning her husband, with the intent to cause a separation between the wife and her husband, and that, when she discovered the falsity of the representations and the intent of defendant, she sought for her husband, but was unable to ascertain his whereabouts, though stating no cause of action for the abduction or enticement of the husband from the wife, states a cause of action for deceit within Civ. Code, §§ 1708, 1709, providing that every one must abstain from infringing on any of the right of another, and that one who willfully deceives another with intent to induce him to alter his position to his injury is liable for the resulting damages, and within the general rule that an action for deceit lies where a party has made a false representation of a material fact susceptible of knowledge, knowing it to be false, or not having sufficient knowledge to warrant the representation, with intent to induce the person to whom it is made to rely on it, and to do or refrain from doing something to his pecuniary injury, when such person, acting with reasonable prudence, is thereby deceived and injured, and the mere fact that the conduct of the wife was the direct cause of the separation did not relieve defendant from liability.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 766-773; Dec. Dig. § 209.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1894-1896; vol. 8, p. 7629.]

#### 4. HUSBAND AND WIFE (§ 209\*)—INTERFERENCE WITH RELATION—FRAUD—LIABILITY.

A wife induced by the false representations of a third person in whom she has confidence to treat her husband harshly and cruelly, so as to cause him to leave her, may recover from the third person the damages caused thereby, where her conduct would have been justified if the representations had been true.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 766-773; Dec. Dig. § 209.\*]

#### 5. HUSBAND AND WIFE (§ 221\*)—INTERFERENCE WITH RELATION—ACTIONS—PARTIES.

Under Code Civ. Proc. § 370, providing that, when a married woman is a party, her husband must be joined with her, except when she is living separate and apart from him by reason of his desertion of her, or by agreement, a wife not living separate and apart from her husband may not sue for damages for deceit without making her husband a party.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 707, 802-806, 968, 973, 976½; Dec. Dig. § 221.\*]

#### 6. PARTIES (§ 80\*)—NONJOINER—OBJECTIONS—WAIVER.

Under Code Civ. Proc. § 430, subd. 4, and sections 433, 434, authorizing a demurrer for defect of parties appearing on the face of the complaint, and, if the objection is not so taken, it is waived, an objection for nonjoinder of the husband in an action by a wife must be raised by demurrer, where the complaint shows on its face that plaintiff is a married woman, and that she and her husband are not living separate and apart by reason of his desertion of her, or it is waived.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 123-131; Dec. Dig. § 80.\*]

Department 1. Appeal from Superior Court, Kings County; John G. Covert, Judge.

Action by Beulah Work against J. D. Campbell. From a judgment of dismissal, plaintiff appeals. Reversed and remanded.

Dixon L. Phillips and Robt. W. Miller, both of Hanford, for appellant. J. C. C. Russell, of Hanford, for respondent.

ANGELLOTTI, J. Defendant's demurrer to plaintiff's amended complaint having been sustained, and plaintiff having declined to amend, a judgment of dismissal was given. This is an appeal by plaintiff from such judgment.

The action is one to recover of defendant \$15,000 damages alleged to have been caused plaintiff by reason of the fact that she has become finally separated from her husband, L. B. Work, and has thereby suffered and will continue to suffer great distress of mind and mental anguish, and has lost and will continue to lose forever his society, comfort, love, and affection, as well as the support and maintenance which he would give her. On or about February 15, 1910, the husband "separated from plaintiff, and from their said children, and departed from the said county of Kings, and has gone to parts unknown to plaintiff with intent to desert and abandon plaintiff." It is not alleged that defendant, who is the husband of an aunt of plaintiff, ever said or did anything to influence the husband to leave plaintiff, or to cause any change of feeling on his part toward her. It is frankly alleged that his departure was caused solely by the fact that she became very angry with him, refused to see him, refused to speak or talk with him, sent him a letter in which she told him that she would hold no further communication with him, but would sue him for a divorce, and that she hoped she might never see or speak to him again. Her complaint characterizes her conduct toward her husband, alleged to be the sole inducement for his departure, as "harsh and cruel treatment" of him. The claim of any liability on the part of defendant to her on account of the separation is based on allegations to the effect that her attitude and conduct toward her husband, which caused the separation, were wholly induced by certain false statements knowingly made to her by defendant concerning her husband, which, owing to her confidence and trust in defendant, she fully believed and relied upon, and certain advice and counsel given to her by defendant in the matter, all of which statements and advice were willfully made and given by defendant with the intent and design on his part to cause a separation between plaintiff and her husband. The complaint alleges in detail the alleged statements and advice of defendant in this behalf, and also the object sought to be obtained by him in causing a separation of the husband and wife, but no useful purpose can be subserved by stating these things here. It further alleges that, when she discovered the falsity of the representations and the intent and purpose of defendant in making them, she at once instituted diligent search for her husband, but has been unable to ascertain his whereabouts. It is further alleged "that, by reason of the

premises hereinabove stated, defendant has unlawfully, fraudulently and wrongfully abducted and enticed from the plaintiff her said husband, and that, by reason of the said abduction, this plaintiff has suffered," etc., to her great damage in the sum of \$15,000.

[1, 2] Under our statutes, a wife may maintain an action for damages suffered by her by reason of the abduction or enticement from her of her husband, as may a husband for the damages suffered by him for the abduction or enticement from him of his wife, and in such an action by the wife her husband is not a necessary party plaintiff. See Civ. Code, § 49, subs. 1, 2; *Humphrey v. Pope*, 122 Cal. 253, 54 Pac. 847.

[3] It may be assumed, purely for the purposes of this decision, that no cause of action for the abduction or enticement of her husband from her is stated by the wife in her complaint. The direct cause of her husband's departure was, of course, her own conduct toward him, and such departure was in no degree brought about by any statement or act of the defendant, except in so far as his statements and advice to the plaintiff influenced her conduct toward her husband, which was the sole direct cause of his leaving, and of any change in his feelings toward her. It may well be argued that the facts alleged indicate rather an abduction or enticement of the wife from her husband by defendant, for which the husband would have the right to maintain an action for damages against him, than an abduction or enticement from the wife of her husband by defendant. Of course, it may be claimed, with some show of reason, that by means of the fraud practiced upon her the wife was a mere instrument in the hands of defendant by means of which he willfully accomplished the taking away or enticement of her husband from her, and that he is therefore responsible to her in damages as for an abduction or enticement of the husband. But it is uncertain whether in any such case where the plaintiff's own conduct in the matter, however produced, is the sole operative cause of the separation, it can fairly be held that he or she may maintain an action based on the theory that another has accomplished the abduction or enticement away of the other spouse, and we prefer to leave the question undecided here, as its determination is not, as we view the case, essential.

We can see no reason why, regardless of the question we have just referred to, the matters alleged in the complaint do not show a cause of action in behalf of plaintiff against defendant. According to the complaint, the sole cause of the conduct of plaintiff causing the separation of the husband and wife, with the same injurious consequences to her that would have followed the abduction or enticement of her husband from her, was the action of defendant in making to her the willfully false representations concern-

ing her husband, for the very purpose and with the design on his part to so influence her as to bring about such a separation. His deception in the matter was the sole cause of such conduct on her part, and such conduct on her part was tantamount to a refusal by her to continue the relation between her husband and herself of husband and wife. It is declared in section 1708 of the Civil Code that "every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights," and in section 1709 "one who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." These are but statements of the well-settled law independent of statute. It is substantially said in 20 Cyc. at page 10, and the statement is well supported by the authorities, that as a general rule, an action for damages for deceit will lie wherever a party has made a false representation of a material fact susceptible of knowledge, knowing it to be false or not having sufficient knowledge on the subject to warrant the representation, with the intent to induce the person to whom it is made, in reliance upon it, to do or refrain from doing something to his pecuniary hurt, when such person, acting with reasonable prudence, is thereby deceived and induced to so do or refrain, to his damage. No reason is apparent to us why the alleged facts set forth in the complaint should not be held to bring the case within the operation of this rule. It is no answer to such an action that the action or conduct of the plaintiff is the direct cause of the result occasioning damages. Such is the situation wherever such an action is allowed. The whole basis of the action is that such act or conduct is fraudulently induced by the defendant. A. is willfully deceived by B. into selling goods to C. upon credit, by false representations as to C.'s solvency willfully and knowingly made by B. to A. for the very purpose of inducing him to so do, and thereby suffers pecuniary injury. The direct and immediate cause of the injury is, of course, the sale by A. to C. on credit. But B. is held liable to A. for the damage thereby suffered because by fraud he induced A. to make such sale on credit.

[4] It may be urged that a person fraudulently misled cannot found his claim on conduct violative of sound morals or public policy, or of a criminal statute. Here the conduct and attitude of the wife causing the separation was her harsh and cruel conduct toward her husband, her refusal to live with him or to see him, her refusal to further continue the relationship of husband and wife, etc. Of course, all her conduct would have been fully justified if the representations made to her by defendant had been true in point of fact, as the complaint sufficiently alleges that plaintiff believed to be the situation. It



has been held that, where the fraudulent representation is intended to create and actually does create in the mind of the party a belief that under the circumstances represented the act which he is induced to do is neither illegal nor immoral, he may recover the damages he has sustained, even though a statute makes the act a criminal offense. See 20 Cyc. 80; *Burrows v. Rhodes*, 1 Q. B. 816 (1899); *Prescott v. Norris*, 32 N. H. 101; *Morrill v. Palmer*, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411. We are not called upon to go as far as this in this case. The complaint indicates no criminal offense on plaintiff's part. Certainly, however, under the circumstances stated, it cannot fairly be said that plaintiff did not believe her conduct toward her husband to be in full accord with good morals and public policy, or was not justified in so believing. It is not claimed that the complaint does not sufficiently show that plaintiff acted with reasonable prudence in accepting as true and relying on defendant's statements. In view of the circumstances alleged as to her relationship to defendant, and her confidence and trust in him, we think the complaint is not fatally defective in this regard, although it must be conceded to be somewhat remarkable that a wife having any affection for or confidence in her husband should be willing to accept as true such statements as are here alleged to have been made to her, without making some further inquiry.

We have not found any case in which the remedy of action for damages for deceit has been invoked under such circumstances as appear here. The fact that the case presented is unique in its circumstances is not, however, any warrant for a refusal to apply a rule that appears on principle to be applicable. We think the facts confessed by the demurrer show a liability on the part of defendant to plaintiff for any damage caused her by the loss of her husband. We are unable to see any force in any other objection made by the demurrer.

[5] It is earnestly urged that the husband is a necessary party plaintiff, and that the ruling of the trial court should be sustained on this ground. Treating the action as purely one for damages for deceit, it may be conceded that defendant had the right to insist that the husband was a necessary party. Under our law in this state, any damages recovered herein, as in actions for damages for personal injury to the wife or one for malicious prosecution of the wife, would be community property, and while, under the decisions, the wife is a necessary party plaintiff in an action for damages for such injuries to her, unless she is living separate and apart from her husband by reason of his desertion of her, or by agreement, in writing, she cannot properly sue for such damages without making her husband a party plaintiff. Code Civ. Proc. § 370; *McFadden v. Santa Ana, etc.*, Ry. Co., 87 Cal. 464, 25

Pac. 681, 11 L. R. A. 252; *Tell v. Gibson*, 66 Cal. 247, 5 Pac. 223; *McKune v. Santa Clara, etc., Co.*, 110 Cal. 480, 487, 42 Pac. 980; *Williams v. Casebeer*, 126 Cal. 77, 58 Pac. 380; *Paine v. San Bernardino, etc., Co.*, 143 Cal. 654, 658, 77 Pac. 659.

[6] The complaint here shows upon its face that the plaintiff is a married woman, and it may be conceded that it also shows that she and her husband are not living separate and apart by reason of his desertion of her. But our Code of Civil Procedure expressly provides among the several grounds of demurrer the ground that there is a defect of parties plaintiff or defendant. Section 430, subd. 4, Code Civ. Proc. No such ground is specified in the demurrer in this case. An objection for nonjoinder of the husband in such an action must be specially urged by demurrer if the matter appears on the face of the complaint, and by answer, if it does not so appear (sections 433 and 434, Code Civ. Proc.), and if not taken either by demurrer or answer, it must be deemed to have been waived. Section 434, Code Civ. Proc. It is not a matter going to the statement of a sufficient cause of action or to the jurisdiction of the court. This was substantially held in *Baldwin v. Second Street, etc., Co.*, 77 Cal. 390, 19 Pac. 644. In *Lamb v. Harbaugh*, 105 Cal. 680, 690, 39 Pac. 56, the objection was made by way of abatement, in the answer, the facts warranting it not appearing on the face of the complaint.

The judgment is reversed and the cause remanded, with directions to the lower court to overrule the demurrer to plaintiff's amended complaint, with leave to defendant to answer.

We concur: SHAW, J.; SLOSS, J.

(20 Cal. App. 299)

MOORE et al. v. SUPERIOR COURT IN  
AND FOR MADERA COUNTY et al.  
(Civ. 1,032.)

(District Court of Appeal, Third District, California. Nov. 4, 1912. Rehearing Denied by Supreme Court Jan. 3, 1913.)

1. ELECTIONS (§ 275\*)—CONTESTS—CONTINUANCE OF TRIAL—STATUTES.

Code Civ. Proc. § 1121, providing that the court may continue the trial of an election contest, before its commencement, "for any time not exceeding 20 days," is not mandatory and exclusive; so that jurisdiction is not lost by a continuance for a longer period.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. §§ 250-256; Dec. Dig. § 275.\*]

2. MANDAMUS (§ 14\*)—TO OFFICER—REQUEST.

Mandamus will lie to the court to reset a case, though it was not asked to do so; it having, by refusing to proceed with the case, on the erroneous idea that it had lost jurisdiction, shown that such an application would be idle.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 44-46; Dec. Dig. § 14.\*]

Application by W. A. Moore and others for mandamus to the Superior Court in and for

the County of Madera, and Hon. W. M. Conley, Judge. Writ granted.

Drew & Drew, of Fresno, for petitioners. Raleigh E. Rhodes, of Madera, for respondents.

CHIPMAN, P. J. [1] The petition with its exhibits is a voluminous document. The essential facts therein appearing are as follows: That petitioners are electors of Madera county. On July 3, 1912, they duly filed their statement contesting the vote in precinct 2 of said county at a certain election on June 8, 1912, under the act of the Legislature, to provide for the regulation of the traffic in alcoholic liquors, approved April 4, 1911. Pursuant to the provisions of section 1118a of the Code of Civil Procedure, to wit, on July 8, 1912, the said court duly made its order for a special session of said court to be held on July 23, 1912, to hear said contest, and directed citations to issue to defendants to appear on said day and answer said contest. On said day counsel for all the parties appeared, Hon. R. H. Latimer, under assignment by the Governor, sitting as judge of said court. One of the contestants objected to the case being heard by said judge because he came from a so-called "wet county," who, without affidavits of prejudice being filed or other showing made, retired from the bench, disclaiming that he knew anything about the case or had any prejudice in favor of or against any of the parties. Respondent Judge Conley, the presiding judge of that court, resumed the bench. Counsel for petitioners expressed a willingness to have Judge Conley try the case, but he deemed himself disqualified and stated that the only course open was "to order a continuance until such time as another judge may be procured to try the case." Counsel for contestees objected to a continuance for the reason that it "would be a waiver of jurisdiction. The Court: Will you stipulate (addressing all the counsel) that any judge in Los Angeles county can try the case? I don't know who the judge will be. Mr. Drew (counsel for petitioners): I am willing to put it on that broad ground. Mr. Rhodes (counsel for respondents): Yes, and reserving all our rights in the matter. The Court: Now when do you want to try this case? How would the 11th day of September suit? Mr. Drew: Yes. Mr. Rhodes: All right. The Court: Then, Mr. Clerk, the order will be that this extra session of court will be continued until September 11, 1912, at 10 o'clock a. m." Thereafter, on July 27, 1912, Judge Conley made an order, contestants not being present, designating Hon. Charles Monroe, judge of the superior court of Los Angeles county, to preside at said trial, "to be held on September 11, 1912, at the hour of 10 o'clock a. m. Mr. Rhodes: Defendants and contestees accept (except) to the ruling of the court on the ground that the court is deprived of its juris-

diction." Immediately thereafter Judge Conley went to the county of Los Angeles and did not return to Madera county until August 10, 1912, and on that day counsel for petitioners appeared in said court, Judge Conley presiding, and moved the court to vacate the minute orders of July 23d and July 27th, aforesaid, "and reset said contest for hearing within 20 days of July 23, 1912, as provided in section 1118a et seq. of the Code of Civil Procedure." This motion was made 18 days after the order of July 23d and 2 days within the statutory period of 20 days. As to what occurred at the hearing of this motion counsel for petitioners and respondent, the judge, do not agree. We quote from the return: "In this behalf respondent avers that, upon the making of said motion, he did, then and there, as the judge of said court, inform moving counsel that said motion to vacate and set aside said minute orders, respectively, would be granted, and, further, that if said orders, respectively, were vacated and set aside, the court would be without power to reset the said contest for hearing; respondent admits that, at said time and place, he stated that he would not reset the said contest for hearing for the reason that in his opinion he had lost jurisdiction of the said contest, and that on said date, to wit, the said 10th day of August, 1912, he did not have, as the judge of said court, the power or authority to reset said contest for hearing, or to set the hearing thereof within 20 days from July 23, 1912, the time on which the said contest was originally set for hearing, and the special session of said superior court called therefor." It further appeared by the return that petitioners asked leave to withdraw said motion to vacate and were informed that leave to withdraw would be granted, but the respondent suggested, for reasons given, that counsel for petitioners "take a ruling on said motion in his favor, vacating said minute orders and the refusal of respondent, as judge of said court, to reset said cause, and apply for a writ of mandate to the appellate court, and that he (respondent) would unite therein, so that said question of jurisdiction could be determined"; that this suggestion was not acceptable to counsel for petitioners, who insisted upon his request to withdraw and dismiss said motion, "whereupon the said request was granted, and said motion to vacate was withdrawn and dismissed, and said proceeding was permitted to remain set for trial for September 11, 1912, at a special session of said court which had theretofore been called." On September 11th the cause came on for trial, and all the parties appeared by counsel, Hon. Charles Monroe, Judge, presiding. Counsel for contestees moved the court to dismiss the action "on the ground that the court has lost jurisdiction to proceed" and "for the reason that the case originally came up on the 23d of



July and was continued upon the motion of contestants, over the objection of the contestees, for a period longer than provided by statute."

Some testimony was taken as to what occurred at the session of the court when the cause was continued to September 11th, but it seems to us immaterial. The motion of counsel for contestees to dismiss the action was denied, and "it is further ordered by the court that defendant's motion, objecting to the court hearing the cause on the ground that the court has no jurisdiction, be and the same is hereby granted." Both Judge Monroe and Judge Conley seem to have been of the opinion that section 1121 of the Code of Civil Procedure is mandatory, and that, as the cause was continued to a date beyond 20 days, jurisdiction was lost, and the court was powerless to hear and determine the contest. This section is as follows: "The court must meet at the time, and place designated, to determine such contested election, and shall have all the powers necessary to the determination thereof. It may adjourn from day to day until such trial is ended, and may also continue the trial, before its commencement, for any time not exceeding twenty days, for good cause shown by either party upon affidavit, at the costs of the party applying for such continuance."

In *Falltrick v. Sullivan*, 119 Cal. 613, 51 Pac. 947, it was held that the court had the power on its own motion to continue the hearing from July 8th to July 14th. Said the court: "The statute contemplates a prompt and speedy determination of election contests; but it cannot be presumed that the Legislature intended that under no circumstances, however essential to the administration of justice, and especially in a matter in which the public as well as the parties have an interest, could an adjournment be made otherwise than from day to day. Contingencies might be readily imagined where, without the fault of the court or of either party, an interruption of several days would be unavoidable."

Referring to the various sections of the Code of Civil Procedure, the Supreme Court, in *O'Dowd v. Superior Court*, 158 Cal. 537, 111 Pac. 751, said: "As the obvious purpose of the statute is to have these contests determined on their merits, no construction should be given to any of its provisions which will defeat that end, unless their language imperatively commands it." It was therefore held that section 1119, which provides that the clerk *shall* issue a citation which "*must* be delivered to the sheriff and served either upon the party in person," etc., was directory, and the court had the power to adjourn the hearing and order another citation to issue; the clerk having failed to

issue a citation in the first instance as required by the statute. In the case of *Busick v. Superior Court*, 16 Cal. App. 499, 118 Pac. 481, the construction to be given section 1121 was directly involved. A petition to have the cause heard in the Supreme Court was denied. Referring to the decision of the Supreme Court in the *O'Dowd* Case, supra, the court said: "We think the same liberal spirit of interpretation which led the Supreme Court to hold that the power in reference to the citation is directory merely should be applied to the section before us (1121) and should lead to a like conclusion. Indeed, we have authority for the position that this section is not mandatory and exclusive, as contended by petitioner"—citing cases.

It is apparent that both Judge Conley and Judge Monroe were of the opinion, and so ruled, that the adjournment of the hearing from July 23d to September 11th was unauthorized and in violation of section 1121, and that jurisdiction to make any order in the case was thereby lost. The effect of this view of the law was to deprive the contestants of a hearing on the merits.

We do not think that the jurisdiction, having been duly acquired, was, by any of the subsequent proceedings, lost, or that the court is now without jurisdiction, under section 1121, to reset the cause for trial. The court, on September 11, 1912, refused to dismiss the action, and it is therefore still pending. The court having also at that time sustained contestees' motion objecting to the court's hearing the cause for want of jurisdiction, we think a writ should now issue directing said court to reset said contest of said contestants for hearing and to call a special session of said court within 20 days from the date so ordered for said hearing and to proceed to hear and determine said contest.

[2] It is now urged that because no subsequent application was made to reset the case, and no refusal is shown, mandamus will not lie. Undoubtedly the rule is that an officer will not be compelled by the writ to do anything which he has not been first asked to do and has neglected or refused. But where the attitude of the officer towards the matter has been officially declared to be such that an application to him would be idle and fruitless, the reason for the rule ceases. The court, as we have seen, refused, for want of jurisdiction, to proceed with the hearing at a time at which the case had been set for hearing. A motion to reset the case after such action would have been to trifle with the court and, if amicably tolerated, would most certainly have been denied. The point now made is, we think, without merit.

Let the writ issue as prayed for.

We concur: HART, J.; BURNETT, J.

(20 Cal. App. 269)

**ARFSTEN v. SUPERIOR COURT IN AND FOR MENDOCINO COUNTY et al.**  
(Civ. 1,031.)

(District Court of Appeal, Third District, California. Oct. 31, 1912. Rehearing Denied by Supreme Court Dec. 30, 1912.)

**1. INTOXICATING LIQUORS (§ 15\*)—ORDINANCES—VALIDITY—"CONFLICT WITH GENERAL LAW"—PENALTIES.**

A county ordinance imposing a maximum penalty of \$600 or imprisonment for seven months, or both, for one to sell intoxicating liquors in the county, it being provided the ordinance shall not apply to sales made at his regular place of business, under authority of a license issued by city or county, in effect penalizes the business of selling liquor without a license, and so is in conflict with a general law, within Const. art. 11, § 11, authorizing counties to make and enforce regulations "not in conflict with general laws," Pen. Code, § 435, making it a misdemeanor to commence or carry on without procuring the license any business for the carrying on of which a license is required by any law of the state, and section 19 prescribing as a maximum penalty for a misdemeanor, except where a different punishment is prescribed by the Code, imprisonment for six months or a fine of \$500, or both.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 17, 18; Dec. Dig. § 15.\*]

**2. PROHIBITION (§ 3\*) — OTHER ADEQUATE REMEDY.**

A court should be prohibited from proceeding with trial of a criminal case of which it has not jurisdiction, the remedy by appeal existing only in case of conviction not being adequate.

[Ed. Note.—For other cases, see *Prohibition*, Cent. Dig. §§ 4-19; Dec. Dig. § 3.\*]

Application by George Arfsten for writ of prohibition to the Superior Court in and for the county of Mendocino, the Honorable J. O. White, Judge. Writ made peremptory.

Mannon & Mannon and Preston & Duncan, all of Ukiah, for petitioner. Robert Duncan, of Ukiah, for respondent.

**BURNETT, J.** [1] The application is to prohibit the superior court from proceeding to try petitioner on an information in which it is charged that on a certain date he did "willfully and unlawfully sell intoxicating liquors, to wit, whisky, to one Dow Chilson." The prosecution is sought to be upheld by reason of two certain ordinances passed by the board of supervisors of the county of Mendocino. The first is known as Ordinance No. 161, and, as far as necessary to quote, is as follows: "It shall be and hereby is made unlawful for any person to sell any alcoholic, spirituous, vinous, malt or other intoxicating liquor within the county of Mendocino, state of California: Provided, that this ordinance shall not apply to sales made at his regular place of business under authority of a license by any person holding a regularly issued city or county retail or wholesale liquor license," etc. The penalty provided for the violation of said ordinance was a fine of not less than \$100 nor more than \$500 or imprisonment in the county

jail not less than 30 days nor more than 6 months. On February 7, 1912, Ordinance No. 189 was passed by said board, providing that "section 3 of Ordinance No. 161 is hereby amended to read as follows: Any person convicted of a violation of Ordinance No. 161 of the county of Mendocino shall be punished by a fine not exceeding \$600 or by imprisonment in the county jail not exceeding seven months, or by both such fine and imprisonment." The ordinance as it originally stood carried with it a penalty cognizable only in the justice court. As amended, its infractions are brought within the jurisdiction of the superior court, but it is the contention of petitioner that this amendment increasing the punishment is invalid.

It is admitted that the authority of the board of supervisors to enact such legislation finds its basis in section 11, article 11 of the Constitution, providing that "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." It is not disputed that said Ordinance 161 involved the exercise of authority conferred by said section 11 of the Constitution, but it is claimed that the purported amendment is invalid by reason of the fact that it is in conflict with a general law. It is asserted that the case is covered by section 435 of the Penal Code, providing that "every person who commences or carries on any business, trade, profession or calling, for the transaction or carrying on of which a license is required by any law of the state, without taking out or procuring the license prescribed by such law, is guilty of a misdemeanor." It is to be observed that no specific penalty is prescribed therein, but it is supplied by section 19 of the Penal Code as follows: "Except in cases where a different punishment is prescribed by the Code, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding five hundred dollars, or by both." It cannot be disputed that the expression, "by any law of this state," found in said section 435, includes an ordinance passed by the board of supervisors of a county. *Ex parte Sweetman*, 5 Cal. App. 577, 90 Pac. 1069; *Ex parte Bagshaw*, 152 Cal. 701, 93 Pac. 864. Neither can it be doubted that the penalty provided by said section 19 brings the offense thus penalized within the jurisdiction of the justice court. Upon the assumption, therefore, that the case before us is within the contemplation and scope of said section 435, the conclusion would follow that the superior court is without jurisdiction to try petitioner.

Of the ordinance it is to be noticed that the "business" of selling liquor without a license is not, specifically and in so many words, penalized, but this is the effect of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



terms employed. In the first place, the ordinance recognizes as lawful the sale of liquor at his regular place of business by one holding a liquor license. In other words, one holding a regular license may conduct the business of liquor selling without incurring the penalty of the ordinance. But if he conducts the business without a license, although at a "regular place of business," he is liable to a fine of \$600 and imprisonment for the term of seven months. This necessarily follows, because a man cannot "carry on" or conduct the liquor business without selling liquor, and, under the terms of the ordinance, he is subjected to the penalty if he makes one sale of liquor. A person may sell liquor without engaging in the liquor business, but the converse does not follow. The incident does not include the principle, but the principle includes the incident. In *Merced County v. Helm*, 102 Cal. 166, 36 Pac. 400, it is said: "The distinction between a single act and the business in which the act is done is very marked, and is well recognized in adjudged cases." It is also declared that a tax upon the sales is a tax upon the different acts in the transaction of the business.

In *Ex parte Seube*, 115 Cal. 629, 47 Pac. 596, it is said that an ordinance which embraces all who sell "certainly embraces all who make a business of selling." We have this situation then: If a person, without a license, "carries on" the business by doing the only thing which enables him to carry it on and for which the business is conducted, the ordinance subjects him to a penalty in excess of that which, under the general law, can be imposed for "commencing or carrying on" the business. But, if the sale of liquor should be considered separate and distinct from the liquor business and not a necessary part of it, still it would seem unreasonable to impose a greater penalty for the former than for the latter. Under the general law, if a person without a license carries on in Mendocino county the liquor business for a single day, he would be liable to a punishment not to exceed imprisonment in the county jail for six months and a fine of \$500. But, if within that day he should make 100 sales of liquor, he might under the ordinance, be subjected to 100 prosecutions with the possibility of the increased penalty for each offense. In this view, accepting the general law as the test, the ordinance would seem to be unreasonable and void.

In *Ex parte Solomon*, 91 Cal. 440, 27 Pac. 757, it was held, as stated in the syllabus, that "section 70 of Ordinance 1587 of the city and county of San Francisco, fixing the minimum penalty for the offense of having lottery tickets in possession at a fine of \$250, or imprisonment for three months, and allowing a maximum penalty of \$1,000, or imprisonment for six months, is not in harmony with sections 320 to 326 of the Penal Code, regulating and punishing kindred and more

serious offenses respecting lottery drawing, the selling of lottery tickets, etc., which can only be punished by a fine not exceeding \$500 or by imprisonment not exceeding six months, without any minimum penalty, and such ordinance is unreasonable and void, as being in conflict with the general laws of the state." In the case of *In re Sic*, 73 Cal. 142, 14 Pac. 405, the prosecution was under section 3 of an ordinance of the city of Stockton providing that "It shall be unlawful for two or more persons to assemble, be, or remain in any room or place for the smoking of opium or inhaling the fumes thereof." Although the ordinance was directed against the smoking of opium "in any room or place," the Supreme Court held that it covered the same offense as included within the provisions of section 307 of the Penal Code, as follows: "Every person who opens or maintains, to be resorted to by other persons, any place where opium, or any of its preparations is sold or given away, to be smoked at such place, and any person who at such place sells or gives away any opium \* \* \* and every person who visits or resorts to any such place for the purpose of smoking opium or its said preparations is guilty of a misdemeanor." While it was said that "section 3 of the ordinance is broad enough in terms to prohibit opium smoking under all circumstances, except when the person keeps moving" it was held that its evident purpose was to prevent the maintenance of places of resort where opium is smoked, and hence the conclusion of the court that the ordinance was conflicting with the general law; it being stated that "an ordinance must be conflicting with the general law which may operate to prevent a prosecution of the offense under the general law." It was further declared that "perhaps it would be enough to say that the offense charged in the complaint, of which respondent was convicted, may be, for aught that appears, the same as that prohibited in the Code." It seems quite clear that, if the ordinance in question here (No. 189) is to be upheld, a person who "commences or carries on" the liquor business in Mendocino county without a license may be prosecuted under said ordinance and subjected to its severer penalty notwithstanding the general law as embraced in said section 435 of the Penal Code. It is also true that, for aught that appears, the offense charged in the information is the same as that punishable under the general law, and the case is thus brought within the rule as above quoted from the *Sic* decision. See, also, *Ex parte Ah You*, 88 Cal. 99, 25 Pac. 974, 11 L. R. A. 408, 22 Am. St. Rep. 280, and *In re Desanta*, 8 Cal. App. 295, 96 Pac. 1027.

Granting, however, that it is competent for the board of supervisors to so discriminate, the ordinance is so framed that it is impossible to say that the part imposing a penalty for the sale in conducting the business is

invalid and for the other sales is valid. The section in that respect is unlike that presented in *Ex parte Mansfield*, 106 Cal. 400, 39 Pac. 775, and *Ex parte Stephen*, 114 Cal. 278, 46 Pac. 86. Of course, what we have said simply applies to the amendment to Ordinance 161 increasing the penalty. The amendment being invalid, it would leave unaffected said ordinance 161 as originally passed by the board of supervisors. The cases cited by respondent, it is believed, are not opposed to the views herein expressed. In *Ex parte Snowden*, 12 Cal. App. 521, 107 Pac. 724, a municipal ordinance punishing a greater rate of speed than that forbidden by the state law was held not to be in conflict with the latter on the ground and for the reason that "the mere fact that the state, in the exercise of its police power, has made certain regulations does not prohibit a municipality from exacting additional requirements." In *re Guerrero*, 69 Cal. 88, 10 Pac. 261, involved the authority of the city of Los Angeles to pass an ordinance requiring a license fee of \$50 a month for carrying on the business of a saloon. It was held that the ordinance was "in harmony with the Constitution of the state, the general laws of the state, and the city charter." The ordinance upheld in *Ex parte Johnson*, 73 Cal. 228, 15 Pac. 43, made it a misdemeanor to frequent a house of prostitution, while the general law (section 315, Pen. Code) is directed against the maintenance of such place or residence therein. In *Ex parte Cheney*, 90 Cal. 617, 27 Pac. 436, the petitioner was convicted of violating an ordinance against carrying concealed weapons. There was no specific provision of the statutes or Constitution upon the subject. The court held that the penalty imposed by the ordinance was not unreasonable. *Ex parte Hong Shen*, 98 Cal. 681, 33 Pac. 799, concerns certain regulations for the sale of opium, and it was held that there was no conflict with the general law. In *Ex parte McClain*, 134 Cal. 110, 66 Pac. 69, 54 L. R. A. 779, 86 Am. St. Rep. 243, an ordinance making it unlawful for any person to have in his possession a lottery ticket and to punish its violation was upheld. It was not contended that the ordinance was in conflict with any general law but that it was unreasonable and oppressive. In *re Berry*, 147 Cal. 523, 82 Pac. 44, 109 Am. St. Rep. 160, relates to a county ordinance prohibiting the use of automobiles in the public roads at night. There was no state law in conflict with it, and it was held to be not unreasonable or void. In *re Hoffman*, 155 Cal. 115, 99 Pac. 517, 132 Am. St. Rep. 75, like *Ex parte Snowden*, supra, involved the imposition of additional requirements to those exacted by the state law for the sale of milk and the ordinance was held to be within the exercise of the police power of the city of Los Angeles. *Harter v. Barkley*, 158 Cal. 742, 112 Pac. 556, involved the validity of

a certain ordinance providing certain regulations "for the tapping and connection with the sewers." The ordinance was held to be reasonable and within the police power of the board of supervisors.

[2] If said Ordinance 189, increasing the penalty for the violation of Ordinance No. 161, is invalid, it follows, we think, that the court is without jurisdiction, and prohibition is proper. *Green v. Superior Court*, 78 Cal. 556, 21 Pac. 307, 541; *People v. Palermo Land & Water Co.*, 4 Cal. App. 717, 89 Pac. 723, 725. In *Gardner et al. v. Superior Court of Los Angeles County et al.*, 126 Pac. 501, the district court of appeal for the second district held that, in a case like this, the writ of prohibition would not lie without an affirmative showing that the petitioner is without any "plain, speedy and adequate remedy in the ordinary course of law." The two decisions cited in support of the doctrine were rendered in civil cases and the later certainly qualifies if it does not overrule the earlier decision. In *Lindley v. Superior Court*, 141 Cal. 220, 74 Pac. 765, it is said: "If, as contended, the superior court is without jurisdiction, there is, of course, a remedy by appeal for any adverse judgment affecting petitioner, and it is not sufficient ground for interfering by prohibition that the trial will be expensive and troublesome." In *Ophir Silver Min. Co. v. Superior Court*, 147 Cal. 467, 82 Pac. 70, 3 Ann. Cas. 340, however, it was held that: "Where the court has no jurisdiction of the subject-matter of the action and the remedy by appeal is inadequate for the reason that the trial would involve heavy expense for transporting witnesses which could not be recovered as legal costs, prohibition will lie notwithstanding the remedy by appeal." The rule in criminal cases, sanctioned by right, reason, and simple justice, as we conceive it, is stated by the Supreme Court in *Terrill v. Superior Court*, 60 Pac. 38,<sup>1</sup> and by this court in *Ex parte Hayter*, 16 Cal. App. 225, 116 Pac. 376. In the latter it is said: "The remedy by appeal is neither speedy nor adequate in a case where a citizen is restrained of his liberty under an illegal process. \* \* \* To require him to resort to his remedy by appeal would, likely, only be to force him to suffer imprisonment until his trial is had, and in case of conviction, until his appeal could be heard and determined and all this as the result of a proceeding of which the court has no jurisdiction." It may be added that the contention of another adequate remedy implies, of course, that the petitioner may be convicted and suffer imprisonment until his case can be reached on appeal. Unless convicted, he will have no occasion to invoke the other remedy. If convicted, and required, as he may be, to suffer the whole

<sup>1</sup> Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 127 Cal. xviii.



or a part of the term imposed, the remedy by appeal would at least to the appellant seem quite inadequate.

The demurrer is overruled, and the alternative writ is made peremptory.

We concur: CHIPMAN, P. J.; HART, J.

(20 Cal. App. 337)

**NEWMIRE v. FORD.** (Civ. 1,222.)

(District Court of Appeal, Second District, California. Nov. 11, 1912.)

**1. APPEAL AND ERROR (§ 931\*)—REVIEW—PRESUMPTIONS—SUFFICIENCY OF EVIDENCE.**

In an action for legal services, plaintiff attached to the complaint a copy of a written contract, by which defendant agreed to pay \$1,500 therefor. There was no allegation of nonpayment, and the court made no finding as to whether any payment had been made, but found as a fact that plaintiff's damages amounted to \$1,000. *Held* that, on an appeal on the judgment roll, it would be presumed that there was evidence supporting the court's finding as to the amount of damages notwithstanding the written contract.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931.\*]

**2. DAMAGES (§ 120\*)—CONTRACT FOR SERVICES—BREACH—MEASURE OF DAMAGES.**

By the express terms of Civ. Code, § 3302, the amount of damages for breach of a contract to pay a specified sum for legal services was the amount due by its terms, with interest.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 291-305; Dec. Dig. § 120.\*]

**3. JUDGMENT (§ 256\*) — CONFORMITY TO PLEADINGS AND FINDINGS.**

Where plaintiff suing for legal services attached to his complaint a copy of a written contract by which defendant agreed to pay \$1,500 therefor, but did not allege nonpayment, and the court without making any finding as to payment found that plaintiff's damage was \$1,000, a judgment for plaintiff for \$1,000 only was supported by the pleadings and findings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446-454; Dec. Dig. § 256.\*]

Appeal from Superior Court, Los Angeles County; John L. Childs, Judge.

Action by Earl Newmire against Caroline F. Ford. From an order denying a motion for a more favorable judgment on the findings of fact than that rendered, plaintiff appeals. Affirmed.

Byrer & Monteleone and Newmire & Morris, all of Los Angeles, for appellant. Earl Rogers, W. H. Dehm, and J. S. Steely, all of Los Angeles, and H. W. Nisbet, of San Bernardino, for respondent.

**JAMES, J.** Plaintiff brought this action against defendant to recover the sum of \$1,500 alleged as damages sustained because of the breach of a contract made by defendant to pay plaintiff the sum of \$1,500 for legal services. An answer was filed and trial had, and judgment was rendered in favor of plaintiff for the sum of \$1,000. Thereafter plaintiff made a motion for a different judg-

ment on the findings of fact, claiming that on the facts as found by the trial judge he was entitled to judgment for the sum of \$1,500, as prayed for in his complaint. This motion was denied, and plaintiff appeals from that order.

[1] Attached to the complaint of plaintiff was a copy of the written contract made by defendant in which she agreed to pay to plaintiff, for legal services to be rendered in defending her against a charge of murder, the sum of \$1,500. Plaintiff alleged that he was not permitted to perform all of the services agreed upon, but was discharged by the defendant without cause. His complaint contained no allegation as to the nonpayment of the damages, and the court made no finding as to whether any payment had so been made. This appeal being on the judgment roll, and the court having found as a fact that the amount of plaintiff's damage was the sum of \$1,000, we must conclude that evidence was heard which would support that finding, or that the trial court found in the evidence a basis for its conclusion that only a portion of the amount agreed to be paid had accrued as damages. *Beardsley v. Clem*, 137 Cal. 328, 70 Pac. 175; *Neumann v. Morretti*, 146 Cal. 25, 79 Pac. 510.

[2] The correctness of plaintiff's assertion that the amount of detriment caused by breach of contract such as the one sued upon will be deemed to be the amount due under the terms of the contract, with interest thereon, cannot be questioned, as such is the measure of damages declared by section 3302 of the Civil Code.

[3] For the reasons we have stated, however, the findings of fact under the pleadings of the parties do support the judgment as entered by the trial court, and the motion for a different judgment was properly denied.

The order is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(20 Cal. App. 343)

**PEOPLE v. MARTINEZ.** (Cr. 265.)

(District Court of Appeal, Second District, California. Nov. 12, 1912.)

**1. CRIMINAL LAW (§ 1144\*)—APPEAL—PRESUMPTIONS.**

Where the court clearly and fully charged that circumstantial evidence must be sufficient to exclude every rational hypothesis except that of guilt, it will be presumed on appeal that the jury followed the instruction, and determined that the circumstances were inconsistent with innocence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. § 1144.\*]

**2. CRIMINAL LAW (§ 1159\*)—APPEAL—REVIEW—QUESTIONS OF FACT.**

The fact that circumstantial evidence reasonably justifying an inference of guilt also reasonably justifies an inference of innocence

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

does not make a question of law for review on appeal, but which of such inferences should be drawn from the evidence, is a question for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

### 3. CRIMINAL LAW (§ 1173\*)—APPEAL—HARMLESS ERROR.

The refusal of an instruction that, if the jury believed from the evidence that any witness had willfully testified falsely to any material fact, they might reject his entire testimony, was not prejudicial error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3164-3168; Dec. Dig. § 1173.\*]

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Aurelio Martinez was convicted of murder in the second degree, and he appeals. Affirmed.

C. C. Haskell, of San Bernardino, and A. Trujillo, of Perris, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. By information filed by the district attorney defendant was charged with the crime of murder. Upon trial therefor he was convicted of murder in the second degree; the judgment of the court being that he be imprisoned in the state prison at Folsom for a term of 30 years. From this judgment, and an order denying his motion for a new trial, he prosecutes this appeal.

[1] The evidence upon which defendant was convicted was of an entirely circumstantial nature. The court, following the elementary rule that, where such evidence is relied upon to establish the guilt of the accused, it should be sufficient to exclude every rational hypothesis other than that of guilt, instructed the jury clearly and fully thereon. We must assume the jury, in considering the circumstances established, followed this instruction, and by the verdict rendered determined that the circumstances were inconsistent with any theory other than that defendant committed the crime.

[2] Where the circumstances are such as to reasonably justify an inference of guilt, as found by the jury, the fact that an inference of innocence might likewise be reasonably drawn therefrom does not present a question of law for review by an appellate court any more than does a verdict based upon direct conflicting evidence. In neither case will the verdict be disturbed. We are not unmindful that the Supreme Court in *People v. Staples*, 149 Cal. 405, 86 Pac. 886, employs language seemingly inconsistent with this view, and upon which appellant claims that, if upon review this court is of the opinion that the circumstances are reasonably compatible with defendant's innocence, then, notwithstanding the fact that they reasonably justify the inference of guilt drawn there-

from by the jury, he is entitled to a reversal of the judgment. In reply to this we quote with approval the language used by Judge Chipman in *People v. Mubly*, 15 Cal. App. 419, 114 Pac. 1018, where, in discussing the *Staples* Case, he says: "We do not understand that case to hold that, where the circumstances are such as to reasonably justify the inference of guilt, the case will be taken from the jury because an inference of innocence might also reasonably have been drawn. Between these two inferences the jury must choose, and it is only where the evidence obviously does not warrant the inference of guilt that the court will interfere. This must be so, or the weight of the circumstantial evidence, and the inference to be drawn from it in almost every case, must finally be determined by the appellate court, thus making the court the arbiter of both law and fact. In our judgment a verdict of a jury, and the judgment of conviction based upon circumstantial evidence, come to us as any other verdict and judgment, clothed with like presumption of support; and, unless we can say that the inference of guilt drawn from the evidence was wholly unwarranted, we cannot interfere." In this case the circumstances established reasonably justified the conclusion of the jury as expressed in their verdict, and, even though this court were of the opinion that such circumstances might be reasonably reconciled with the innocence of defendant, such fact does not warrant interference with the determination of the jury.

[3] The refusal of the court, at defendant's request, to instruct the jury that if they believed from the evidence that any witness had willfully testified falsely to any material fact they were at liberty to reject the entire testimony of such witness constituted no prejudicial error. *People v. Corey*, 8 Cal. App. 728, 97 Pac. 907, and cases there cited. The instruction found on page 43 of the clerk's transcript was refused, and the ruling is assigned as error. Without quoting the requested instruction, it is sufficient to say that, in so far as the same correctly stated the law, the subject thereof was covered by other instructions given, which, taken as a whole, are not only full and complete, but were well calculated to protect every right of defendant.

Other rulings complained of were upon the admission and rejection of evidence. The points made, however, are too trivial to merit any discussion. Suffice it to say that in no event could the rulings by any possibility have prejudiced the substantial rights of defendant in the slightest degree.

The judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; JAMES, J.





(20 Cal. App. 346)

**OSBORN v. MILLS et al. (Civ. 1,163.)**

(District Court of Appeal, Second District, California. Nov. 13, 1912. Rehearing Denied by Supreme Court Jan. 10, 1913.)

**1. QUIETING TITLE (§ 22\*)—COMMUNITY PROPERTY—ACTION—PERSON ENTITLED TO SUE—HUSBAND.**

A husband may maintain an action to quiet title under Code Civ. Proc. § 738, where the realty belongs to the community, though conveyed to the wife, if not reconveyed to a purchaser in good faith and for value.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 54; Dec. Dig. § 22.\*]

**2. HUSBAND AND WIFE (§ 265\*)—COMMUNITY PROPERTY.**

If property be community property, the legal title is in the husband, though the deed was taken in the wife's name; the whole title vesting in the husband under the deed to the wife.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 896, 917-924; Dec. Dig. § 265.\*]

**3. HUSBAND AND WIFE (§ 249\*)—COMMUNITY PROPERTY—CRITERION.**

Whether property is community property should be determined from the nature of the transaction involving its acquisition, without reference to who received and retains title.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 887, 889-892; Dec. Dig. § 249.\*]

**4. BANKRUPTCY (§ 268\*)—DEED BY TRUSTEE—TITLE CONVEYED.**

A deed executed by a trustee in bankruptcy at a sale conveyed to the purchaser only such interest therein as the bankrupt had.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 372-379; Dec. Dig. § 268.\*]

Appeal from Superior Court, Los Angeles County; W. M. Conley, Judge.

Action by Oliver D. Osborn against Mrs. Belle Mills, C. D. Warden, and others. From a judgment for plaintiff, the defendant last named appeals. Affirmed.

C. D. Warden, of Los Angeles, in pro. per.  
O. H. Myrick, of Los Angeles, for respondent.

ALLEN, P. J. The action in the court below was one brought by plaintiff under section 738, Code of Civil Procedure, against the defendants, alleging that they claimed an estate or interest in real property adverse to him, and for the purpose of determining such adverse claim. The facts material for consideration upon this appeal, as alleged in the complaint, are: That plaintiff and one Kitturia B. Osborn are husband and wife; that plaintiff was the owner and in possession of certain described real property; that the possession thereof and the title thereto were acquired by plaintiff in 1903, and the consideration paid therefor was from the personal earnings of plaintiff while a member of the marital community; that for the personal convenience of plaintiff the conveyance was made to his wife to hold for the marital community, subject to the disposition and control of plaintiff; that said wife never made any claim or asserted any right to said premises as her separate property or estate;

that said wife never conveyed, transferred, or disposed, or attempted to convey, transfer, or dispose of, said property; that on the 12th day of March, 1906, the wife was declared a bankrupt, and a trustee appointed; that said trustee in the year 1908 proceeded to sell, and did sell, said premises to defendant Warden for the sum of \$25, the premises at the time being of the value of \$1,500; that plaintiff had no knowledge or notice of such attempted sale until in the year 1910; that Warden when he purchased said premises had full knowledge that the premises belonged to the marital community. The ownership and seisin of plaintiff were not denied; nor was it denied, except in an evasive way, that defendant Warden when he purchased said premises had full knowledge of the fact that the same were community property. The court found all of the allegations of the complaint to be true, and that the allegations of the answer and of the special defenses set forth therein were untrue, and rendered judgment in favor of plaintiff, adjudging plaintiff to be the owner of said premises, and that the defendants' claims thereto were invalid and groundless, and quieting the title of plaintiff to said premises. From this judgment, upon the judgment roll alone, defendant Warden appeals.

[1] The principal contention of appellant is that plaintiff under the facts of the case possessed no right to maintain the action under section 738, Code of Civil Procedure. The right of the husband to maintain an action of this character where the real property involved belongs to the community, although conveyance thereof has been made to the wife and no purchaser has acquired title thereto in good faith and for value, has been recognized by our Supreme Court in a number of instances. *Fanning v. Green*, 156 Cal. 280, 104 Pac. 308; *Fulkerson v. Stiles*, 156 Cal. 703, 105 Pac. 966, 26 L. R. A. (N. S.) 181. Appellant relies upon *Von Drachenfels v. Doolittle*, 77 Cal. 295, 19 Pac. 518, and *Shanahan v. Crampton*, 92 Cal. 13, 14, 28 Pac. 50, but these cases do not in our opinion determine the matters herein involved. The court finds, and it must be assumed from competent evidence, that the wife of plaintiff possessed and claimed no interest in this property.

[2, 3] "If the property was community property, the legal title remained in the husband, notwithstanding that the deed was taken in the name of the wife. \* \* \* The whole title, both real and equitable, at once vests in the husband by means of the deed to the wife." *Peiser v. Griffin*, 125 Cal. 12, 57 Pac. 691. The nature of the property is to be determined "from the nature of the transaction without reference to who retains the title." *Killian v. Killian*, 10 Cal. App. 318, 101 Pac. 808.

[4] Appellant's deed from the trustee in bankruptcy conveyed to him only such inter-



est as the wife had. She having no interest, the deed conveyed none, in addition to which he had full notice of the facts of the case at the time of the purchase and payment of the nominal consideration. It is found by the court that the wife never purported to make any conveyance of these premises to the trustee, but, on the contrary, disclaimed any interest therein in the bankruptcy proceedings. Under section 164, Civil Code, the conclusive presumption of title arises only where the wife conveys to a purchaser or incumbrancer in good faith and for a valuable consideration, none of which facts exist in the case at bar.

We see no error in the record, and are of opinion that the judgment has support from the findings, and the same is affirmed.

We concur: JAMES, J.; SHAW, J.

(20 Cal. App. 324)

**HARELSON v. SOUTH SAN JOAQUIN IRR. DIST.** et al. (Civ. 980.)

(District Court of Appeal, Third District, California. Nov. 8, 1912. Rehearing Denied by Supreme Court Jan. 6, 1913.)

**1. WATERS AND WATER COURSES (§ 226\*)—IRRIGATION — ORGANIZATION OF IRRIGATION DISTRICT—EXCLUSION OF LAND—"ANOTHER SOURCE."**

St. 1897, p. 279, § 78, as amended by St. 1905, p. 27, provides that if, upon the hearing of a petition to exclude land from an irrigation district, the board of directors deem it advisable that the land be excluded, "the board shall make an order that the lands \* \* \* be excluded from the district," provided that the board shall exclude all lands which cannot be irrigated "from, or which are not susceptible to, or would not \* \* \* be directly benefited by the actual irrigation of the same from a common source, or by the same system of works with the other lands of such district \* \* \* or which are already irrigated or entitled to be irrigated from another source or by another system of irrigation works." Held that, where land is already irrigated from another source, such as wells on the land, the owner may have it excluded from the proposed district; the term "another source" meaning any source from which lands are in fact irrigated, and not necessarily another system of irrigation similar to that provided by the proposed district.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 318; Dec. Dig. § 226.\*]

**2. WATERS AND WATER COURSES (§ 226\*)—ORGANIZATION OF DISTRICT—EXCLUSION OF LAND—ESTOPPEL.**

Where no irrigation bonds had been sold so as to become a lien on the land included within the proposed district, when plaintiff petitioned to have his land excluded therefrom, he was not estopped from suing to compel the exclusion of his land on the ground that he participated in the election establishing the district, and had an opportunity to object when the board of supervisors organized the district.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 318; Dec. Dig. § 226.\*]

**3. MANDAMUS (§ 4\*)—PURPOSE OF WRIT—PERFORMANCE OF DUTIES.**

If a landowner was clearly entitled under St. 1897, p. 279, § 78, as amended by St. 1905,

p. 27, to have his land excluded by the board of directors from an irrigation district because it was already irrigated, mandamus was a proper remedy to compel the board to exclude the land; the irrigation district act not providing for an appeal from their decision so that there was no speedy or adequate remedy by appeal.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 9-21, 24-34; Dec. Dig. § 4.\*]

**4. MANDAMUS (§ 1\*)—PURPOSE OF WRIT.**

While mandamus is not usually available to compel a quasi judicial body, acting within its jurisdiction, to alter or vary its finding, if the facts are undisputed and only the duty of such body remains to be determined, it may be compelled by mandamus to perform such duty in a particular manner after it is ascertained in the proceeding.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 1-3; Dec. Dig. § 1.\*]

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by W. B. Harelson against the South San Joaquin Irrigation District and others. From a judgment for plaintiff, defendants appeal. Affirmed.

L. L. Dennett, of Modesto, for appellants.  
A. L. Levinsky, of Stockton, for respondent.

CHIPMAN, P. J. Mandamus. Plaintiff seeks to have his land situated within the boundaries of defendant district excluded therefrom. To this end he filed his petition in due form with the board of directors of defendant district, which was denied. Thereupon he complained to the superior court and prayed for a writ of mandamus to compel the said board to make the necessary order excluding his lands from said district. A general demurrer to the complaint was overruled, defendant answered, the cause was tried, and plaintiff had findings and judgment as prayed for. The appeal is from this judgment on the judgment roll.

At the hearing before the board of directors on said petition there was "filed a protest against the granting of said petition," witnesses were called and evidence taken, and the board of directors made findings and rendered its decision which are made part of the findings of the court and are as follows: "(3) That W. B. Harelson now is, and was during all the times mentioned in his petition, the owner of the lands hereinbefore described, which said land is entirely surrounded by lands included within the boundaries of the South San Joaquin Irrigation District. (4) That said South San Joaquin Irrigation District was organized during the year 1909; that prior to the organization of said South San Joaquin Irrigation District said W. B. Harelson sunk a well to the depth of 137 feet upon said land and premises for the purpose of irrigating crops grown and to be grown thereon, and proceeded to construct ditches and otherwise prepare said lands for irrigation and installed a pumping plant and gasoline

engine thereon at a cost of about \$1,400, with which he has since irrigated and is now irrigating alfalfa growing upon about 40 acres, a portion thereof being in each 40 of said 80-acre tract; that said ditches, etc., can be used to irrigate from the system of canals and ditches of the South San Joaquin Irrigation District, and will be necessary for such purpose. (5) That said pumping plant installed by the said W. B. Harelson is adequate for the irrigation of the lands and premises heretofore irrigated therefrom, and the same has been and now is being used for such purpose. (6) That a general system of pumping would probably lower the water level in said district, and that the water level has been raised materially by the irrigation system now in operation, which the South San Joaquin Irrigation District has agreed to purchase and take over. (7) That irrigation by a pumping system is practicable but more expensive than by a system taking water from streams through canals and ditches. That, subsequent to the filing of said petition herein referred to, a bond issue has been regularly authorized and provided for by said district. (8) The board further finds that said pumping plant does not constitute a source or system as contemplated by section 78 of the irrigation act, and that said lands are not already irrigated or entitled to be irrigated from another source or by another system of irrigation works, and deem it not for the best interests of said district that the lands mentioned in said petition should be excluded from the district, and that petitioner has failed to establish any facts showing that he is entitled to have such lands excluded."

The court made the following findings not appearing in the findings of the board of directors: Finding 7 is that under section 78 of the act approved March 31, 1897 (St. 1897, p. 279), and the acts amendatory thereof, on a showing of the facts therein mentioned, "the directors of such district have no discretion, or authority, or jurisdiction, to deny or refuse to make and enter an order excluding such lands. That, upon the finding that said lands are irrigated by a well and pumping plant, the petitioner herein became entitled to and it was the duty of said board of directors to make and enter its order excluding the lands of petitioner." That from the facts found by the board of directors it resulted "that said petitioner has a feasible and practicable system of irrigation established, and it was so established prior to the organization of said the South San Joaquin Irrigation District, and the aforesaid well and pumping plant provided is sufficient for the irrigation of the lands, and that the irrigation of the lands of said petitioner, by means of the aforesaid well, gasoline engine, and pumping plant, constitutes and is a source other and different from the South San Joaquin Irrigation District." Finding 9. That it is immaterial

that the said board refused to make its order excluding said lands, "upon the ground, or for the reason, that said board of directors did not deem it for the best interests of the district that the lands of petitioner, or any part thereof, described in the petition, should be excluded from said district, or not, because and by reason of the findings of said board of directors (which are hereinafter set forth) were required and compelled under and by reason of the law hereinbefore set forth, to exclude such lands, and each and all thereof." Finding 11. Finding 12 is as follows: "That, notwithstanding that it may be that the lands of the petitioner herein are within the watershed or drainage basin of the Stanislaus river, nevertheless the lands of said petitioner, as hereinbefore described, have not, and neither of them has, been materially, or at all, benefited by the said irrigation system known as the 'Tulloch system,' or Tulloch canals, and the water level has not been materially raised by the irrigation system known as the 'Tulloch system,' which has its ditches near the lands of said petitioner; and neither have the lands of said petitioner been benefited, neither will they continue to be benefited by the said irrigation system of said respondent, and, if the lands of said petitioner are excluded from the said South San Joaquin Irrigation District, the petitioner will not obtain the benefit of any money or labor expended by either the respondent, or the assessment payers of said South San Joaquin Irrigation District, and neither will the said petitioner become a beneficiary of said irrigation system, and neither will his lands be benefited thereby. (13) That the underground flow tapped by the well of the petitioner herein has its ultimate source and head in the Sierra Mountains to the east of said lands, and said source is and has been amply sufficient for the irrigation of the lands of said petitioner. (14) That it is immaterial whether the lands of said petitioner obtained their supply of water from the same watershed and drainage basin as that from which the waters of the Stanislaus river flow, and from which the Tulloch system obtained its water, for the reason that the said Tulloch system and the South San Joaquin Irrigation District are not injured by reason of the irrigation of the lands of said petitioner by the pump and well of said petitioner."

[1] The position taken by the trial court and by respondent here is that, under the facts as found, the board of directors had no discretion or power to do otherwise than order the land excluded, and, failing in its duty, plaintiff is entitled to the writ of mandamus to compel its performance. And this is claimed to result from the provisions of section 78 of the act of March 31, 1897 (Stats. 1897, p. 254), as amended in 1905 (Stats. 1905, p. 27). The act of 1905 re-enacts section 78 of the original act, except as to the last paragraph, which is omitted. This



paragraph provided that "no lands included within the limits of any city or town \* \* \* shall be excluded under the provisions of this act." The sections relating to the exclusion of lands, after the district has been organized, are 74 to 78, inclusive. Under the provisions of section 2 of the act, upon hearing the petition for the organization of the district, the board of supervisors is given authority "to make such changes in the proposed boundaries as may be deemed advisable, and shall define and establish such boundaries. But said board shall not modify said boundaries so as to exclude from such proposed district any territory which is susceptible of irrigation from a common source and by the same system of works applicable to the other lands in such proposed district; nor shall any lands which will not in the judgment of said board be benefited by irrigation, by means of said system of works, be included within such proposed district. Any person whose lands are susceptible of irrigation from the same source and system of works, may, upon his application, in the discretion of said board, have such lands included within said proposed district." A right of appeal to the superior court is given by section 4 "to any person interested who is a party to the record." While section 2 seems to have given the board of supervisors authority to make such changes in the boundaries of the proposed district as it deemed advisable, it was prohibited from excluding any territory therefrom "which is susceptible of irrigation from a common source and by the same system of works applicable to the other lands in such proposed district." The act seems to have contemplated that the board of supervisors might define the boundaries in a way harmful or unjust to one or more landowners embraced therein, and hence the provisions of sections 74 et seq. Section 74 provides that "the boundaries of any irrigation district now organized, or hereafter organized under the provisions of this act, may be changed, and tracts of land which were included within the boundaries of such district at or after its organization \* \* \* may be excluded therefrom, in the manner herein provided"; but neither such change of boundaries of, nor such exclusion from, the district "shall impair or affect its organization, or its rights to property, or any of its rights or privileges of whatever kind or nature." Section 75 prescribes the steps to be taken by petition for a hearing before the board of directors for the exclusion of any land, and requires the petition to state the grounds and reasons upon which it is claimed that the land should be excluded. Section 76 directs what notices of such hearing are to be given, the time and place of hearing, etc. Section 77 directs the board to proceed to hear the petition and the evidence in its support. Section 78 relates to

the decision of the board and is as follows: "If, upon the hearing of any such petition, no evidence or proofs in support thereof be introduced, or if the evidence fail to sustain said petition, or if the board deem it not for the best interests of the district that the lands, or some portion thereof, mentioned in the petition, should be excluded from the district, the board shall order that said petition be denied as to such lands; but if the said board deem it for the best interest of the district that the lands mentioned in the petition, or some portion thereof, be excluded from the district, \* \* \* then it shall be the duty of the board to, and it shall forthwith, make an order that the lands mentioned and described in the petition, or some defined portion thereof, be excluded from said district: Provided, that it shall be the duty of said board to so order, upon petition therefor as aforesaid, that all lands so petitioned to be excluded from said district shall be excluded therefrom which cannot be irrigated from, or which are not susceptible to, or would not, by reason of being permanently devoted to uses other than agricultural, horticultural, viticultural, or grazing, be directly benefited by the actual irrigation of the same from a common source, or by the same system of works with the other lands of said district, or from the source selected, chosen or provided, or the system adopted for the irrigation of the lands of said district, or which are already irrigated, or entitled to be irrigated, from another source or by another system of irrigation works."

Whether or not mandamus can be resorted to in the present action depends upon the construction to be given section 78. It is therein provided that "if the evidence fail to sustain said petition, or if the board deem it not for the best interests of the district that the lands \* \* \* should be excluded from the district, the board shall order that said petition be denied as to such lands"; likewise, if the board deem it for the best interest of the district that the lands or some portion thereof be excluded, "it shall be the duty of the board to \* \* \* make an order that the lands \* \* \* be excluded from said district." Then follows the proviso which declares that "it shall be the duty of said board to so order \* \* \* that all lands \* \* \* shall be excluded therefrom which cannot be irrigated \* \* \* from a common source, or by the same system of works with the lands of said district \* \* \* or which are already irrigated, or entitled to be irrigated, from another source or by another system of works."

Appellants contend "that, inasmuch as the irrigation act contemplates a comprehensive system of irrigation upon a large scale, the 'separate source or system' referred to in the sections relied upon by respondent likewise refers to a comprehensive

system involving an acreage of sufficient magnitude to come within the classification of irrigation by a system." The terms used in the act are not quite accurately quoted by appellants. The lands referred to are lands "which are already irrigated, or entitled to be irrigated, from another source or by another system of irrigation." The statute contemplates that lands may have been included within the boundaries of the district, as defined by the board of supervisors, "which are already irrigated, or entitled to be irrigated, from another source"—that is, a source other than by the proposed works—or may be irrigated or entitled to be irrigated "by another system of irrigation works." The terms "another source" do not necessarily mean another system of irrigation works similar to that provided by the district claiming the lands as part thereof. They mean, when considered in their natural signification, any source by which the lands are in fact being irrigated. The statute seems to deal with two classes of lands which it is made the duty of the board of directors to exclude: First, lands which are already irrigated or entitled to be irrigated "from another source"; and, second, lands which are irrigated or entitled to be irrigated "by another system of irrigation works." The Legislature had in mind the protection of the individual landowner who had succeeded in providing means for the complete irrigation of his lands, although the source was limited to supplying water for his own individual needs. Nor should the means adopted be limited to some enlarged and general scheme for the irrigation of large tracts. The means may be by bringing water by gravity to the land, through a ditch taken directly from some water course, or it may be by pumping it from a bordering or nearby creek or river, or from wells on the land. If the means are such as show that by them the land is already irrigated or entitled to be irrigated from any source other than by the proposed district system, the landowner is entitled to have his land excluded, and the statute makes it the duty of the board of directors to so order.

[2] It is claimed by appellants that, as respondent must have participated in the election establishing the district and had his day in court when the board of supervisors authorized the organization of the district, he is now estopped from objecting to the boundaries thus established. We cannot give the act such a construction. The act contemplates, as we have shown, that land may be included which ought not to be included, and hence the act gives the landowner the right to have the question heard by the board of directors, and no time is prescribed within which a petition to have land excluded may be filed. If a bonded indebtedness had been created and the bonds had been

sold and had become a lien on the land before plaintiff petitioned to have it excluded, a question of estoppel might arise. But no such situation existed. It was alleged in the answer that a bonded indebtedness had been voted and the board of directors had passed a resolution authorizing the issuance of bonds at the time the petition of plaintiff was filed with the board. But such action alone was not sufficient to create a lien on the land, and none would thereby be created until the bonds had been sold, and there is no averment that bonds had become a lien on the land. The court found that no evidence was introduced in support of this issue. Finding of the board of directors was that the bond issue was authorized after the petition was filed.

[3] It remains to determine whether plaintiff is entitled to the remedy of mandamus. The irrigation district act makes no provision for an appeal from the decision of the board of directors, and there is therefore no speedy or adequate remedy by appeal. The findings are specific and clear that half of plaintiff's land was irrigated, and that he had an adequate supply of water and means for irrigating the other half from a source within his own control. The court found "that the water supply obtained by petitioner from said well, pump, and through said ditches has proven sufficient for years, and prior to any action taken for the organization of the aforesaid irrigation district was sufficient to irrigate said 80 acres of land and is now sufficient for the irrigation of the same." Such being the facts, it became the duty of the board of directors, by the very terms of the act, to order the land excluded. It is true that in the earlier part of section 78 of the act it is provided that, "if the board deem it not for the best interests of the district that the lands \* \* \* should be excluded from the district, the board shall order that said petition be denied as to such lands." But this power is not an arbitrary one to be exercised regardless of the positive provisions, we have noticed, conferring indisputable rights upon the landowner. If the above-quoted provision gives the power contended for, it would make the provisions for the protection of the landowner absolutely meaningless and of no purpose whatever. Indeed, it is only by giving the terms "from another source or by another system of irrigation works" the broad and comprehensive interpretation they contend for that appellants rely upon their claim that the act lodges with the board of directors the discretion to say that it may "deem it not for the best interests of the district that the lands be excluded," even though the owner's land is irrigated and is amply supplied with water for that purpose by a source within his own control. Nor can the position of appellants be other-



wise maintained without utter disregard of what seem to be the plain requirements of the law.

Section 1085 of the Code of Civil Procedure provides that the "writ may be issued by any court \* \* \* to any inferior \* \* \* board \* \* \* to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station \* \* \*"; and section 1086 provides that "the writ must be issued in all cases where there is not a plain, speedy and adequate remedy, in the ordinary course of law."

[4] In the present case we know of no remedy whatever except by mandamus. The rule was stated in *Puterbaugh v. Wadham et al.* (Sup.) 123 Pac. 804, as follows: "It is undoubtedly true that the writ of mandamus is not a writ of error and that, generally speaking, it is not available for the purpose of altering or varying in any particular the finding of a judicial or quasi judicial body or officer acting within its or his appropriate jurisdiction; but, where the facts are undisputed and the only matter to be determined is the duty of the body or officer under the law, the court will define such duty and enforce not only its performance, but the carrying out of the obligations of the respondent body or officer in a particular manner." It is true that the case there involved the payment of a salary as fixed by law, but we do not see that the principle is to be limited in its application to such a case. In the present case the facts are undisputed—that is, the facts out of which arose the duty as defined and declared by the statute. There, then, can be no sound objection urged to enforcing the performance of this duty by directing that the obligation of the respondent be carried out in a particular manner, to wit, by making an order excluding the land in question.

*Inglin v. Hoppin*, 156 Cal. 483, 105 Pac. 582, is an instructive case and somewhat cognate to the case here. There the writ was invoked to compel the board of supervisors to set aside an order made by it in the matter of the petition to have certain lands situated in a certain reclamation district set off and erected into an independent district, by which order the petition was denied. After citing numerous cases, the court said: "While, of course, it is the general rule that mandamus will not lie to control the discretion of a court or officer, meaning by that that it will not lie to force the exercise of discretion in a particular manner, the above cases abundantly show that mandamus will lie to correct abuses of discretion, and will lie to force a particular action by the inferior tribunal or officer, where the law clearly establishes the petitioner's right to such action."

The findings of fact by the board of di-

rectors show very clearly that the evidence from which the findings were deduced established petitioner's right to have his land excluded. It was found "that said pumping plant does not constitute a source or system as contemplated by section 78 of the irrigation act, and that said lands are not already irrigated or entitled to be irrigated from another source or by another system of irrigation works." This finding is but a conclusion of law based on what we regard as an erroneous construction of the statute. The statement which immediately follows, to wit, "and we deem it not for the best interests of said district that the lands mentioned in said petition should be excluded, and that petitioner has failed to establish any facts showing that he is entitled to have such lands excluded," is but a deduction from this same erroneous construction of the statute. This is apparent from the fact that the board of directors found that petitioner's land was being irrigated by means of a pumping plant, which fact established entitled him to have the land excluded, and this fact could not be nullified by an erroneous meaning given to the statute.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

20 Cal. App. 319

PLUMMER et al. v. AGOURE. (Civ. 1,223.) (District Court of Appeal, Second District, California. Nov. 8, 1912. Rehearing Denied Dec. 7, 1912. Denied by Supreme Court Jan. 6, 1913.)

1. LANDLORD AND TENANT (§ 291\*)—UNLAWFUL DETAINER—RIGHT OF ACTION—GRANTEE OF LESSOR.

Code Civ. Proc. § 1161, provides that a tenant for years is guilty of unlawful detainer when he continues in possession without the permission of his landlord or "the successor in estate of his landlord," and Civ. Code, § 821, provides that one to whom realty is transferred, upon which rent is reserved, is entitled to the same remedies for recovery of rent or nonperformance of the lease as his grantor might have had. *Held*, that an attornment of the tenant to his lessor's vendee was not necessary to enable the vendee to maintain unlawful detainer.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1217-1241, 1243-1267; Dec. Dig. § 291.\*]

2. LANDLORD AND TENANT (§ 208\*)—LIABILITY FOR RENT.

A lessee unlawfully withholding land and in default for rent cannot escape liability by assigning the lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 737, 821-831; Dec. Dig. § 208.\*]

3. LANDLORD AND TENANT (§ 291\*)—PARTIES—ASSIGNEE OF LESSEE.

Since a lessee in default in rent could not escape liability in unlawful detainer by assigning the lease, his assignee was improperly substituted as defendant in such proceedings.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1217-1241, 1243-1267; Dec. Dig. § 291.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. FORCIBLE ENTRY AND DETAINER (§ 45\*)—  
APPEAL AND ERROR (§ 986\*)—STAY OF PROCEEDINGS—DISCRETION.

A stay of proceedings pending an appeal in unlawful detainer proceedings is not a matter of right but one for the exercise of the trial court's discretion, so that a ruling thereon will not be disturbed on appeal in the absence of abuse thereof.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. § 186; Dec. Dig. § 45;\* *Appeal and Error*, Cent. Dig. § 3892; Dec. Dig. § 986.\*]

5. FORCIBLE ENTRY AND DETAINER (§ 45\*)—  
APPEAL—STAY OF PROCEEDINGS.

The power to stay proceedings on a judgment in unlawful detainer is vested by Code Civ. Proc. § 1176, in the trial court, and, if it does not order a stay, the appellate court has no power to order a supersedeas.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. § 186; Dec. Dig. § 45.\*]

6. FORCIBLE ENTRY AND DETAINER (§ 45\*)—  
REVIEW—REFUSAL TO STAY PROCEEDINGS.

While a trial judge's action in refusing to stay proceedings on appeal is subject to review and reversal for abuse of discretion, it cannot be reviewed upon application for a writ of supersedeas.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. § 186; Dec. Dig. § 45.\*]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by Eugene R. Plummer and others against Pierre Agoure. From a judgment for plaintiffs, and from an order denying a motion for a new trial, defendant appeals. Affirmed, and application for supersedeas made to appellate court denied.

C. W. Byrer, of Los Angeles, for appellant. Haas & Dunnigan, of Los Angeles, for respondents.

SHAW, J. Action for unlawful detainer. Defendant failed to plead to the complaint, whereupon judgment by default was rendered in favor of plaintiffs for the recovery of possession of the real estate involved and damages in the sum of \$650 for the detention of the same. Defendant appeals from the judgment, as well as from an order denying his motion made after judgment to set aside the default.

The appeal from the judgment is based upon the claim that the complaint fails to state a cause of action. The complaint shows that on August 31, 1907, plaintiffs and several other persons owning the tract of land in question executed to defendant a lease thereof upon certain covenants and reservations of rent contained therein; that thereafter by two deeds one of which was executed March 10, 1908, and the other August 3, 1909, plaintiffs acquired from their colessors title to the whole of the property; that defendant made default in the payment of an installment of rent which, under the terms of the lease, became due and payable on

April 1, 1912, whereupon, on April 5, 1912, plaintiffs, pursuant to the provisions of section 1161 of the Code of Civil Procedure, caused to be served upon defendant a written notice signed by them, requiring defendant, within three days, to pay said installment of rent, or failing so to do, surrender possession of the premises to plaintiffs.

[1] Appellant contends that, in the absence of an allegation showing an attornment by defendant as tenant, none but the original lessors named in the lease could give the notice or maintain the action. The right to maintain an action by "the successor in estate of his landlord" is expressly conferred by section 1161 of the Code of Civil Procedure. Moreover, section 821 of the Civil Code provides: "A person to whom any real property is transferred or devised, upon which rent has been reserved, or to whom any such rent is transferred, is entitled to the same remedies for recovery of rent, for non-performance of any of the terms of the lease, or for any waste or cause of forfeiture, as his grantor or deviser might have had." Nor was any attornment of the tenant necessary to enable plaintiffs as vendees of the leased lands to maintain the action. Section 1111, Civ. Code; *McDonald v. Hanlon*, 79 Cal. 442, 21 Pac. 861. The case of *Reay v. Cotter*, 29 Cal. 168, relied upon by appellant, is not applicable to the existing statute. *Martel v. Meehan*, 63 Cal. 47. Appellant's contention upon this point is without merit.

[2] Upon the grounds of excusable neglect, inadvertence, and surprise, defendant moved the court to set aside his default and vacate the judgment. In support thereof he presented a proposed answer and affidavit of merits. The motion was denied. There was no abuse of discretion on the part of the court in so ruling. The proposed answer is in form evasive and must be construed as admitting the nonpayment of rent, service of notice, and possession of the premises by defendant, all as alleged in the complaint. Hence the sole ground for the claim of relief, as appears from the affidavit and answer, is that prior to the commencement of the proceedings defendant, who retained possession of the premises, assigned the lease to one John Lapique, by reason of which "transaction (defendant) was led to believe that he had been duly exonerated from all liability that may have accrued against him by virtue of said lease." Certainly no argument is required in support of the proposition that one unlawfully withholding the possession of land and in default for the rent thereof cannot escape his obligation by assigning the liability to another.

[3] It also appears that, by an ex parte order made by the court, John Lapique was substituted as defendant in said action and given 30 days within which to file an answer therein, which order was, a few days there-



after, vacated and set aside. The first order was clearly erroneous, and hence it was not error for the court to vacate the same. Lapique, who was the party aggrieved by the vacation of the order, is not complaining on account of the ruling, and defendant is in no position to complain.

The rendition of judgment was followed by the issuance to the sheriff of an execution and writ of possession under and by virtue of which plaintiffs were placed in possession of the land. Thereafter defendant served and filed notice of appeal from the judgment, and on the same day, pursuant to the provisions of section 945 of the Code of Civil Procedure, filed an undertaking upon which he applied to the court for an order directing a stay of proceedings upon the judgment as provided by section 1176 of the Code of Civil Procedure. Thereupon the court ordered that the writ of possession (which, however, had already been executed) and the execution be recalled until the further order of court, and at the same time required plaintiffs to appear at a time and place fixed hereof and show cause why the execution and writ of possession theretofore issued in said proceedings should not be stayed pending the appeal from said judgment. At the hearing the court denied the application for a stay of proceedings. Defendant appeals from this order.

[4] A stay of proceedings pending an appeal in a proceeding of this character is not a matter of right (*Gross v. Kelleher*, 73 Cal. 639, 15 Pac. 362), but one in the determination of which the court exercises large discretionary powers. Hence the ruling thereon will not be disturbed by this court unless an abuse of discretion is made to appear. Suffice it to say that the record is silent as to any matter indicating erroneous action on the part of the court in making the ruling. During the pendency of the appeal defendant applied to this court for a writ of superseas restoring him to possession of the property from which he had been ousted under and by virtue of proceedings had upon the judgment.

[5] By virtue of section 1176, *supra*, the power to stay proceedings upon a judgment in unlawful detainer is vested in the trial judge, and, in the absence of such direction, this court has no power to order a superseas. *Bateman v. Superior Court*, 139 Cal. 140, 72 Pac. 922; *Cluness v. Bowen*, 135 Cal. 660, 67 Pac. 1048.

[6] While the action of the trial judge in refusing to direct a stay of proceedings is subject to review on appeal, and such order will be reversed for an abuse of discretion in making the ruling, it cannot be reviewed upon an application for a writ of superseas.

It follows that the judgment and orders appealed from should be affirmed, and the

application for a writ of superseas made in this court denied; all of which is so ordered.

We concur: ALLEN, P. J.; JAMES, J.

20 Cal. App. 339

PEOPLE v. MEASOR. (Cr. 261.)

(District Court of Appeal, Second District, California. Nov. 12, 1912.)

1. CRIMINAL LAW (§ 1130\*)—APPEAL—BRIEFS—NECESSITY.

An appellate court will not search the record for prejudicial error where appellant's attorney fails to file points and authorities or assign any ground for a reversal, but will affirm the conviction under Pen. Code, § 1253, providing that the judgment may be affirmed if the appellant fail to appear, but can be reversed only after argument, even though the respondent fail to appear, especially in view of section 1247 requiring the appellant within five days after taking an appeal to file the points upon which he relies.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2956, 2965–2970, 3205; Dec. Dig. § 1130.\*]

2. CRIMINAL LAW (§ 1132\*)—APPEAL—DETERMINATION.

The proper and efficient administration of the penal laws of the state requires a speedy disposition of all appeals in criminal cases.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2980–2983; Dec. Dig. § 1132.\*]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Kate Measor was convicted of crime, and she appeals. Affirmed.

Henry W. Nisbet, of San Bernardino, and Dick Foye Harding, of Santa Ana, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. [1] Notwithstanding the fact that the transcript herein, containing upwards of 200 pages, was filed August 14, 1912, and the case duly set for hearing October 28, 1912, the attorneys of record purporting to appear for defendant neglected and failed to file any points and authorities herein. At the calling of the case at the October term, one of defendant's attorneys of record, while making no argument and submitting no points and authorities in support of the appeal, asked that 10 days be granted defendant within which to file points and authorities in support of her appeal. The time was granted as requested, but her attorneys, still unmindful of their obligation to both their client and the court, have neglected and failed to file points and authorities, or otherwise assign any ground upon which to base a claim for a reversal herein.

The law provides that in criminal appeals the reporter, upon demand, shall prepare a transcript, the duty of certifying which is imposed upon the trial judge, and when so certified the clerk is required to file the same in the appellate court. The Code, however, does not impose upon the appellate court the

duty of examining the record in search for prejudicial error justifying a reversal. This court will not assume such labor, but, where attorneys neglect their duty and, in violation of their obligation, abandon the interest of a client, will assume that no ground for reversal exists, and, as provided by section 1253 of the Penal Code, order the judgment affirmed. *People v. Albitre*, 153 Cal. 367, 95 Pac. 653; *People v. McDermott*, 97 Cal. 247, 32 Pac. 7. Section 1247, as amended, not only provides that upon an appeal being taken the defendant must within five days file with the clerk and present to the trial court an application stating the grounds of the appeal and the points upon which appellant relies, and designate what portion of the photographic notes will be required for use on said appeal, but further expressly provides that, if such application is not filed within said time, the appeal is ineffectual for any purposes and shall be deemed dismissed. To this we add that, where an appeal is perfected in accordance with the provisions of said section, and defendant neglects to file points and authorities within the time prescribed therefor, or within such further time as the court may by order designate, and likewise fails to appear at the time when the appeal is regularly called for hearing, this court, in the absence of any sufficient showing for relief, will deem such neglect and want of action sufficient ground for affirming the judgment in accordance with the provisions of section 1253 of the Penal Code. It is quite true that in some cases defendants may, by reason of the enforcement of this rule, be deprived of a hearing on appeal.

[2] Nevertheless, the proper and efficient administration of the penal laws of the state, due regard being had to establish procedure, demands a speedy disposition of all appeals taken in criminal cases.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

20 Cal. App. 335

VREDENBURGH v. REHER. (Civ. 1,210.)

(District Court of Appeal, Second District, California. Nov. 9, 1912.)

ELECTIONS (§ 194\*)—BALLOTS—DISTINGUISHING MARKS.

Under Pol. Code, § 1211, forbidding distinguishing marks, a ballot on which the cross is not in the voting square but a distance therefrom and within the rectangular space containing the name of the candidate could not be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.\*]

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by Levi Vredenburg against James C. Reher. Judgment for plaintiff, and defendant appeals. Affirmed.

Ralph E. Swing, of San Bernardino, for appellant. Will H. Willis and E. M. Guthrie, both of Los Angeles, for respondent.

ALLEN, P. J. This appeal involves a contest over the result of an election for the office of trustee, held in the city of Chino April 8, 1912, at which election the parties hereto were rival candidates for such office. The election returns, as certified by the board of election, show contestee Reher to have received a plurality of the votes cast at such election. The canvassing board found the result as so returned and declared Reher elected to such office, and ordered a certificate of election issued to him, which certificate was issued, and contestee thereupon qualified. This contest was commenced within due time and a recount had, at which time the trial court found in favor of contestant and ordered judgment in his favor, from which the contestee appeals.

The questions presented upon the appeal relate alone to the action of the court with reference to certain ballots presented upon the recount, and which original ballots are before this court for examination. We are unable to see that the court erred in its action in relation to such ballots. Plaintiff's Exhibit 4 is a ballot on which the cross is not in the voting square but a distance therefrom and within the rectangular space containing the name of the candidate. Under section 1211 of the Political Code this ballot should not be counted, and the trial court so declared. It is claimed by appellant that the ballot marked Exhibit A should have been counted for contestee. We think upon an inspection it is obvious that no cross was intended to be placed in the square opposite contestee's name, but that the indistinct mark there was produced through a blot occasioned by folding the ballot. The ballots marked Exhibits F and G, when examined, clearly appear to have a cross in the square opposite the name of contestant, and that the apparent mark opposite contestee's name was also produced by blot occasioned in folding the ballot. Ballot marked Exhibit D to our minds shows the cross in the proper place, entitling it to be counted for contestant. We do not regard the ballot marked Exhibit H as objectionable upon the ground of a distinguishing mark, under section 1211 of the Political Code. Exhibit I, while indistinct, appears by a critical examination to contain the cross in the proper place—opposite the name of contestant. It is apparent that the mark was not produced, as in the other cases, through careless folding of the ballot. We think this ballot was properly counted for contestant. The carelessness of the voters in the instances presented renders it a difficult matter to determine in every case what intent the voter clearly expressed.

We think, however, that the learned trial judge correctly determined the questions pre-



sented, and that the judgment of the superior court should be affirmed, and it is so ordered.

We concur: JAMES, J.; SHAW, J.

(20 Cal. App. 305)

CLARK v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

(Civ. 1,251.)

(District Court of Appeal, Second District, California. Nov. 6, 1912.)

1. GUARDIAN AND WARD (§ 13\*) — APPOINTMENT OF GUARDIAN—TEMPORARY CUSTODY OF INFANT—CHANGE.

Before a court may change the custody of a minor, a proper motion must be presented with some evidence that the best interests of the child require such action, since proceedings affecting infants and the appointment of guardians are special in their nature, and must be had in accordance with the procedure outlined by the Code.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 40-52; Dec. Dig. § 13.\*]

2. GUARDIAN AND WARD (§ 13\*)—CUSTODY—REVIEW OF PROCEEDINGS — EVIDENCE — FINDINGS.

On motion to be appointed temporary guardian of a child in place of another, a conclusion of the trial court that a refusal to do so would imperil the interests of the minor cannot be disturbed on appeal, though supported only by slight evidence.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 40-52; Dec. Dig. § 13.\*]

3. GUARDIAN AND WARD (§ 13\*)—TEMPORARY GUARDIANSHIP—EVIDENCE.

In an action for the custody of a child, evidence held sufficient to support a finding that a failure to change the temporary custody of the child would imperil its interests.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 40-52; Dec. Dig. § 13.\*]

4. GUARDIAN AND WARD (§ 13\*)—INFANTS—INTERESTS "IMPERILED" — CHANGE OF CUSTODY.

The interests and welfare of an infant are "imperiled" within Code Civ. Proc. § 1747, providing that in such a case the court may provide for the temporary custody of the child, whenever it appears to be to the best interests of the minor that a change be ordered.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 40-52; Dec. Dig. § 13.\*]

5. PARENT AND CHILD (§ 2\*)—RIGHT OF PARENT—CUSTODY OF CHILD.

The parent of a minor has no property right in his offspring, and his privilege of being awarded its custody is only a matter of right when the parent is found to be reasonably fitted to become such guardian.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 4-32; Dec. Dig. § 2.\*]

Application by J. Ross Clark for a writ of certiorari to annul an order made by the superior court of the state of California in and for the county of Los Angeles. Denied.

J. W. McKinley, C. O. Whittemore, and Herbert L. McNair, all of Los Angeles, for petitioner. Flint, Gray & Barker, Oscar C. Mueller, and Leo V. Youngworth, all of Los Angeles, for respondent.

PER CURIAM. Application in certiorari to annul an order made by the superior court relating to the temporary custody of an infant aged 2½ years, named J. Ross Clark, II.

The child is the son of Walter Miller Clark and Virginia M. Clark (Tanner). The father was lost at sea on or about the 15th day of April, 1912, and a few months thereafter, and on or about the 26th day of September, 1912, the mother of the boy married one Tanner at the city of New York. Immediately upon her marriage, she departed for Paris, France. At the time of her departure from California for the East, she left the child at her mother's place of residence in charge of Margaret Heffron, a nurse. After the mother had gone away, J. Ross Clark, the parental grandfather of the boy, obtained the custody of the child by causing its nurse to take it to his home. He had previously been appointed, with the consent of the mother, as guardian of the estate of the minor. On October 8, 1912, he filed a petition in the superior court asking for letters of guardianship of the person of the boy. At the time this petition was filed an order was made by the superior court giving temporary guardianship of the person of the minor to the petitioner pending the final hearing on the application. When news of the latter proceedings was transmitted to the boy's mother, who was then in France, she immediately returned to the city of Los Angeles and proceeded in the superior court to file an answer to the petition mentioned of J. Ross Clark and to ask that the temporary custody of the minor be given to her. The court, after hearing the parties, made an order in the following form: "It is ordered that the temporary custody of the minor J. Ross Clark, II, be restored to his mother, Virginia M. Tanner, and that that portion of the order herein dated October 8, 1912, providing for temporary guardianship of the minor, be set aside, and that the question of the guardianship of the person of said minor be left to be determined at the hearing herein on November 20, 1912. It is further ordered that Miss Margaret Heffron be retained as the nurse of said child, and it is further ordered that said nurse take said child to the home of its grandparents, Mr. and Mrs. J. Ross Clark, at least daily, until the further hearing herein, and said nurse to take said child to said home of Mr. and Mrs. J. Ross Clark at such other times as, in the judgment of said nurse, may deem prop-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

er and advisable under the circumstances. It is further ordered that under no circumstances shall said child be removed from its home in the city and county of Los Angeles."

It is this order of the superior court that we are asked to annul on the ground that it was entered without jurisdiction. On the hearing had, which was followed by the making of the order complained of, affidavits were introduced in evidence and various witnesses heard. It was the claim of J. Ross Clark that the child had been abandoned by its mother, and that it was for the best interests of the minor that the custody be retained by him. Margaret Heffron had been the child's nurse from October 6, 1911, during the lifetime of his father, and continuously thereafter. She made affidavit that the mother, prior to her going to New York where she was married to Mr. Tanner, and after the death of her first husband in April, 1912, made two trips to San Diego, one of a week's duration, and that at other times she was absent for days at a time, leaving the child always in the care of said nurse, and that while at home and in the same house with the child frequently made no effort to see him, one of such periods being from Saturday noon until Monday noon following; and that the mother was absent from him nearly every day and frequently for the whole day, and that she paid very little attention to the infant. On the other hand, the mother asserted that she had great affection for the child. She asserted, further, that she had gone to Paris only at the insistence of the new husband, who was called thence by the illness of his mother. From the affidavits filed it appeared that the manner in which J. Ross Clark obtained possession of the child was a question of dispute; it being contended by him that the grandmother, in whose home the child was, consented that it be taken by him, and this statement was corroborated by that of the nurse, although denied by the grandmother.

If the custody of the minor was in J. Ross Clark at the time he filed his petition for letters of guardianship of its person, then the authority of the court to disturb that custody pending a hearing on the petition must be found in the provisions of section 1747, Code of Civil Procedure, which, in part, provides as follows: "In all such proceedings, when it appears to the satisfaction of the court, either from a verified petition, or from affidavits, that the welfare of the minor will be imperiled if such minor is allowed to remain in the custody of the person then having the care of such minor, the court may make an order providing for the temporary custody of such minor until a hearing can be had on such petition." It seems to be admitted that the first order appointing J. Ross Clark tempo-

rary guardian of the minor was made without authority, and may be treated as of no effect. As to the application of the mother upon which the court in the second instance acted, that application may be considered as one on behalf of the parent under the provisions of the section quoted to remove the minor from the temporary custody of J. Ross Clark pending hearing on the petition for letters of guardianship.

[1] Proceedings affecting infants and the appointment of guardians are special in their nature, and must be had in accordance with the procedure outlined by the Code. The superior court, before it was authorized to provide for a change in the temporary custody of the minor, must have had a proper motion presented to it and some evidence to the fact that the best interests of the child would be imperiled unless such order was made.

[2] Such a motion was presented on behalf of Mrs. Tanner, and if the action taken can be sustained by any evidence whatsoever which was presented to the superior judge, however slight that evidence may be, we cannot here disturb the conclusion there made.

[3] We think that the order finds some support in the affidavits of the parties and testimony heard.

[4,5] To say that the best interests of the child shall be imperiled before the action indicated by section 1747 can be taken, amounts to no more, in our opinion, than to say that whenever it appears to be for the best interests of the minor such change of custody may be ordered. And this consideration for the welfare of the child is of first importance. The parent of a minor has no property right in his or her offspring, and the privilege of the parent to have awarded to it the custody of the child is only a matter of right when the parent is found to be reasonably fitted to become such guardian. As is said in *Re Lundberg*, 143 Cal. 402, 77 Pac. 156: "The right of the state to provide for the disposition of the custody of children whose safety and welfare are menaced by the conduct or incompetency of their natural guardians has been too long established to be seriously questioned." It may be here noted that in passing upon the question as to where the temporary custody of this infant should be lodged the court was careful to limit the privileges of the mother in that regard. Reference to the order shows that the parental rights accorded to her pending final hearing were restricted and made subject to certain discretionary powers affecting the custody of the child as they were conferred upon the nurse Heffron, and in the exercise of which discretion the mother was left no right of interference. For instance, the order required the nurse to take the child to the home of Mr. and Mrs. J. Ross Clark at



least daily; that is, at least once a day. No direction was given as to the length of these daily visits; that matter being also left to the discretion of the nurse. She was also authorized, as her best judgment might direct, to take the child there at such other times as she might deem appropriate and advisable. Further, the order provided that the child might be taken upon automobile rides by Mr. and Mrs. Clark; the only limitation to the exercise of that privilege being that the nurse should on such occasions accompany them. Doubtless the court, in view of the showing that the mother had frequently absented herself from her child and had for two nights and a day at a time remained in the same house with her offspring without visiting it, deemed it best to see that the nurse who had attended it so constantly for more than a year should be retained as the actual custodian of the boy. At any rate, this court cannot say, viewing the evidence upon which the court was called upon to act, that the judge was without authority to order the child into the limited custody of its mother pending the day set when the question of the mother's fitness to be the guardian of her son might be fully inquired into. The fact that this court, under the evidence exhibited, might have felt impelled to act differently than did the superior court, and might have, under such evidence, refused to disturb the custody of the minor pending final hearing, when the matters in issue as to the abandonment by the mother of her child, or her fitness to be made the guardian of its person, could be fully inquired into, cannot have any influence in the decision of the legal questions presented on this application.

It appearing that the superior court has not exceeded its jurisdiction in making the order complained of, the writ herein sued out will not lie.

It follows that the petition should be denied; and it is so ordered.

20 Cal. App. 311

**WALL ESTATE CO. v. STANDARD BOX CO.** (Civ. 1,091.)

(District Court of Appeal, First District, California. Nov. 8, 1912.)

**1. LANDLORD AND TENANT (§ 150\*)—REPAIRS—COMMON LAW.**

At common law, and in the absence of any agreement, the landlord is generally under no obligation to keep the demised premises in repair.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 536-557; Dec. Dig. § 150.\*]

**2. STATUTES (§ 211\*)—CONSTRUCTION—CODE HEADLINES.**

Headlines, which precede each article of the Code, numbered to correspond to the sections following, and purporting to give, in brief, the subject of each of the sections, are parts of the statute limiting and defining the sec-

tions to which they refer, and are entitled to more consideration than the title to an entire act, and should be given effect according to their import.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 288; Dec. Dig. § 211.\*]

**3. LANDLORD AND TENANT (§ 151\*)—REPAIRS—STATUTE—"OCCUPATION OF HUMAN BEINGS"—"DILAPIDATIONS."**

Within Civ. Code, § 1941, providing that the lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it in a condition fit for such occupation and repair all subsequent dilapidations which render it untenable, a building leased for and used as a box factory, in which a large number of persons were employed, was not one intended for "the occupation of human beings"; and the obligation to repair "dilapidations," rendering it untenable does not require the landlord to install new conveniences.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 537; Dec. Dig. § 151.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 4906, 4907; vol. 8, p. 7738.]

**4. LANDLORD AND TENANT (§ 151\*)—REPAIRS—STATUTORY PROVISIONS—NEW IMPROVEMENTS—"DILAPIDATIONS."**

Civ. Code, § 1942, which provides that if, within a reasonable time after notice to the lessor of "dilapidations" which he ought to repair, he neglects to do so, the lessee may repair the same himself where the cost is less than one month's rent, and may deduct such cost from the rent, does not authorize a tenant to put in new work or new conveniences which did not before exist, since such work is not "dilapidations."

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 537; Dec. Dig. § 151.\*]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by Wall Estate Company against the Standard Box Company. Judgment for plaintiff, and from an order denying a new trial defendant appeals. Affirmed.

Costello & Costello and A. W. Brouillet, all of San Francisco, for appellant. A. L. Weil, of San Francisco, for respondent.

**KERRIGAN, J.** This action was in unlawful detainer and for the recovery of the sum of \$500, alleged to be due for rent under a lease had by defendant. The premises involved were business property used as a box factory, in which a large number of persons were employed. The property is situate in San Francisco, and the board of health of that city ordered the plaintiff and defendant to make certain changes in the building. This order directed the installation of toilets, the removal of wooden box hoppers, and their replacement by more modern contrivances, flushed closets, and other work necessary, in the opinion of said board, to put the premises in a sanitary condition. Defendant gave notice to the plaintiff to make these improvements, which plaintiff declined to do; whereupon the defendant complied with the order of said board, expending

in so doing the sum of \$355. The defendant, answering the allegations of the complaint, consented to confess judgment for the sum of \$145, which, with the \$355 expended by defendant, constituted the amount of plaintiff's demand. Plaintiff recovered judgment in the sum of \$500, less the \$145 paid to it by defendant since the commencement of the action, with interest and costs of suit. The appeal is from an order denying defendant's motion for a new trial.

The lease contained the usual covenants, but there was no provision therein as to who should make repairs. Section 1941 of the Civil Code provides that the lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it in a condition fit for such occupation, and repair all subsequent dilapidations which render it untenable. Section 1942 of the same Code authorizes the tenant, after reasonable notice to the lessor, to make the necessary repairs where the cost does not require an expenditure of more than one month's rent.

Two questions are presented and urged for decision: First, in imposing the duty on the landlord to repair, is section 1941 confined to dwelling houses and similar structures, or does it cover all classes of buildings where human beings assemble, such as, as in the present case, a box factory where a large number of persons are daily employed? And if this is so, second, does section 1942, permitting the tenant to repair where the landlord has refused, refer to new work, such as here, the installation of sanitary necessities, which did not theretofore exist in the building, under the compulsion of the board of health?

[1] At common law it is the well-settled rule that, in the absence of any agreement between the parties, the landlord is generally under no obligation to keep the demised premises in repair. 18 Am. & Eng. Ency. of Law, 215. The common-law rule in this respect is in force in this state, except as modified by the sections above referred to. In the case of *Willson v. Treadwell*, 81 Cal. 58, 22 Pac. 304, it is held that the landlord of business property is not bound to make repairs where the lease contains no covenant obligating him to do so. That was an action by an employé of a tenant of business property against the landlord for damages for personal injuries caused by a defective stairway, and the controlling question was whether or not the landlord was legally bound to make necessary repairs. The court held that, in the absence of a covenant in the lease requiring him to do so, no such obligation rested upon him. Upon this subject several of the states have statutes more or less similar to ours which have received judicial construction. The case of *Tucker v. Bennett*, 15 Okl. 187, 81 Pac. 423, is like the case at

bar. There it was decided that where the landlord rented the second story, in a store block, which was intended to be used by the lessee for printing and publishing a newspaper therein, in the absence of an agreement in the lease requiring it, he was not bound to put the building in a condition fit for occupation, and to repair all subsequent dilapidations thereof, as the property leased was not a building intended "for occupation of human beings" within the meaning of the statute. In that case the court cites *Willson v. Treadwell*, supra, with approval. So, also, in *Edmison v. Aslesen*, 4 Dak. 145, 27 N. W. 82, the rule is announced that a landlord, who rents the cellar and first story in a store block, is not bound to keep the same in repair in the absence of an agreement, as the property leased is not a building intended for the "occupation of human beings" within the meaning of the Civil Code. See, also, 24 Cyc. 1083. The same doctrine is announced in *Landt v. Schneider*, 31 Mont. 15, 77 Pac. 307.

[2] The view we have taken appears to be in accord with the intention and purpose of the Legislature, as revealed by the headline of section 1941 of the Civil Code as originally adopted in the year 1872 (Civ. Code 1872, p. 341), which reads, "Lessors to make dwelling house fit for its purpose." Headnotes which precede each article "are numbered to correspond to the sections following, and purport to give in brief the subject of each of the sections. These headnotes are entitled to more consideration than the 'title' to an entire act. They are parts of the statute limiting and defining the sections to which they refer. To refuse to give them effect according to their import would be to make the law, not to administer it"—citing cases. *Sharon v. Sharon*, 75 Cal. 1, 16, 16 Pac. 345, 352.

[3, 4] It must be held therefore that the building leased in this case is not one intended for the occupation of human beings as contemplated by the provision of the Civil Code cited.

Furthermore, under sections 1941 and 1942 of the Civil Code, the only duty of the landlord, after putting the building into fit condition for the occupation of human beings, is to "repair all subsequent dilapidations"; and the right given to the tenant under section 1942 is in the following terms: "If within a reasonable time after notice to the lessor of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, where the cost of such repairs does not require an expenditure greater than one month's rent of the premises, and deduct the expenses of such repairs from the rent. \* \* \*" This does not authorize the tenant to put in new work or new conveniences which did not theretofore exist. Much, if not the greater part, of the work for which



the defendant claims credit in the case at bar was new in character, and was not for the repair of dilapidations. No effort was made at the trial by the defendant to show how much of the expense incurred by it in complying with the order of the board of health was for new work and new conveniences, nor how much was for repair of dilapidations. Even if we conceded for the purposes of this case that the two sections relied upon by a defendant apply to a building used for manufacturing and business purposes exclusively, we think it quite clear that the sections do not require the landlord after the beginning of the tenancy to install new conveniences, but only require him to repair "subsequent dilapidations" of the building which render it untenable.

The order denying the motion for a new trial is, accordingly, affirmed.

We concur: LENNON, P. J.; HALL, J.

20 Cal. App. 316

**BLAIR v. BROWNSTONE OIL & REFINING CO.** (Civ. 1,182.)

(District Court of Appeal, Second District, California. Nov. 8, 1912.)

**1. COSTS (§ 258\*)—"COSTS" ON APPEAL—EXPENSE OF PRINTING BRIEFS.**

The expense of printing briefs for use in the appellate court is not costs which the successful party may recover under Code Civ. Proc. §§ 1033, 1034, requiring the party claiming costs to file and serve a memorandum of the items of costs; the word "costs" meaning fees and charges required by law to be paid to the courts or some of their officers, the amount of which is fixed by law.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 978-982; Dec. Dig. § 258.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1633-1640; vol. 8, p. 7620.]

**2. COSTS (§ 224\*)—COSTS ON APPEAL—DISCRETION OF COURT.**

An appellate court has discretion to determine what shall be considered as necessary costs and charges incurred on an appeal.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 838-843; Dec. Dig. § 224.\*]

**3. COSTS (§ 258\*)—ON APPEAL—PRINTING BRIEFS.**

Supreme Court rule 13 (119 Pac. xii), declaring that the expense of printing transcripts on appeal and pleadings and other papers constituting the record shall be allowed as expense, does not include the expense for printing briefs, and it is not recoverable as costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 978-982; Dec. Dig. § 258.\*]

**4. COSTS (§ 254\*)—CASH PAID TO OFFICIAL REPORTER FOR TRANSCRIPT OF EVIDENCE.**

The cash paid to the official reporter of the trial court for a transcript of the evidence is not recoverable as costs on appeal, unless the order directing the reporter to transcribe his notes has been made in the manner prescribed by Code Civ. Proc. § 274.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 962-966, 974-977; Dec. Dig. § 254.\*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Charles H. Blair against the Brownstone Oil & Refining Company. From an order taxing costs, plaintiff appeals. Affirmed.

See, also, 17 Cal. App. 471, 120 Pac. 41.

William H. Fuller and Chas E. Putnam, both of Los Angeles, for appellant. Leonard B. Slosson, of Los Angeles, for respondent.

**JAMES, J.** Plaintiff herein heretofore appealed to this court from a judgment entered in favor of defendant and by that appeal secured a reversal of the judgment, with an order that he might recover his costs of appeal. Upon the going down of the remittitur he duly filed in the superior court a memorandum setting forth a statement of costs and disbursements accruing upon the appeal. This bill of costs contained an item of \$26.60 purporting to be for money paid to the official reporter of the superior court for transcript of evidence, and the items of \$22.50 and \$13.50 designated as the amounts paid for having printed the opening and closing briefs filed on behalf of appellant on the appeal. Defendant objected to these items being charged on the ground that they were not such as were taxable against it, and the superior court disallowed the same. From that order the plaintiff has now appealed.

[1] Section 1033 of the Code of Civil Procedure provides that the party in whose favor a judgment is rendered, and who claims his costs, "must deliver to the clerk, and serve upon the adverse party, \* \* \* a memorandum of the items of his costs and necessary disbursements in the action, \* \* \* verified by the oath of the party, or his attorney or agent, \* \* \* stating that to the best of his knowledge and belief the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding." Section 1034 of the same Code, immediately following, provides: "Whenever costs are awarded to a party by an appellate court, if he claims such costs, he must, within thirty days after the remittitur is filed with the clerk below, deliver to such clerk a memorandum of his costs, verified as prescribed by the preceding section, and thereafter he may have an execution therefor as upon a judgment." The expense of printing briefs to be used in the appellate court, in our opinion, is not an expense intended to be considered as costs which the successful party shall be allowed to recover. Generally speaking, by the term "costs" we understand to be meant those fees and charges which are required by law to be paid to the courts or some of their officers, or the amount of which is expressly fixed by law. It has been held that a trial judge has discretion in determining what expenses and dis-

bursements have been necessarily incurred in the course of the trial, and that his determination of such a question will not be disturbed on appeal, except where an abuse of such discretion is shown. *Miller v. Highland Ditch Co.*, 91 Cal. 103, 27 Pac. 536. In that case it was held, however, that, unless the charges made appeared upon their face to be proper and necessary, the burden would be upon the party claiming the right to collect them to show that the expense or expenses had been necessarily incurred. The matter of the amount of costs on appeal is one which under the old practice act was settled in the appellate court. Later the practice was adopted of filing a memorandum of costs in the lower court (*Ex parte Burrill*, 24 Cal. 350), and this practice became the settled rule when section 1034 of the Code of Civil Procedure was adopted, which expressly required such memorandum of costs to be filed with the clerk of the court below.

[2] But as we have suggested, a discretion rests with the trial court to determine what are the necessary costs and disbursements incident to the trial, and likewise it must be said that the appellate courts have discretion to determine what shall be considered as necessary costs and charges incurred upon the appeal.

[3] Our Supreme Court by rule 13 (119 Pac. xii), has adopted the following regulation affecting the matter of costs incurred for printing papers to be used on appeal: "The expense of printing transcripts on appeal in civil causes and pleadings, affidavits, or other papers constituting the record in original proceedings upon which the case is heard, required by these rules to be printed, shall be allowed as costs, and taxed in bills of costs in the usual mode." By necessary construction it follows that other printing charges not included within the specifications of the rule, such as for the printing of briefs, are not to be deemed as proper costs or disbursements which the successful party is entitled to collect. We cite: *Bond v. United Railroads of San Francisco*, 128 Pac. 786.

[4] The item of \$26.60 was charged as cash paid to the official reporter of the superior court for transcript of evidence. It does not appear that any application was made to or order secured from the superior judge directing the reporter to transcribe his official notes, and unless such order was made, agreeable to the provisions of section 274 of the Code of Civil Procedure, the party paying such charges cannot recover them as costs. In our opinion, the order of the court disallowing the charges enumerated as not being proper costs and disbursements chargeable against the adverse party, was without error.

The order is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(20 Cal. App. 280)

**SMITH v. JACCARD.** (Civ. 1,098.)

(District Court of Appeal, First District, California. Nov. 2, 1912. Rehearing Denied by Supreme Court Dec. 30, 1912.)

**1. APPEAL AND ERROR (§ 624\*)—TRANSCRIPT—FILING—DISCRETION.**

The superior court did not abuse its discretion in certifying to a transcript not filed by the reporter with the clerk within the 20 days allowed by Code Civ. Proc. § 953a, especially where the effect tended to a determination of the appeal upon its merits; such section being merely directory, and failure of the reporter to file the transcript within the time allowed not being jurisdictional.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2737-2742; Dec. Dig. § 624.\*]

**2. APPEAL AND ERROR (§ 985\*)—FILING OF TRANSCRIPT—DISCRETION.**

The superior court's determination whether an appellant has exercised due diligence to secure the timely filing of the transcript in conformity with Code Civ. Proc. § 953a, providing that the reporter shall file same within 20 days, being largely within the jurisdiction of the trial court, will not be disturbed in the absence of an abuse of discretion.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3889-3891; Dec. Dig. § 985.\*]

**3. PLEADING (§ 204\*)—SUFFICIENCY OF PETITION—DEMURRER.**

Where a complaint, in one count, stated a cause of action, it was sufficient as against a demurrer to the entire complaint.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 486-490; Dec. Dig. § 204.\*]

**4. VENDOR AND PURCHASER (§ 341\*)—RECOVERY OF PURCHASE PRICE—PLEADING—SUFFICIENCY.**

The complaint in a purchaser's action for money paid on a contract for the sale of land, such contract being pleaded according to its legal effect, was not demurrable for failure to allege that the conditions stated were all the conditions of the contract.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 1008-1017; Dec. Dig. § 341.\*]

**5. VENDOR AND PURCHASER (§ 334\*)—REMEDY OF PURCHASER—RECOVERY OF DEPOSIT.**

A purchaser is entitled to recover a deposit made upon the purchase price where the vendor rescinds and states that he will not convey upon receipt of the balance of the purchase money, and it is immaterial whether the vendor has a good title.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 959-980; Dec. Dig. § 334.\*]

**6. APPEAL AND ERROR (§ 1040\*)—HARMLESS ERROR—OVERRULING DEMURRER.**

Where a complaint states one good and one bad ground of recovery, error in overruling a demurrer to the statement of the bad ground is harmless, where the court, on conflicting evidence, finds for plaintiff on the good ground.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.\*]

**7. PRINCIPAL AND AGENT (§ 120\*)—ACTION BY PURCHASER—EVIDENCE.**

Where, in a purchaser's action for money paid to the vendor's agent on the purchase price, the contract authorizing the agent to make the sale was shown to have been lost, a letter written by the vendor to the agent



stating his willingness to sell the land on certain terms was properly admitted to aid in fixing the time of the agent's authorization.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 402-412; Dec. Dig. § 120.\*]

#### 8. EVIDENCE (§ 353\*) — CONTRACTS — ADMISSION AS EVIDENCE.

In a purchaser's action for payments made, two instruments, one signed by the vendor in person and by the purchaser by "H. & G." and the other by the vendor by "H. & G. Agent," were admissible in evidence, though they did not disclose that H. & G. was a corporation or have the corporate seal affixed.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1404-1428, 1430, 1431; Dec. Dig. § 353.\*]

#### 9. APPEAL AND ERROR (§ 1039\*)—ACTION BY PURCHASER—VARIANCE.

Where, in a purchaser's action for payments made, the date of the sale contract was not put in issue by defendant's answer, a variance between the pleading and proof of such date was immaterial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4075-4088; Dec. Dig. § 1039.\*]

#### 10. VENDOR AND PURCHASER (§ 341\*)—ACTION BY PURCHASER—ACCRUAL OF CAUSE.

A purchaser's right of action for the purchase money paid accrued when the vendor rescinded, and stated that he would not convey, though the time allowed to cure the vendor's title had not expired.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 1008-1017; Dec. Dig. § 341.\*]

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Nora Smith against Victor Jacard. From a judgment for plaintiff, defendant appeals. Affirmed.

For opinion of Supreme Court denying rehearing, see 128 Pac. 1026.

C. W. Eastin, of San Francisco, for appellant. Stoney, Rouleau & Stoney and Orville C. Pratt, Jr., all of San Francisco, for respondent.

HALL, J. This is an appeal from a judgment in favor of plaintiff, taken by defendant according to the method prescribed by section 953a of the Code of Civil Procedure. It is claimed by respondent that this court cannot consider upon this appeal anything contained in the reporter's transcript, because such transcript was not filed with the clerk within 20 days from the time notice requiring said transcript was filed with the clerk, as provided in section 953a, Code of Civil Procedure.

Appellant filed his motion requiring the transcript on August 17, 1911, and gave the bond for the cost thereof as required by the clerk. Forty-eight days thereafter, on October 4, 1911, respondent gave notice of a motion to terminate the proceedings to obtain such transcript, on the ground that no such transcript had been filed, nor any extension of time obtained for filing the same. Upon a hearing, the transcript having been

filed in the meantime, the court denied this motion, and thereafter, over the objection of the respondent upon the same grounds, certified to the correctness of such transcript, and included therein the proceedings on such motion and objection.

[1] Section 953a, Code of Civil Procedure, provides that the appellant shall file his notice of appeal with the clerk, requesting that a transcript of the proceedings at the trial be prepared. It further provides that upon receiving such notice it shall be the duty of the court to require the stenographic reporter to transcribe the phonographic report of the trial, and that the reporter shall, within 20 days after said notice has been filed with the clerk, prepare a transcript of the proceedings and shall file the same with the clerk. Neither in the statute nor in the rules of the court is any penalty prescribed for the failure of the reporter to file such transcript within 20 days. We think it perfectly clear that the provision as to the time for filing such transcript is merely directory, and the failure of the reporter to file such transcript within the time allowed is not jurisdictional.

[2] It is doubtless the duty of the appellant, as the moving party, to take the necessary steps to secure the filing of such transcript, and for want of diligence in such matter on his part it is within the power of the trial court to terminate his proceedings for procuring such transcript. The determination of the question as to whether or not there has been due diligence in such matter is one largely lying in the discretion of the trial court, with which the appellate court will not interfere unless it appears that the court in its action has abused its discretion. *Galbraith v. Lowe*, 142 Cal. 295, 75 Pac. 831, and cases there cited. Especially will this court abide by the action of the trial court when it tends to a determination of the appeal upon its merits. Without going into the facts shown upon the hearing of the motion to terminate the proceedings in the case, it is sufficient to say that we do not think that the court abused its discretion in denying respondent's motion or in certifying to the correctness of the transcript. We therefore shall consider the reporter's transcript as a proper part of the record on this appeal.

The action was brought by plaintiff to recover of defendant the sum of \$865, alleged to have been paid by plaintiff to defendant as a deposit upon the purchase price of a piece of land, which it was alleged defendant had agreed to sell to plaintiff for the sum of \$1,900. The complaint is in two counts, and defendant filed a demurrer thereto as a whole, which was by the court overruled. Defendant answered, and upon trial the court made findings in favor of plaintiff, and rendered judgment as prayed for.

[3] The first point urged by appellant is

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that the complaint does not state a cause of action in that the second count, which is for money had and received, contains no allegation of nonpayment, and that the first count, while it alleges the making of a contract of sale containing certain conditions, does not allege that they were all the conditions of the contract, nor does it set out the contract in terms. As the demurrer was to the entire complaint and not to each count thereof, it is sufficient if either count states a cause of action.

[4] We know of no rule requiring the pleader, in counting upon a contract according to its legal effect, to allege that the conditions stated are all of the conditions of the contract. It not appearing upon the face of the complaint that there are other conditions, it will not be assumed upon demurrer that there are others.

[5, 6] It is further claimed that the first count is fatally defective in that it does not sufficiently allege that the title to defendant's land was actually defective so as to entitle plaintiff to a return of her deposit, but only that a title insurance company had so reported it, and that even the facts reported by the title insurance company, if true, did not show a defect in the title. In answer to this contention it is sufficient to say that the count also alleges that "defendant \* \* \* rescinded the sale and informed plaintiff that he would not convey the land to plaintiff upon receipt of the balance of the purchase money. This if true, entitled plaintiff to a return of her deposit money. *Chatfield v. Williams*, 85 Cal. 518, 24 Pac. 839; *Merrill v. Merrill*, 95 Cal. 334, 30 Pac. 542; *Merrill v. Merrill*, 102 Cal. 317, 36 Pac. 675; *Wood v. McDonald*, 66 Cal. 546, 6 Pac. 452. The court, upon a conflict of evidence, found in favor of plaintiff on this point, which makes the ruling of the court upon the demurrer, so far as it attacks, specially or otherwise, the allegations as to the supposed defect in the title immaterial. Appellant claims that the court erred in several particulars to the prejudice of the defendant during the course of the trial.

[7] It was shown that defendant, who was in Oroville at the commencement of the transaction involved in this action, authorized Healey & Gillespie, a corporation, by a written instrument to sell for him a certain piece of land situate in San Francisco for the net price of \$1,700, with power to receive a deposit on such sale. The instrument being shown to have been lost, its contents were proven by Healey, who was the president of the corporation and transacted its business. The court, over the objection of defendant, admitted in evidence a letter, signed and sent by defendant to Healey & Gillespie, under date of December 28, 1909, in which defendant stated his willingness to sell the land in question for \$1,750 net cash. In this the court did not err. The letter was admissible as fixing the time

at which the authorization relied on was given, the exact date of which could not be shown, except that it was given subsequently to this letter and before the sale that was in fact made.

[8] The evidence tended to show that on the 4th day of February, 1910, "Healey & Gillespie," as agent for defendant, made an agreement to sell to plaintiff the land in question for the sum of \$1,900. This agreement was evidenced by a writing signed by "Healey & Gillespie" as agent for defendant, and acknowledged the receipt of \$500 as a deposit on account of the sale, and gave 30 days' time for a search of title, and allowed 90 days for the correction of defects. Plaintiff testified that she in fact paid to said Healey said \$500 at the execution of such agreement. Healey, who transacted the business with plaintiff, however, sent an agreement of sale to defendant of the same date as the one given plaintiff, but differing therefrom only in that it acknowledged the receipt of \$200 and stated the selling price as \$1,700 net to the seller. This was signed by the defendant in person and returned to Healey. At the bottom thereof it contained a memorandum whereby the purchaser agreed to purchase the property on the terms stated in the body of the writing, which Healey signed "Nora Smith, purchaser, by Healey & Gillespie."

Subsequently, February 24, 1910, Healey, by representing to plaintiff that defendant was in need of money, induced her to make a further payment of \$365, and thereupon destroyed the writing that he had originally given her, and gave her a new writing dated February 24, 1910, acknowledging the receipt of \$865 on the purchase price of said land, but in other respects it was a duplicate of the original receipt and contract given plaintiff. At least such was the testimony of plaintiff. This instrument was signed, "Victor Jaccard, Owner, by Healey & Gillespie, Agent," and a memorandum at the bottom thereof, agreeing to purchase on the terms stated, was signed by plaintiff. Both these writings were received in evidence over the objection of appellant that neither of them purported to be signed by a corporation. This objection was properly overruled. The instrument dated February 4, 1910, was signed by defendant in person. The one dated February 24, 1910, described Healey & Gillespie as a corporation, and it was signed in the corporate name by Healey, who transacted the business of the corporation. It is no longer held to be necessary that the ordinary everyday transactions of a corporation be evidenced by a writing attested with the corporate seal. Appellant in his brief discusses some other reasons why he thinks these instruments should not have been admitted in evidence, but the only objection that he pointed out to the trial court was the one above disposed of. It is too



late to raise objection to evidence not presented to the trial court.

[9] Appellant also claims that there was a fatal variance between the allegations and the proof as to the contract of sale. The allegation is that on or about the 24th day of February, 1910, defendant agreed in writing to sell to plaintiff the land in question for \$1,900. The denial in the answer upon this allegation only raises an issue as to the amount for which the sale was made. The proof shows that the agreement was in fact made on the 4th day of February for a sale for \$1,900, at which time \$500 was paid. On February 24, 1910, an additional payment of \$365 was made, and the first instrument destroyed and a new one given to the same effect. Whether or not these be considered as two different contracts, or simply as the same contract, is quite immaterial to the determination of the merits of the case. The complaint does not set out any particular instrument as containing the contract.

[10] It is certain that the money sued for was paid as a deposit on one and the same sale, and that after plaintiff had paid the money to the authorized agent of defendant, the defendant, as found by the court, rescinded the sale, and informed plaintiff that he would not consummate the same. This, as we have before shown, entitled the purchaser to a return of her money.

Under this finding it is immaterial that the action was commenced before the expiration of the time allowed to cure the title.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(20 Cal. App. 280)

SMITH v. JACCARD. (S. F. 6,414.)

(Supreme Court of California. Dec. 30, 1912.)

1. APPEAL AND ERROR (§ 607\*)—TRANSCRIPT—NOTICE OF APPEAL.

The purpose of Code Civ. Proc. § 953a, providing for preparation of papers on appeal from the superior court for notice to the clerk of such court, and that the court reporter shall transcribe and file the report of the trial, is merely to assist in preparing a record for appeal, and is not jurisdictional.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2665-2672; Dec. Dig. § 607.\*]

2. APPEAL AND ERROR (§ 611\*)—TRANSCRIPT—JURISDICTION.

Where an appeal is taken either under Code Civ. Proc. §§ 940, 941, providing how appeal may be taken and for an undertaking or deposit, or under sections 941a, 941b, 941c, providing an alternative method of appeal, the appellate court may have jurisdiction though no transcript is filed; and, while it may dismiss the appeal for delay in filing the transcript, such dismissal will be for want of diligence and not for lack of jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2691-2693, 3126; Dec. Dig. § 611.\*]

In Bank. On petition for rehearing. Petition denied.

For former opinion see 128 Pac. 1023.

PER CURIAM. The petition for a rehearing of this cause in the Supreme Court is denied. The district court of appeal, in its opinion, says that section 953a of the Code of Civil Procedure "provides that the appellant shall file his notice of appeal with the clerk." This section has been misapprehended by some practitioners, and, lest there be further misapprehension by reason of this language, we take this occasion to correct it.

[1] Section 953a does not provide at all for a notice of appeal. The purpose of that section, in connection with sections 953b and 953c, is to provide a method of preparing the record or transcript to be filed in the proper appellate court in support of the appeal. None of the proceedings there prescribed are jurisdictional to the appeal.

[2] The appeal may be taken either in the manner provided by sections 940 and 941 of the Code of Civil Procedure, or in that provided by sections 941a, 941b and 941c of the Code of Civil Procedure. When properly taken by either method, the appellate court to which it is taken has jurisdiction of the appeal, even if no transcript on appeal is ever filed to support it. It may dismiss such appeal for delay in filing the transcript. But such dismissal will be a dismissal for want of diligence in prosecuting it, and not a dismissal for lack of jurisdiction of the appeal.

Whether the superior court may, or may not, dismiss proceedings to obtain a record taken under section 953a, on the ground that such proceedings have not been diligently prosecuted, we need not say, but it is obvious that such proceedings are in aid of the appeal, and for no other purpose, and that the final determination of the question whether they have been diligently prosecuted must remain in the appellate court to which the appeal is properly taken.

(164 Cal. 294)

LANG v. LILLEY & THURSTON CO. et al.  
(S. F. 5,880.)

(Supreme Court of California. Dec. 3, 1912.)

1. APPEAL AND ERROR (§ 957\*)—REVIEW—DISCRETION OF TRIAL COURT.

On appeal from the denial of an application to set aside a default judgment based on Code Civ. Proc. § 473, providing that the court may, in furtherance of justice, relieve a party from any judgment or order taken against him through his mistake or excusable neglect, the only question reviewable is whether the trial court abused its discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. § 957.\*]

2. JUDGMENT (§ 139\*)—DEFAULT—VACATION—ABUSE OF DISCRETION.

The trial court did not abuse its discretion in refusing to vacate a default judgment for defendant taken more than a month after plai-

tiff's failure to file an amended complaint within the time fixed after confession of demurrer, where the affidavits on the question of whether defendant's counsel agreed not to take a default were conflicting, and the court was on the point of sustaining the last demurrer without leave to amend.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 265-268; Dec. Dig. § 139.\*]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Joakim Lang, as administrator of the estate of Albert Lang, deceased, against the Lilley & Thurston Company and others. From an order denying plaintiff's motion to vacate a default judgment, plaintiff appeals. Affirmed.

See, also, 128 Pac. 1031.

Costello & Costello, of San Francisco (A. W. Brouillet, of San Francisco, of counsel), for appellant. Linforth & Herrington and C. H. Wilson, all of San Francisco, for respondents.

HENSHAW, J. This is an appeal by the plaintiff from an order refusing to vacate a judgment entered in favor of the defendants Mahony Bros. The following are the facts: Plaintiff had filed three complaints, to all of which demurrers had been sustained. To his last complaint, the second amended complaint, plaintiff confessed demurrer and asked and obtained 10 days' time within which to file a third amended complaint. By stipulation between the attorneys this time was extended 10 days. When the time thus extended by stipulation was about to expire on August 31, 1910, plaintiff's attorney telephoned the attorney for Mahony Bros., respondents herein, asking a further extension of time. The affidavit of plaintiff's attorney upon this matter is: "That he communicated with C. H. Wilson, Esq., attorney for the defendants Mahony Bros., asking him if the time for filing the third amended complaint would be extended by him. Said C. H. Wilson replied, saying that he would not take a default against plaintiff." The affidavit of Mr. Wilson declares an absolute want of recollection of this incident and conversation, asserts affiant's belief that the conversation did not take place, and insists that if it did take place the import of the declaration was, and was only, that respondents' attorney would not take an immediate default against plaintiff, but would allow him a reasonable time in which to secure an order or a stipulation extending his time to plead. It should be added that the action was brought against several parties for their negligent conduct resulting in the death of plaintiff's intestate; that by his demurrers Mr. Wilson was successfully pressing his con-

tention that there was an improper joinder of causes of action and of parties defendant in plaintiff's complaints; and that plaintiff's complaints did not show any liability upon the part of Mahony Bros. The asserted conversation relative to the granting of further time occurred on August 31, 1910. Counsel for defendants Mahony Bros. did not take judgment of dismissal for default until October 19, 1910. During the interval of 48 days counsel for plaintiff neither obtained nor sought any extension of time.

[1] This application for relief is based on section 473 of the Code of Civil Procedure, and from the foregoing statement of facts it is manifest that the sole question is whether or not the court abused its discretion in denying the application for relief. The rule of decision and the course of conduct of this court in dealing with such appeals has been well expressed in *Ingrim v. Epperson*, 137 Cal. 370, 70 Pac. 165, where it is said: "While it has been said in some cases that this discretion is better exercised when it tends to bring about a decision of the cause upon its merits, the rule itself (not to disturb an order setting aside, or refusing to set aside, a default except in clear cases of an abuse of discretion by the lower court) has never been relaxed. This observation has been in the nature of advice to the superior court, and not for the purpose of compelling it to decide in that mode. Unless the record clearly shows that the court has abused its discretion, its order, whether it be to grant or deny the application, will be affirmed."

[2] It is, of course, the province of the trial court to determine the truth when it is put in doubt by conflicting statements in the affidavits. In view of the fact that the trial court believed the defects in the complaint so far as the Mahony Bros. were concerned were incurable and was on the point of sustaining the last demurrer without leave to amend, in view further of the opposing statements of fact in the affidavits, and, finally, of the unquestioned fact that the attorney for plaintiff neglected for 48 days to secure any stipulation or extension of time, it cannot be said that the statement attributed to Mr. Wilson that he would not take a default against plaintiff meant that plaintiff might go on indefinitely or forever without pleading. The delay of 48 days was unexplained and unexcused. In view of all these facts and circumstances it cannot be said that there was any abuse of discretion in the order appealed from.

It is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.



20 Cal. App. 223

**LANG v. LILLEY & THURSTON CO. et al.**  
(Civ. 996.)

(District Court of Appeal, Third District, California. Oct. 23, 1912.)

**1. MASTER AND SERVANT (§ 96\*)—INJURIES TO SERVANT—DUTY OF MASTER.**

The master of plaintiff's intestate was hired by the general contractor to assist in the construction of a building; deceased, while engaged as a housesmith, being killed while at work in the elevator shaft. It did not appear that the elevator machinery was unsafe; the accident being caused by the negligence of the operator who was a servant of the general contractor. *Held*, that the master was not liable; it not appearing that the danger from the negligent elevator man was apparent, or that deceased was entitled to a warning or did not assume the risk, and the master having no control over the elevator.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 158, 162; Dec. Dig. § 96.\*]

**2. PARTIES (§ 27\*)—JOINDER OF PARTIES—JOINT TORT-FEASORS.**

A joint and several liability may arise against several joint tort-feasors, where a direct personal injury is occasioned by the separate but concurring negligence of all of them, and in such case an action will lie against any or all of them, although usually actions cannot be maintained against several defendants jointly where there has been no concerted action.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 35; Dec. Dig. § 27.\*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Joakim Lang, administrator of the estate of Albert Lang, deceased, against the Lilley & Thurston Company and others. From a judgment sustaining the demurrer of the named defendant, plaintiff appeals. Affirmed.

See, also, 161 Cal. 295, 119 Pac. 100; 128 Pac. 1026, 1031.

Costello & Costello, of San Francisco, for appellant. Samuel Rosenheim and Bernard Silverstein, both of San Francisco, for respondent.

**CHIPMAN, P. J.** This is an action to recover damages resulting from the death of plaintiff's intestate, alleged to have been caused by the negligent operation of an elevator. A separate demurrer, both general and special, was interposed by each of said defendants, the copartnership and the corporation, to the second amended complaint. The court sustained each demurrer, and, plaintiff declining further to amend, a separate judgment passed in favor of each defendant that plaintiff take nothing by his action. Plaintiff appeals from the judgment in favor of the defendant corporation. There is a separate appeal from the judgment in favor of the defendant copartnership.

Alleging that the defendant the Lilley & Thurston Company, at all the times mentioned in the complaint, was a corporation, hereinafter referred to as the "corporation," and

that the defendants John J. and Jeremiah Mahoney were, during all said times, a copartnership as Mahoney Bros., hereinafter referred to as "Mahoney Bros.," the complaint states that, on and prior to May 25, 1908, one Jacob Stern employed Mahoney Bros. to erect a building on his lot in the city and county of San Francisco, and that on said mentioned day said building was in process of erection; that Mahoney Bros. "so carelessly and negligently operated an elevator in said building by means of an ignorant and unskilled employé, in whose selection the defendants (Mahoney Bros.) named in this paragraph (paragraph 4) did not use ordinary or any care, that one Albert Lang, then working in the shaft in which said elevator was operated by said defendants (Mahoney Bros.) on said date, received such personal injuries from said elevator thus operated by said defendants (Mahoney Bros.) as aforesaid that he was instantly crushed to death and killed." In paragraph 5 it is averred that Mahoney Bros. "did not use ordinary or any care in the selection of their employé who was operating said elevator \* \* \* at the time said Lang was killed." In paragraph 6 it is alleged that said Albert Lang was aged 23 years and was in the employ of the said corporation as a housesmith; that said corporation "was in the employ of defendants" Mahoney Bros. "to do certain work on said building"; that on said day said Lang was "directed by the foreman of said defendant," the corporation, "to do certain work within the elevator shaft of said building," which direction said foreman of defendant corporation had the right to give as its foreman; that, pursuant to said instructions, said Lang "went within the said elevator shaft on said May 25, 1908, and was performing said work, as previously ordered by said foreman, when said Lang was crushed to death and killed by the counterweight of said elevator, which elevator and counterweight were then and there operated in a careless and negligent manner by an incompetent and unskilled employé of defendant" Mahoney Bros., "in whose selection said defendants," Mahoney Bros., "had not used ordinary or any care." It is next alleged in paragraph 7, "that by reason of the fact that said elevator was being operated by an incompetent and unskilled employé of defendants," the said Mahoney Bros., "in whose selection said defendants," the Mahoney Bros., "had not used ordinary or any care, said elevator shaft was an unsafe and dangerous place, and plaintiff avers that said unsafe and dangerous condition of said elevator shaft could have been discovered by said defendant corporation \* \* \* by the use of ordinary or reasonable care, and that the said defendant," the corporation, "failed and neglected to use ordinary and reasonable care to discover the unsafe and dangerous

condition of said elevator shaft." Then follows paragraph 8, in which it is alleged "that in ordering and sending said Albert Lang to work in said elevator shaft, as aforesaid, operated by an incompetent and unskilled employé of defendants" Mahoney Bros., "defendant the said corporation was careless and negligent in not providing said Albert Lang a safe place in which to work when so ordered by its foreman, as herein-aforesaid"; that "at all the times herein mentioned said Lang was unskilled in the use of elevators and counterweights" and "ignorant of the dangers to which he was subject while working in said elevator shaft." The remaining averments pertain to matters not necessarily involved in the questions raised by the demurrers.

The only question is whether the complaint states a cause of action against the corporation in terms sufficient to withstand the objections raised by its demurrer. In addition to its general demurrer and also its demurrer on the ground of a misjoinder of parties, defendant corporation interposed a special demurrer on the grounds of ambiguity, unintelligibility, and uncertainty, and in the following particulars: "(a) That it cannot be ascertained therefrom whether the plaintiff has endeavored to allege a joint cause of action against this defendant with the other defendants, or is endeavoring by said second amended complaint to allege independent causes of action against this defendant and its codefendants. (b) That it cannot be ascertained therefrom what the negligence complained of this defendant consists of. (c) That it cannot be ascertained therefrom in what manner it is claimed that this defendant is responsible for the employment by its codefendants of an alleged unskillful and ignorant employé. (d) That it cannot be ascertained therefrom whether or not it is claimed that this defendant had any knowledge or notice of the alleged ignorance or unskillfulness of the said employé of the said defendants John J. Mahoney and Jeremiah Mahoney and Mahoney Bros., a copartnership, prior to the happening of the accident mentioned in said second amended complaint. (e) That it cannot be ascertained therefrom whether it is claimed by the plaintiff that this defendant knew prior to the happening of the accident described therein that its codefendants did not use ordinary or any care, in the selection of their employé as alleged in said second amended complaint. (f) That it cannot be ascertained therefrom whether or not it is claimed by the plaintiff that this defendant knew the alleged fact set forth in said second amended complaint that the said elevator was operated by an ignorant and unskilled employé of its codefendants. (g) That it cannot be ascertained therefrom whether the plaintiff claims that this defendant had anything to do with the employment of the said alleged unskillful employé of its codefendants, or with the retention of said em-

ployé in the employment of its codefendants. (h) That it cannot be ascertained therefrom what the alleged direction of the foreman of this defendant has to do with the alleged employment of said employé of said defendants John J. Mahoney and Jeremiah Mahoney and Mahoney Bros., a copartnership. (i) That it appears affirmatively by said amended complaint that if there was any negligence which caused the death of Albert Lang, deceased, mentioned in said second amended complaint, such negligence was the negligence of the codefendants of said the Lilley & Thurston Company, and it cannot be ascertained from said second amended complaint what the alleged order of this defendant's foreman has, or had, to do with the acts of the said codefendants complained of in the said second amended complaint. (j) That it cannot be ascertained therefrom whether or not it is claimed the elevator shaft mentioned in said second amended complaint was of itself unsafe, nor why, if it was safe, this defendant is chargeable with negligence for merely sending said Albert Lang, deceased, to work in said elevator shaft, as alleged in said second amended complaint. (k) That it cannot be ascertained therefrom in what respect it is claimed that this defendant did not give said decedent, Albert Lang, a safe place to work." Some of these specific objections bear upon the general demurrer for insufficiency of facts, and it may be that not all of the objections, whether in support of the general or the special demurrer, are fatal to the pleading; but we are convinced that sufficient objections are there pointed out to justify the order of the court.

[1] The proximate cause of the accident as attempted to be shown by the complaint is apparently aimed at Mahoney Bros.' negligence in employing an unskilled person to operate the elevator; there is no allegation that defendant corporation knew this fact or had anything to do with employing him or directing his work; there is no averment that the shaft was a dangerous place to work from any inherent or visible defect in the shaft or elevator or the machinery by which it was operated, nor is it shown how or why the shaft became a dangerous or unsafe place in which to work other than that it became so because the elevator was being operated by an unskilled person, of which fact it is not alleged that defendant corporation knew or had reason to know or suspect from anything noticeable or to which its attention was drawn. The averment is that the shaft was unsafe because Mahoney Bros. were operating the elevator with an unskilled person, and that "the said unsafe and dangerous condition of said elevator shaft could have been discovered by said defendant corporation, by the use of ordinary and reasonable care, and that said defendant, the Lilley & Thurston Company, failed and neglected to use ordinary and reasonable care to discover the unsafe and dangerous



condition of said elevator shaft." There is no averment that the shaft itself was in a dangerous condition. That the shaft was in a dangerous condition is not to be implied from the averment that the unskilled operation of the elevator caused the dangerous condition. The shaft may have been dangerous from many causes and whatever the cause relied on by the pleader should have been clearly stated. There is no averment that the corporation knew of any fact that would tend to arouse suspicion that the condition of the elevator was such as to make it a dangerous or unsafe place in which to work, nor that the operator was incompetent; nor is there any relation shown between the Mahoney Bros. and the corporation that would make the one responsible in any way for the acts of omission or commission of the other. So far as appears, the corporation was merely employed to do certain work on the building in no different capacity than any other person might have been employed, and it had a right to assume that the elevator would be properly operated by its employer, Mahoney Bros. No duty was placed on the corporation to employ the elevator man or to inquire into his capabilities unless in the latter case some fact or circumstance had come to its knowledge such as should have awakened reasonable apprehension that the elevator was not being safely operated, and no such fact is alleged. The averment is not that the corporation could have discovered the unsafe condition of the shaft by some such means; the averment is but a mere statement of opinion, unsupported by any fact or circumstance occurring prior to the accident, that this defendant could have discovered the danger by the use of ordinary care. It would be requiring extraordinary care to say that it was the duty of the corporation, before directing Lang to go to work in the shaft, to first ascertain that Mahoney Bros. had used ordinary care in selecting the elevator man, and that he was competent to do the work assigned to him.

The situation was simply this: Mahoney Bros. had the contract for all the work and were engaged in a branch of the work requiring the use of this elevator by them. They engaged the corporation to do some certain other branch of the work, and, for some unexplained purpose, to send said Lang into the shaft at some unexplained part of the building to perform some unexplained work, and, while there, the counterweights struck him, but under what circumstances and how it happened does not appear, except as we may suppose by the moving up or down of the elevator. We are not told what office these counterweights performed, or whether they added to the danger of the place or how they contributed to its danger. The only source of danger suggested by the complaint is the unskillfulness of the elevator man. We can only conjecture, from our

slight knowledge of the builders' art, that these counterweights are heavy pieces of iron used to balance the weight of the elevator in some way, and run up or down as the elevator moves down or up, and on the outside of the elevator carriage, and within and near the walls of the shaft. This is but a conjecture and may be wide of the fact, but we find nothing in the complaint to aid us in suggesting some other purpose served by the so-called counterweights. Furthermore, if, as alleged, the corporation could, by the exercise of reasonable care, have learned that the shaft was a dangerous place in which to work, and, if means of knowledge must be held equivalent to knowledge, there is no averment that the foreman of the corporation failed to warn Lang of the danger. It is not enough to allege knowledge of the danger, but it must be made to appear that the foreman, who gave the direction, failed in his duty to warn Lang, unless it also is made to appear that the danger was apparent, or the age or mental condition of Lang was such as to have justified him in entering the shaft without the exercise of his own faculties and in unquestioning obedience to his foreman. But Lang was 23 years old and possessed of all his faculties, so far as is made to appear, and he may have fully comprehended all the danger and voluntarily assumed the risk. So far as is alleged, the shaft itself was safe enough, except from something that was done by the Mahoney Bros., for which defendant corporation is not shown to have been responsible, or with which it had any casual connection. Mahoney Bros.' negligence consisted in not exercising ordinary care in the selection of its servant to run the elevator (Civ. Code, § 1970); the proximate cause of the accident was the unskillfulness of Mahoney Bros.' servant taken into their service without using ordinary care in selecting him. But upon what principle can it be claimed that the corporation, itself an employé of Mahoney Bros. to work on the building, should be charged with negligence for not having, by the like exercise of ordinary care, seen to it that Mahoney Bros.' servant was competent to run an elevator; or upon what principle can it be held for the negligent act of such person, in view of the facts alleged? We can discover no principle of law justifying such liability. The liability of the corporation must spring from what it knew or ought by the exercise of reasonable care to be presumed to have known, and not from something the Mahoney Bros. did without its knowledge. We have endeavored to show wherein the complaint, in our opinion, fails to fix any legal liability upon the corporation. We do not think it necessary to consider in detail the grounds of the special demurrer.

The principle underlying the decisions relating to the duty of the employer to furnish a safe place in which the employé is put to

work is that the employer cannot be justly charged with negligence as to matters over which he has no control. In the present case the defendant corporation had absolutely no control over the operation of the elevator by its codefendants. Its liability, as we have said, had to do solely with conducting the work it was doing for the moment in the shaft, and, as to its duty towards its employé in that connection, we think plaintiff has failed to show any failure or any just ground for holding it chargeable with damages.

[2] Respondents make the point that there was a misjoinder of actions, for there is an utter failure to show the cause of the accident to have been the joint act of both defendants contributing to the injury, or that both were responsible for the one act causing the injury. Although the action seems to have been commenced against both defendants as joint tortfeasors, we have chosen to ascertain whether, considered as an action against the corporation alone, the facts alleged are sufficient. And this, for the reason, as we understand the law to be, that where there are two or more joint tortfeasors a joint and several liability might arise, in a case involving facts such as we have here. In *Doeg v. Cook*, 126 Cal. 213, 218, 58 Pac. 707, 708 (77 Am. St. Rep. 171), the court said: "It is unquestionably the rule that an action cannot be maintained against several defendants jointly for damages when there has been no concert of action or unity of design amongst them. But, upon the other hand, where direct personal injury is occasioned by the separate but concurring negligence of two parties at one and the same time, an action will lie against one or all of them." *Tompkins v. Clay St. Ry.*, 66 Cal. 163, 4 Pac. 1165.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

(20 Cal. App. 264)

LANG v. LILLEY & THURSTON CO. et al.  
(Civ. No. 997.)

(District Court of Appeal, Third District, California. Oct. 31, 1912.)

**1. NEGLIGENCE (§ 111\*)—PLEADING—SUFFICIENCY.**

While negligence may be charged in general terms, it is yet necessary to specify the particular negligent act. Hence an averment that plaintiff's intestate was killed by defendant's negligent operation of an elevator is insufficient, because leaving additional facts to be proven at the trial; it being obvious that a witness could not properly be asked whether the elevator was operated in a careless and negligent manner.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 182-184; Dec. Dig. § 111.\*]

**2. MASTER AND SERVANT (§ 329\*)—EMPLOYÉ OF SUBCONTRACTOR—PLEADING—SUFFICIENCY.**

A complaint, seeking recovery for the wrongful death of plaintiff's intestate who was

killed in the elevator shaft of a building which defendants were erecting, must show by what authority decedent was in the elevator shaft, it appearing that he was only the servant of a subcontractor, for, while his status would entitle him to come upon the premises, it would not license him to roam at will over them, and, consequently, to show defendant's negligence, it must appear by what right he was on the premises.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1268, 1269; Dec. Dig. § 329.\*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Joakim Lang, as administrator of the estate of Albert Lang, deceased, against the Lilley & Thurston Company and others. From a judgment sustaining demurrer of defendants John J. Mahoney and Jeremiah Mahoney to the complaint, plaintiff appeals. Affirmed.

See, also, 161 Cal. 295, 119 Pac. 100; 128 Pac. 1028.

Costello & Costello, of San Francisco, for appellant. C. H. Wilson and Linforth & Herrington, all of San Francisco, for respondents.

**BURNETT, J.** The question for solution on this appeal by plaintiff involves the legal integrity of the ruling of the lower court sustaining the demurrer of defendants, the Mahoney Bros., to plaintiff's second amended complaint. In an opinion rendered by this court and filed the 23d day of the present month and reported in 128 Pac. 1028, the order of the lower court sustaining the demurrer of the Lilley & Thurston Company was upheld, and to that decision reference is made for a fuller exposition of plaintiff's pleading. The demurrer of respondents herein, which was both general and special, directs attention to several asserted defects in said second amended complaint. Of these, brief consideration will be given to two only.

[1] The ruling was justifiable for the reason that there was a failure to specify the particular act or acts of negligence which proximately caused the accident. It is not sufficient to allege that the elevator was negligently operated and thereby the injury was produced. Defendants should have been informed, by appropriate allegation, in what respect the contrivance was negligently operated, and it should have appeared that the recited facts had a causal connection with the death of plaintiff's intestate. We are left entirely to surmise whether the elevator was moved too suddenly or too rapidly or too far or without warning, or, in other words, what particular act was negligently performed. If the case were tried on the pleading as it stands, it is evident that additional facts to those alleged would have to be proved in order for plaintiff to recover. If a witness were asked, in the language of



the complaint, whether the elevator was operated in a "careless and negligent manner," it is quite apparent that it would call for the opinion of the witness, and, in the face of a proper objection, no answer would be permitted. Or if a witness should be called upon to state the facts as he observed them or to describe what he saw in reference to the operation of the elevator, it would hardly be contended that he might answer without challenge that the "elevator and counterweight were then and there operated in a careless and negligent manner by an incompetent and unskilled employé." As said in *Cary v. Los Angeles Ry. Co.*, 157 Cal. 603, 108 Pac. 684, 27 L. R. A. (N. S.) 764, 21 Ann. Cas. 1329: "While it is permissible to charge negligence in general terms, it is nevertheless necessary to specify the particular act or acts alleged to have been negligently done. *Stephenson v. Southern Pacific Co.*, 102 Cal. 144 [34 Pac. 618, 36 Pac. 407]; *Smith v. Buttner*, 90 Cal. 95 [27 Pac. 29]. If appellants had desired to predicate negligence upon the crowded condition of the car, they should have done so by appropriate allegation."

[2] Another palpable defect in the complaint arises from the fact that it does not appear that it was necessary for deceased to be in the elevator shaft to do the work required of him by his employer, the Lilley & Thurston Company. It will be remembered that Mahoney Bros. had the contract of erecting the building and had employed said company as a subcontractor "to do certain work upon said building." The complaint does not disclose the nature of said work or in what part of the building it was to be performed. Whether it had anything to do with the elevator shaft or called for or justified the presence of any of the employés of the Lilley & Thurston Company in said shaft does not appear from the complaint. It does appear that deceased was ordered by the foreman of said company to do certain work in the elevator shaft, but we have a right to assume that it was not a part of the work that the Lilley & Thurston Company were employed by Mahoney Bros. to perform. At least, the complaint is uncertain in that respect, and hence it does not sufficiently appear that respondents owed the deceased any legal duty. Of course, there cannot be neglect without the existence of a corresponding duty. *Kennedy v. Chase*, 119 Cal. 637, 52 Pac. 33, 63 Am. St. Rep. 153. The complaint must set out facts showing in what capacity or by what right the injured person was on the premises at the time of receiving the injuries complained of, whether as a trespasser, a licensee, or an employé; otherwise, it will fail to state a cause of action. 6 *Thompson on Negligence*, § 7578; *Grundel v. Union Iron Works*, 141 Cal. 566, 75 Pac. 184.

In the *Grundel Case*, speaking of the deceased, it is said: "It is not shown therefore that he was not a trespasser, and, under the most favorable view which could be taken of the pleading, he was at the best a mere licensee. As such licensee, the defendant owed him no duty to keep its premises or its passageways in a safe condition, and no duty being owed by defendant to plaintiff, no negligence could be imputed to the former." There is no pretense that the deceased was employed by Mahoney Bros., or that he was in the building by their request or invitation, and if they could be held liable at all, it could only be by virtue of the fact that he was engaged in the work which they had employed the subcontractor to perform, and, as we have seen, the vital fact showing the contractual relation is not found in the complaint.

It could not be maintained that the right of the deceased to be in the building would impose upon respondents any legal obligation to assume that he would go into the elevator shaft or give rise to any duty as to him to operate the elevator in a careful manner. In other words, his license to come upon the premises would not give him the right to roam at will in a manner disconnected from and not pertaining to the business in hand. *Glaser v. Rothschild*, 221 Mo. 180, 120 S. W. 1, 22 L. R. A. (N. S.) 1045, 17 Ann. Cas. 576; *Hall v. Poole*, 94 Md. 171, 50 Atl. 703; *McDonough v. Pelham Elevator Co.*, 111 App. Div. 585, 98 N. Y. Supp. 90; *Cogswell v. Rochester Machine Screw Co.*, 39 App. Div. 223, 57 N. Y. Supp. 145; *Jossaers v. Walker*, 14 App. Div. 303, 43 N. Y. Supp. 891; *Kennedy v. Chase*, *supra*.

We deem it unnecessary to pursue the subject further. The defects pointed out by the demurrer could easily have been remedied, if the facts existed, and, it may be said, appellant was granted permission to amend. He chose, however, not to avail himself of the privilege, and, as we are satisfied the action of the lower court was clearly justified, the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

164 Cal. 363

CLARK v. ATCHISON, T. & S. F. RY. CO.  
(L. A. 3,012.)

(Supreme Court of California. Dec. 17, 1912.  
Rehearing Denied Jan. 15, 1913.)

1. CARRIERS (§ 333\*)—PASSENGERS—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

A locomotive fireman directed to go to a place to work obtained an order allowing him to ride to the place on a regular passenger train. When nearing the place he went out on the platform of the front car intending to get on the lower step and jump from the train when it slowed up. When he reached the platform he noticed that the train was on a double curve, about to pass a switch leading to a "Y" and

running 30 miles an hour, and that it could not be stopped to allow him to jump. He went on the lower step and stood there holding the rods, and while in that position the force of the car swinging around the curve threw his body first inward toward the platform and then out from it with such force as to throw him to the ground. He was familiar with the switch and the curves and knew that it was unsafe to jump from the train. The engineer had promised him to slow up so as to allow him to jump off the train. *Held*, that he was guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1385, 1386, 1388-1397; Dec. Dig. § 333.\*]

## 2. CARRIERS (§ 317\*)—PASSENGERS—ACTIONS—EVIDENCE—ADMISSIBILITY.

In an action for injuries to a passenger thrown from the train while standing on the lower step, evidence that the engineer had promised the passenger to slow up to allow him to jump from the train was inadmissible, in the absence of proof that the engineer had authority to slow up trains for that purpose.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1295, 1297-1305; Dec. Dig. § 317.\*]

## 3. MASTER AND SERVANT (§ 302\*)—INJURIES TO THIRD PERSONS—LIABILITY OF MASTER.

An employer is responsible for the negligent acts of an employé only when such acts are within the actual or ostensible authority of the employé, or within the apparent scope of his duty; but he is not responsible where the wrong done by the employé was done without authority, and not in the doing of his work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1217-1221, 1225, 1229; Dec. Dig. § 302.\*]

## 4. CARRIERS (§ 333\*)—INJURY TO PASSENGER—AUTHORITY OF SERVANTS.

A passenger on a regular passenger train is not justified in relying on the promise of the engineer to slow down the train to permit the passenger to alight, on the assumption that he has authority to slow down trains for that purpose, and the promise of the engineer so to do is not a promise of the carrier.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1385, 1386, 1388-1397; Dec. Dig. § 333.\*]

## 5. CARRIERS (§ 333\*)—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Where a passenger, knowing that the train was running 30 miles per hour and that it could not be slowed down to allow him to jump off, went on the platform and down on the lower step intending to jump off when the train slowed down, the mere fact that the engineer had promised to slow down to allow him to jump off was not an excuse for his negligence in standing on the lower step, from which he was thrown by the force of the train swinging around a curve.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1385, 1386, 1388-1397; Dec. Dig. § 333.\*]

## 6. CARRIERS (§ 315\*)—PASSENGERS—ACTIONS—ISSUES, PROOF, AND VARIANCE.

There is no variance between the complaint alleging that a carrier negligently ran its train around a curve at a high speed, causing it to violently jerk so as to throw a passenger standing on the lower step to the ground, and the proof that the engineer acting within the scope of his authority promised the passenger to slow down the train so that he could alight, but failed to do so and ran the train at a high rate of speed, and the failure to prove the authority

of the engineer to make the promise is a failure of proof and not a variance.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1270, 1281, 1282; Dec. Dig. § 315.\*]

Department 1. Appeal from Superior Court, Los Angeles County; M. J. Dooling, Judge.

Action by Homer A. Clark against the Atchison, Topeka & Santa Fé Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

E. W. Camp, U. T. Clotfelter, A. H. Van Cott, and M. W. Reed, all of Los Angeles, for appellant. Gray, Barker, Bowen, Allen, Van Dyke & Jutten and Flint, Gray & Barker, all of Los Angeles, for respondent.

SHAW, J. The plaintiff sued to recover damages for personal injuries alleged to have been caused by the negligence of defendant in the management of its passenger train. There was a verdict and judgment in favor of the plaintiff, from which, and from the order denying its motion for a new trial, the defendant appeals.

The answer denied the material allegations of the complaint and, as an affirmative defense, alleged that, if the plaintiff suffered either or any of the injuries alleged in his complaint, the same were caused solely by his own carelessness and negligence.

[1] We think, upon the plaintiff's own testimony, he was clearly guilty of contributory negligence sufficient to bar a recovery. He was a locomotive fireman and had been in the employ of the defendant for more than two years prior to the accident as an "extra man," being sent from place to place to act as fireman where there was a temporary vacancy. On the day of the accident he was directed to go from Los Angeles to San Bernardino to take a position there as fireman and had been given an order allowing him to ride to San Bernardino on a regular passenger train of the company. When nearing San Bernardino, in accordance with a promise which he said the engineer had made to slow up so as to allow him to jump off the train at the roundhouse 1800 feet before reaching the station, he went out on the platform of the front car intending to get upon the lower step and jump therefrom when the train should slow up. When he reached the platform he noticed that the train was upon a double curve and was about to pass a switch leading to a "Y." He testified it was then going at the rate of 30 miles per hour and that he knew it could not be stopped in time to allow him to jump off. Nevertheless he got down on the lower step and stood there with his hands holding the rods and with a small package of clothes swinging over his thumb. While he was in that position the force of the car swinging around the double curve threw his body first in toward the platform and then out from it with such



force as to break his hold on the rods and throw him violently to the ground. It needs no argument to establish the proposition that it is negligence for one to put himself in that position with a train going at that rate over such a track. The plaintiff had previously worked at the San Bernardino yard and was entirely familiar with the switch and the curves over which the train was going. He was also familiar with the speed of trains and knew that it would be unsafe to jump off. He had no orders to get off the train at that place, or in that way, it was no part of his duty at that time, and he was under no compulsion to do so. He voluntarily placed himself in this dangerous position knowing the peril, and he is clearly chargeable with contributory negligence. The accident occurred in October, 1909. The statute, declaring that damages may be recovered, notwithstanding the contributory negligence of the person injured, was not enacted until 1911.

[2] The court erred in allowing the plaintiff to testify that the engineer promised that he would slow up opposite the roundhouse to allow plaintiff to jump off, provided the train was on time, without first requiring proof that the engineer was authorized by the defendant to slow up trains for that purpose. The plaintiff testified that this train was a regular passenger train, that by the rules of the company it was required to run on schedule time, and that it was at that time four minutes late. Not being ahead of time, there was no occasion for it to slow up. It is common knowledge that the running time and the stopping places of regular passenger trains upon a railway are controlled by schedules and are in charge of a train dispatcher who communicates his orders from time to time for the management of the train. If the engineer were allowed to modify the speed and slow up his train at will to allow passengers to jump off at places along the road, it is obvious that the schedule would often be greatly disarranged. The duty of the engineer is merely to run the engine and thereby to move and stop the train according to the schedule prepared for him and the orders of those who have authority to change it. It would be so far out of the ordinary course of business and so improbable in the nature of things that an engineer should have authority to make such agreements with passengers, that one, who would claim an advantage against the company solely by reason of a promise by the engineer to slow up for such purpose, must be charged with the burden of proving that the engineer had authority to make the promise and carry it out.

[3] The plaintiff contends that the promise to slow up, although unauthorized, was admissible as evidence of want of care by the engineer, first, in making the promise, and, second, in failing to keep it. This might be sound doctrine if the action were against the

engineer alone. But the company can be held responsible for the negligent acts of its servants only when such acts are within the actual or ostensible authority of the servant, or within the apparent scope of his duty. There are, of course, numerous cases in which railroad companies have been held liable for such negligent acts, although it appeared that the acts were unauthorized, or were expressly forbidden. The failure to ring a bell or sound a whistle at crossings, running at forbidden speed, and the like, are familiar examples. But in all these cases the test is whether the negligent act "was done in the particular business that the servant was employed to do." *Cosgrove v. Ogden*, 49 N. Y. 257, 10 Am. Rep. 361. "The master is not responsible if the wrong done by his servant is done without his authority and not for the purpose of executing his orders or doing his work." *Howe v. Newmarch*, 94 Mass. 57. "The master's liability does not depend on the question whether the act was one which the master ought to have understood would be done by the servant, but rather upon the circumstances whether it was so far an incident to the particular service in which he was engaged, that it may be said to have been done in the line of his duty, and in furtherance of his master's business." *Wood, Master & Servant*, § 280. The engineer was not employed to slow trains, or promise to slow them, wherever passengers wished to get off, but to run trains from station to station on schedule time and under orders from those higher in authority. The promise was not in the line of his duty, or incident to the work he was set to do, or a part of it, and it was not made in execution of any order of the company or in furtherance of any duty resting upon him. The negligent slowing of a train by the engineer without authority might, of course, cause an injury to some person, for which the company would be liable in damages. But this would not be so if the person injured was one who, knowing the lack of authority, had procured from the engineer the promise to slow up at that place.

[4] The mere fact that he was the engineer does not justify third persons in taking such promise on the assumption that he has such authority, nor make such promise the act of the company.

[5] It was not material in rebuttal of the contributory negligence shown. It did not tend to disprove the negligent act which contributed to his injury. At the time he got down upon the step, he says he knew that the train was going 30 miles an hour and that it could not be slowed up enough to allow him to jump off. He therefore knew that the promise was not to be and could not be performed, and he cannot claim that he put himself in the perilous position on the bottom step, which was his act of negligence, in reliance upon the promise, or in the expectation that it would be fulfilled. It there-

fore furnished no excuse for his negligent act.

[6] The defendant's claim that there is a variance between the negligence charged and that which the plaintiff sought to prove, is not tenable. The charge was that the defendant negligently ran its trains around the curve at a high speed, causing it to violently sway, jerk, and jolt so as to break plaintiff's hold on the rods, whereby he was thrown from the car to the ground. If the promise, which the plaintiff testified the engineer had made, had been within the scope of the engineer's duty or authority, the failure to keep the promise and the running of the train at a high rate of speed at the place where he had promised to slow up, would have constituted negligence on the part of the defendant, within the terms of the charge. The fact that the plaintiff failed to prove that the engineer had such authority, made simply a failure of proof, and not a variance.

Because of the errors above set forth it is necessary to reverse the judgment and order.

The judgment and order are reversed.

We concur: SLOSS, J.; ANGELLOTTI, J.

164 Cal. 350

PEOPLE v. AH LEE. (Cr. 1,743.)

(Supreme Court of California. Dec. 16, 1912.)

1. CRIMINAL LAW (§ 1169\*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where the evidence without conflict showed that decedent, while in his place of business, was shot and killed, the error, if any, in admitting in evidence a photograph showing the relative location in the room of decedent at the time of the shooting of a bed, stove, and lamp, was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3137-3143; Dec. Dig. § 1169.\*]

2. CRIMINAL LAW (§ 438\*)—EVIDENCE—PHOTOGRAPHS—ADMISSIBILITY.

A photograph showing the relative location, in the room of decedent when he was shot, of a bed, stove, and lamp, taken by a witness shortly after the shooting and at a time when such objects were in the same position as at the time of the shooting, is properly admitted in evidence, where the witness testifies that it is a correct representation of the objects shown and their relative location at the time of the taking of the photograph, though the photographer who finished the picture from the negative given him by the witness for that purpose does not testify.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 893; Dec. Dig. § 438.\*]

3. CRIMINAL LAW (§ 404\*)—DEMONSTRATIVE EVIDENCE—ADMISSIBILITY.

Where the evidence showed that accused was seen on the street on the day of the homicide with another person, wearing an overcoat, and that one of the two men committing the homicide wore such an overcoat at the time, the court properly received the overcoat in evidence to show that accused was one of the men participating in the homicide.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891-893, 1457; Dec. Dig. § 404.\*]

4. CRIMINAL LAW (§ 789\*)—REASONABLE DOUBT—INSTRUCTIONS.

An instruction that by the term reasonable doubt was not meant every possible doubt, nor "a mere guess or surmise," but was that state of the case which after the entire comparison and consideration of the evidence leaves the minds of the jurors in such condition that they could not say that they felt an abiding conviction to a moral certainty of the truth of the charge, was not objectionable by reason of the insertion of the quoted phrase.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1904-1922, 1960, 1967; Dec. Dig. § 789.\*]

5. CRIMINAL LAW (§ 829\*)—INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS COVERED BY THE CHARGE GIVEN.

It is not error to refuse a requested charge on the question of motive in a homicide case, where the court charged that there could be no presumption of motive, in the absence of a showing thereof, and that the jury might consider the absence of motive in determining the guilt or innocence of accused, since the establishment of motive is not essential to justify a finding, but the presence or absence of motive is simply a circumstance in each case on the question of guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

In Bank. Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Ah Lee was convicted of murder in the first degree, and he appeals. Affirmed.

Oliver Dibble, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., of Sacramento, for the People.

ANGELLOTTI, J. The defendant Ah Lee and one Ye Quong were jointly charged by information filed in the superior court of Stanislaus county on April 15, 1912, with the crime of murder, alleged to have been committed in said county on March 25, 1912. Ah Lee demanded and was accorded a separate trial, which resulted in a verdict of "guilty of murder of the first degree." His motion for a new trial was denied, and on May 11, 1912, judgment of death was pronounced. This is an appeal by said defendant from the judgment and from an order denying his motion for a new trial.

No claim is made that the verdict is without sufficient support in the evidence, and an examination of the record shows that there is no foundation for any such claim. The evidence is without conflict on the proposition that during the evening of March 25, 1912, in his place of business in Newman, Stanislaus county, the deceased, Sue Hoo Kee, was shot by two Chinamen who apparently entered the place solely for the purpose of killing him, who then and there inflicted upon him several mortal gunshot wounds, which at once caused his death, and immediately thereafter left the place. There was sufficient evidence to warrant a conclusion on the part of the jury that said Ah Lee was one of the murderers.

[1, 2] A photograph was received in evi-



dence, over the objection of defendant, to show the relative location in the room of deceased, at the time of the shooting, of a bed, a stove, and a lamp. Even if there was error in the admission of this photograph, we do not see how, in view of the evidence as to the shooting, it could be held that it was in the slightest degree prejudicial to defendant. But we perceive no error in the matter. The photograph was taken by the witness Newsome shortly after the shooting, and at a time when the objects referred to were in exactly the same position that they were at the time of the shooting. Newsome was a constable and was in the room immediately after the shooting, and so testified. While a photographer, who was not called as a witness, finished the picture from the negative given him by Newsome for that purpose, Newsome testified substantially that the finished picture offered in evidence was a correct representation of the objects sought to be shown and their relative location at the time he took the picture. A sufficient foundation for the admission of the photograph was thus laid. It is not claimed that the photograph was not admissible if there was a sufficient showing that it was a correct representation of the objects sought to be shown and their relative location at the time of the shooting. The only objection urged is that there was no such showing, and we are satisfied the objection is not well based.

Mr. Newsome was allowed to testify to a conversation had with said defendant in the branch jail at Newman on March 27th. The sum and substance of the statement then made by defendant to Newsome, as testified to by the latter, was as follows: He had come from Stockton, his name was Ah Lee. He was 28 years old. He had stayed in Tracy all of the Monday on which the shooting took place. He belonged to the Sue Sing Tong and had a rich company back of him. He would not say when he left Tracy. The objection made is that the voluntary character of these statements was not sufficiently established to entitle the same to be received in evidence. There was in these statements of defendant no admission by him of any fact tending to indicate his guilt. However, an examination of the record satisfies us that there was ample warrant for a conclusion on the part of the trial court that the voluntary character of the statement was sufficiently established to entitle the same to be admitted in evidence.

[3] There is no force in the objection that an overcoat was improperly admitted in evidence. It was sufficiently made to appear that it was the overcoat worn by defendant at the time of his arrest, which occurred on the day following the homicide, some eight or nine miles from Los Banos, where defendant and Ye Quong had procured an automobile to carry them to Fresno. There had been evidence given tending to show that Ah Lee was seen on a street in Newman about

6:40 p. m. on the day of the homicide, with Ye Quong, wearing an overcoat similar to the overcoat so received in evidence, and also evidence tending to show that one of the two men committing the murder wore at the time such an overcoat. Under such circumstances the people were entitled to have the coat admitted in evidence, to be considered by the jury in connection with the evidence just referred to, as tending to show that the defendant was one of the men participating in the murder.

[4] The trial court instructed the jury as follows: "All the presumptions of law, independent of evidence, are in favor of innocence, and every person accused of crime is presumed to be innocent until his guilt is established to a moral certainty and beyond all reasonable doubt. This presumption attaches at every stage of the case and to every fact essential to a conviction. By the term reasonable doubt is not meant every possible doubt or conjecture that may suggest itself to your minds. *A reasonable doubt is not a mere guess or surmise*, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. As I have said before, such possible doubts or imaginary doubts are not reasonable doubts. A reasonable doubt is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge."

Complaint is made only of the portion that we have italicized, "a reasonable doubt is not a mere guess or surmise," for it is admitted that otherwise the instruction as a whole has been many times held free from error. But it is said that the insertion of the italicized words "is a departure from precedent, not justified in law." Similar phraseology was used in an instruction on reasonable doubt given in *People v. Yun Kee*, 8 Cal. App. 82, 96 Pac. 95; but no objection appears to have been there made to that part of the instruction. We are of the opinion that the insertion of these words did not render the instruction given substantially different from the general instruction on reasonable doubt that has many times been held free from error.

[5] Complaint is made that the trial court improperly refused to give a requested instruction on the question of motive. It is apparent that the subject-matter of such requested instruction was fully covered, so far as it can be reasonably claimed that defendant was entitled to have it covered, by an instruction given by the court to the effect that there can be no presumption of motive in the absence of a showing thereof, and that the jury has the right to consider the absence of motive in determining the guilt or innocence of defendant. See page 36, Clerk's Transcript. Of course, it is not

contended that the establishment of a motive is at all essential as an element necessary to justify conviction. "The presence or absence of motive is simply a circumstance in each particular case, sometimes weak and sometimes strong, going to the question of guilt or innocence." *People v. Owens*, 132 Cal. 469, 471, 64 Pac. 770, 771

No other point is made for reversal. We have, however, carefully examined the whole record and find nothing warranting a reversal of the judgment or the order denying a new trial.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

164 Cal. 374

PUGH et al. v. MOXLEY et al. (L. A. 2,987.)

(Supreme Court of California. Dec. 20, 1912.)

# 1. MECHANICS' LIENS (§ 149\*)—REQUISITES OF CLAIM FOR LIEN—ENTIRE CONTRACTS.

A claim for lien for labor and materials furnished in the construction of two buildings under a single and entire contract for both buildings for an agreed lump sum, or for a sum to be fixed in accordance with the amount of the work done and materials furnished, is not subject to Code Civ. Proc. § 1188, providing that one filing a lien claim against two or more buildings must designate the amount due on each or the lien is postponed to other liens.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 256-259; Dec. Dig. § 149.\*]

# 2. COURTS (§ 92\*)—DECISIONS—DICTUM.

Where a decision is based on two independent lines of reasoning, neither one is a dictum, but one is as necessary to the decision as the other.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 335; Dec. Dig. § 92.\*]

# 3. COURTS (§ 93\*)—DECISIONS—STARE DECISIS.

An unquestioned decision that a claim for labor or materials furnished in the construction of two buildings under a single contract for labor or materials on both buildings for an agreed lump sum is not subject to Code Civ. Proc. § 1188, providing that one filing a lien claim against two or more buildings must designate the amount due on each, or the lien will be postponed to other liens, will be adhered to, since it is fair to presume that lien claimants have relied on the decision in framing their notices of lien.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 336-339; Dec. Dig. § 93.\*]

# 4. MECHANICS' LIENS (§ 73\*)—"MATERIAL-MAN"—"ORIGINAL CONTRACTOR"—"CONTRACTOR."

The word "contractor," in Code Civ. Proc. §§ 1183, 1184, providing that original contracts for more than \$1,000 must be in writing and filed for record, does not refer to a materialman, but one may be an original contractor, though he has agreed to do only a part of the work for the construction of a building, and one who agrees to manufacture at his own works and install in the building of another various appliances is a materialman and not an original

contractor, and his contract is not subject to the statute.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 87, 88, 90-102; Dec. Dig. § 73.\*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1534-1537; vol. 8, p. 7616; vol. 5, p. 4409; vol. 8, p. 7718; vol. 6, pp. 5056, 5057.]

# 5. MECHANICS' LIENS (§ 73\*)—ORIGINAL CONTRACTOR—MATERIALMAN.

A contractor to do the work and furnish all materials and fixtures necessary to install heaters, bathtubs, toilets, laundry trays, wash basins, and kitchen sinks, with necessary connecting pipes, in buildings under construction, is not an original contractor within Code Civ. Proc. § 1183, requiring contracts for more than \$1,000 to be in writing and filed, but he is a materialman, where the value of the materials is \$950 and the labor cost only \$128; the test being the relation of the cost of the labor to the cost of the materials.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 87, 88, 90-102; Dec. Dig. § 73.\*]

# 6. MECHANICS' LIENS (§ 73\*)—ORIGINAL CONTRACTOR—"MATERIALMAN."

A contractor to furnish lumber and building materials for the erection of buildings, as required from time to time, at current prices, is a materialman, and not an original contractor within Code Civ. Proc. § 1183, where the only element of labor connected with the furnishing of material is cartage.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 87, 88, 90-102; Dec. Dig. § 73.\*]

# 7. APPEAL AND ERROR (§ 1071\*)—REVIEW—HARMLESS ERROR—ERRONEOUS FINDINGS.

Where the court gave a party the relief demanded, the error, if any, in finding against him on a claim included in the judgment, is harmless and must be disregarded as required by Code Civ. Proc. § 475.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.\*]

# 8. MECHANICS' LIENS (§ 280\*)—CLAIMS OF LIEN—EVIDENCE—ADMISSIBILITY.

The defect in a claim of lien for labor or materials furnished in the erection of two buildings, arising from the failure to designate the amount due on each building, merely affects the priority of the lien and is no ground for refusing to admit it in evidence in a suit to foreclose it.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 557-563; Dec. Dig. § 280.\*]

Department 1. Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Consolidated actions by Ray L. Pugh and George Gordon Zuck against J. Moxley and others, in which defendant F. M. Ryon filed a cross-complaint. From a judgment for plaintiffs, defendant Ryon appeals. Affirmed.

Purington & Adair, of Riverside, for appellant. M. Estudillo, of Riverside, Patterson Sprigg, of San Diego, and Collier, Carnahan & Craig, T. T. Porteous, and C. L. McFarland, all of Riverside, for respondents.

SLOSS, J. A number of actions for the foreclosure of mechanics' liens were consoli-



dated, and judgment in favor of the claimants was entered. The defendant Ryon, asserting an interest as mortgagee, appeals from the judgment and from an order denying his motion for a new trial.

In 1909, Mrs. O. E. Moxley, acting through her husband, J. Moxley, as agent, commenced the construction of two dwelling houses upon a parcel of land, owned by her, in the city of Riverside. There was no contract for the erection of the buildings, or either of them, as a whole. J. Moxley made contracts with laborers and others for the doing of work and the furnishing of materials; the construction being superintended by him personally. The buildings were completed on November 27, 1909. On December 7, 1909, the appellant, Ryon, loaned the Moxleys \$8,000, taking a mortgage on the two houses, and the land on which they were situated, as security. The various lien claimants filed their respective claims within the time allowed by the statute. The owners defaulted. Ryon answered and filed a cross-complaint, in which he asked that his mortgage be foreclosed, and that the lien of said mortgage be declared to be prior to that of the claimants of mechanics' liens. The decree postponed the mortgage to the mechanics' liens. The several points made by the appellant are as follows:

[1] 1. It is urged that the provisions of section 1188 of the Code of Civil Procedure give the mortgage priority over the other liens. As the mortgage here involved was made after the completion of the buildings, and therefore after the work was done, and materials commenced to be furnished, it was subordinate to the liens of mechanics, etc. (Code Civ. Proc. § 1186), unless given a superior standing by the provisions of section 1188. That section reads as follows: "In every case in which one claim is filed against two or more buildings, mining claims, or other improvements owned by the same person, the person filing such claim must at the same time designate the amount due to him on each of such buildings, mining claims or other improvements; otherwise, the lien of such claim is postponed to other liens. \* \* \*" In the case at bar it appears that each of the claimants made a single and entire contract with J. Moxley for the doing of work or the furnishing of materials on both buildings for an agreed lump sum, or for a sum to be fixed in accordance with the amount of work done and materials furnished (for example, 11 cents per square foot for certain cement work).

If the question were a new one, there might be some doubt whether claims of lien under such contracts are subject to the requirements of section 1188. But there is authority to the effect that the section has no application to work done or material furnished under the circumstances here disclosed. In *Warren v. Hopkins*, 110 Cal. 506, 42 Pac. 986, the court said: "While section

1188 requires the claimant who files a lien against two or more buildings, or other improvements, to designate the specific amount for which he claims a lien upon each of such 'improvements,' it does not require him to make such designation unless there is in fact a specific amount due to him on each of such improvements, and it might frequently happen that a contractor would construct several buildings under one contract, and there would not be any specific amount due to him on each of such buildings." The District Court of Appeal for the Third Appellate District has held to the same effect in *Southern Cal. Lumber Co. v. Peters*, 3 Cal. App. 478, 86 Pac. 816. See, also, *Kritzer v. Tracy Eng. Co.*, 16 Cal. App. 287, 116 Pac. 700. It is contended by appellant that the foregoing quotation from the opinion in *Warren v. Hopkins* is to be disregarded as dictum. It is true that the opinion in question states, as a ground of decision, that section 1188 does not apply to the particular character of improvement (grading of lots) involved in that case. But the court did not rest its conclusion upon this ground alone. It went on to express the view that, if section 1188 were to be held to be applicable, the result would not be different, for the reason that the section, upon a proper construction of its terms, does not require separate statements of the amount due on each building or improvement, where two or more buildings or improvements are constructed under a single contract for a single consideration.

[2] Where a decision is based upon two independent lines of reasoning, neither one can be said to be dictum. One is as necessary to the decision as the other. *Clary v. Roland*, 24 Cal. 147; *Camron v. Kenfield*, 57 Cal. 551; *King v. Pauly*, 159 Cal. 554, 115 Pac. 210, Ann. Cas. 1912C, 1244.

[3] *Warren v. Hopkins* was decided in 1895. The correctness of the views there expressed has never been questioned by this court. It is fair to assume that many lien claimants, including, it may be, the respondents in the case at bar, have relied upon that decision in framing their notices of lien. Under these circumstances, we should not be disposed to alter the rule laid down, even if we felt much more doubtful than we do of the soundness of the construction heretofore declared. It must therefore be held that the court below did not err in giving to the liens of the respondents priority over the mortgage lien.

[4-6] 2. Two of the claims are attacked on the ground that they were based on original contracts for more than \$1,000, and that such contracts were void, because not reduced to writing, or filed for record, as required by section 1183 of the Code of Civil Procedure. One of these contracts was that of the *Hinde Hardware Company*. By its terms the hardware company agreed with

J. Moxley to do all work and furnish all materials and fixtures necessary to install two solar heaters, two bathtubs, two toilets, two pair laundry trays, two wash basins, and two kitchen sinks, with the necessary connecting pipes, for the sum of \$1,078. The other was a contract whereby the Russ Lumber & Mill Company agreed to furnish to Moxley lumber and building materials for the two houses, as required from time to time, at current market prices. Goods were furnished to the amount, including cartage, of \$2,137.70. The court found that neither of these contracts was an original contract within the meaning of section 1183, but that each was a contract for the sale of materials to be used in the construction of the buildings. If this finding is sustained by the evidence, the conclusion that the contracts, whatever the amount payable under them, were not required to be in writing or filed for record, necessarily followed. *Hinckley v. Fields' Biscuit, etc., Co.*, 91 Cal. 136, 27 Pac. 594; *Roebing's Sons Co. v. Humboldt, etc., Co.*, 112 Cal. 288, 44 Pac. 568; *Bennett v. Davis*, 113 Cal. 337, 45 Pac. 684. 54 Am. St. Rep. 354; *Bryson v. McCone*, 121 Cal. 154, 53 Pac. 637; *Cal. Portland Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 692, 118 Pac. 103, 113. "It is quite clear to us," says the court in *Hinckley v. Fields' Biscuit, etc., Co.*, supra, "that the word 'contractor' in sections 1183 and 1184 of the Code of Civil Procedure does not refer to a materialman." On the other hand, one may be an original contractor although he has agreed to do only a part of the work required for the construction of a building. *La Grill v. Mallard*, 90 Cal. 373, 27 Pac. 294; *Pac. Mut. L. Ins. Co. v. Fisher*, 106 Cal. 224, 39 Pac. 758; *Smith v. Bradbury*, 148 Cal. 41, 82 Pac. 367, 113 Am. St. Rep. 189. The line of demarcation may be illustrated by a brief reference to the facts of some of the cases we have cited. One who agrees to manufacture, at his own works, and to install in the building of another, a steam plant, consisting of boilers, engine, and attachments, is a materialman, and not an original contractor. *Hinckley v. Fields' etc., Co.*, supra. The same is true of one who agrees to furnish and set up, ready for use, electrical machinery (*Roebing's Sons Co. v. Humboldt, etc., Co.*, supra), or one who contracts to furnish mantels, tiles, and grates, and perform the labor necessary to install them in a building (*Bennett v. Davis*, supra), or to furnish and put in place a plant for the manufacture of ice (*Bryson v. McCone*, supra), or to furnish and install elevators (*Cal. Portland Cem. Co. v. Wentworth Hotel Co.*, supra). But contracts to paper and

decorate rooms (*La Grill v. Mallard*, supra), or to do the plastering work, including labor and materials, in a building (*Smith v. Bradbury*, supra), are original contracts. The test of the character of the contract is the relative value of the material and the labor supplied. If the value of the labor is small in comparison with that of the material, the claimant is a materialman. *Bennett v. Davis*, supra. Applying this ground of discrimination, the evidence was clearly such as to justify the finding that the *Hinde Hardware Company* and the *Russ Lumber & Mill Company* were materialmen, and not original contractors. In the case of the former the value of the fixtures and other material supplied was \$950, while the labor cost was only \$128. The only element of labor connected with the furnishing of lumber by the *Russ Company* was cartage, which was trifling in comparison with the value of the materials.

[7] 3. The appellant, *Ryon*, alleged in his cross-complaint that the *Moxleys* had violated a covenant of their mortgage requiring them to keep the buildings insured for the benefit of the mortgagee, and that he had been compelled to insure, expending \$116 as a premium for such insurance. He prayed for foreclosure of his mortgage, including the \$116 as a part of the debt secured. The court found that the payment of the premium was voluntary on *Ryon's* part. This finding is assailed as contrary to the evidence. But since the court, notwithstanding the finding, gave to the appellant the relief which he asked, and included this sum of \$116 in the amount to be paid him out of the proceeds of a sale, he is not in any way injured by the error, if error there was, in finding against him on this point. *Code Civ. Proc.* § 475.

The objection to the finding that the mortgage is subsequent to the liens of the respondents is sufficiently answered by what has been said on the first point discussed in this opinion.

[8] 4. The appellant excepted to the admission in evidence, over his objection, of the claims of lien of the several respondents. The ground of objection was that the amount claimed as against each of the buildings was not separately stated. As we have already seen, no such separate statement was required. But even if it had been, the defect would merely have affected the priority of the liens. It would have been no ground for refusing to admit them in evidence.

No other points are made.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.



164 Cal. 380

**NEWHALL v. WESTERN ZINC MINING CO. et al. (S. F. 5,896.)**

(Supreme Court of California. Dec. 20, 1912.)

**1. CORPORATIONS (§ 630\*)—FORFEITURE OF CHARTER—EFFECT.**

A corporation whose charter has been forfeited cannot be sued, and a judgment obtained against it is void.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2482-2486; Dec. Dig. § 630.\*]

**2. CORPORATIONS (§ 630\*)—FORFEITURE—EFFECT.**

Act March 20, 1905 (St. 1905, p. 493), and amendments, providing for the forfeiture of franchises and charters of corporations, specifying the exact time when a forfeiture shall arise, and making it a penal offense for any officer or agent thereafter to exercise any corporate powers, and providing for the winding up of the corporate affairs by the directors as trustees of the corporation and stockholders, is self-acting and operative, and a corporation forfeited under the statute ceases to have a corporate existence, and cannot be sued.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2482-2486; Dec. Dig. § 630.\*]

**3. CORPORATIONS (§ 202\*)—STOCKHOLDERS—INTEREST IN JUDGMENT AGAINST CORPORATION.**

A stockholder is interested in any judgment obtained against the corporation, and his interest is not dependent on his stockholder's liability, nor on the existence or nonexistence of corporate assets, and he has sufficient interest to intervene to expunge from the records a void judgment against the corporation because rendered in an action begun against the corporation after its charter had been forfeited.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 770-780; Dec. Dig. § 202.\*]

**4. CORPORATIONS (§ 202\*)—JUDGMENT—STOCKHOLDERS—ESTOPPEL.**

A stockholder of a corporation whose charter has been forfeited is not estopped from impeaching a judgment against the corporation rendered in a suit begun after the forfeiture on the ground that the directors are trustees, and that one of them filed an answer of the corporation, since the act of the director rendered him criminally liable under Act March 20, 1905 (St. 1905, p. 493), as amended, relating to the forfeiture of franchises and charters of corporations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 770-780; Dec. Dig. § 202.\*]

**Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.**

Action by E. W. Newhall against the Western Zinc Mining Company, in which I. W. Levy, a stockholder of defendant, appeared, and moved to set aside the judgment obtained by plaintiff. From an order refusing to set aside the judgment, I. W. Levy appeals. Reversed.

Joseph C. Meyerstein, of San Francisco, for appellant. Thomas, Gerstle, Frick & Beedy, Thomas, Frick & Beedy, and Francis V. Keesling, all of San Francisco, for respondents.

**HENSHAW, J.** On the 4th day of March, 1909, plaintiff, as assignee of certain claims for goods sold and delivered to the West-

ern Zinc Mining Company, a corporation, commenced his action against this corporation upon these claims. The complaint was verified, and contained the usual and appropriate averment of the corporate existence and capacity of the defendant. On the 24th of March, 1909, what purported to be the answer of the corporation was filed. This answer was verified by one P. A. Brangier, declaring himself to be a director of the defendant. The answer admitted, by failing to deny, the averment in the complaint touching the corporate capacity of the defendant. Subsequently the action was tried by the court sitting without a jury, and on the 8th of April, 1910, the court gave judgment in favor of the plaintiff and against the defendant for the sum of \$24,193.80. On the 26th of September, 1910, I. W. Levy entered his appearance in the action, and gave notice of his intended motion to set the judgment aside. The motion was made, and was by the court denied. In support of the motion, it is established by affidavit of the moving party that he was during all the period of time involved in the action and still is a stockholder of the defendant corporation; that the corporation was organized, and had existed under the laws of the state of California as a corporation for profit; that the corporation had not paid the annual license tax required by law to be paid by such corporations for the fiscal year commencing July 1, 1908; and that on the 30th day of November, 1908, it had forfeited its charter to the state and had ceased to exist as a corporation.

[1] None of these facts is controverted or denied. I. W. Levy, the moving party and appellant herein, contends upon these admitted facts that it was the clear duty of the court to have granted his motion. That a corporation whose charter has been forfeited cannot be sued, that a judgment obtained against such corporation is void, and may be impeached at the instance of a stockholder of such corporation, are legal propositions conclusively settled in favor of appellant's contention by *Crossman v. Vivien Water Co.*, 150 Cal. 575, 89 Pac. 335.

[2] True that in the *Crossman* Case there had been a dissolution of the corporate existence by judicial decree. But there can be no legal distinction between such a termination of corporate existence and the termination by forfeiture of franchise and charter under the act of March 20, 1905 (St. 1905, p. 493), and the amendments thereto; for that act clearly and unmistakably declares and provides for a forfeiture not dependent upon judicial determination and decree, but a forfeiture which is self acting and operating. The language of the act does not even permit a doubt upon this question. It not only declares the day and the hour when the forfeiture shall arise, but it makes it a

penal offense for any officer or agent thereafter to exercise any corporate powers on behalf of the corporation, and, finally, it provides that the winding up of the corporate affairs is imposed upon the directors or managers of the corporation who "are deemed to be trustees of the corporation and stockholders or members of the corporation whose power or right to do business is forfeited." These trustees and not the corporation may sue or "may be sued in any of the courts of this state by any person having a claim against said corporation."

[3] As little doubt can be entertained of the stockholder's right to intervene for the purpose of expunging from the records such a void judgment against the corporation, respondents urge that in this instance the stockholder does not show that he is a party interested, or, if interested, that his interests are liable to injury by reason of the judgment. In this respect it is argued that the stockholder does not show that he was a stockholder at the time that the liability upon which the judgment was obtained by the corporation accrued, and that, if he was not a stockholder at such time, no stockholder's liability was cast upon him; further, that an execution upon the judgment had been returned unsatisfied, and it is said that the stockholder has failed to show by his affidavit that the corporation has acquired any assets since the date of the entry of the judgment. But in answer to this suffice it to say that it was not incumbent upon the stockholder to show any of these things, any more than it was incumbent on him to plead the negative of an estoppel. A stockholder is interested in any judgment obtained against his corporation, and that interest is not dependent upon his stockholder's liability for that judgment, nor upon the existence or nonexistence of corporate assets. Even if the judgment could not be made the basis of proceedings against the stockholder, it would serve to reduce the assets of the corporation, and consequently the value of the stockholder's shares if at any time the corporation should acquire assets.

[4] We can perceive no force to the argument that the appellant is estopped from complaining of the judgment. Herein it is said that as the directors are made trustees of the defunct corporation, and as the corporate answer was filed by one of these directors or trustees, it results that the stockholder's own trustee filed the answer in this case, and that this director or trustee having defended the action, and having admitted the corporate existence of the defendant, the stockholders are bound by this action. But to this it must be replied that the law authorizes the directors, and not one of them, to act as trustees. It empowers them as trustees to sue and be sued but not to answer suits in the name of the defunct cor-

poration. Brangler's answer was, therefore, not only without authority of law, but in direct violation of the law. And, finally, if, notwithstanding these plain violations of the law, assent be given to the statement of respondent that "the business of the Western Zinc & Mining corporation was continued by defending this suit in its name, it must inevitably result that the trustee who thus did continue the business of the Western Zinc Mining Company not only did so in violation of his powers and of the express mandate of the statute, but made himself criminally liable for his conduct, under section 9 of the amended act.

The order appealed from is therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

164 Cal. 355

D. GHIRARDELLI CO. v. HUNSICKER et al.  
(S. F. 5,882.)

(Supreme Court of California. Dec. 16, 1912.)

1. CONTRACTS (§ 116\*)—FIXED PRICE FOR GOODS—SECRET PROCESS OR TRADE-MARK.

The fact that a product sold under a contract fixing its retail price for the benefit of the manufacturer is manufactured, prepared, and packed in accordance with certain processes and formulae of the manufacturer, or sold under a trade-mark, is in no way material on the issue of the lawfulness of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542-552; Dec. Dig. § 116.\*]

2. CONTRACTS (§ 187\*)—CONSTRUCTION—PARTIES—CONTRACT FOR BENEFIT OF THIRD PERSON.

Where a jobber or wholesaler gets goods from a manufacturer under an agreement which, if valid, binds the wholesaler to contract, for the manufacturer's benefit, with any person to whom he sells the goods at wholesale, the situation is the same as if the retailer had purchased directly from the manufacturer under such agreement, and his agreement to sell at prices fixed by the manufacturer is, if otherwise valid, enforceable under Civ. Code, § 1559, providing that a contract made expressly for the benefit of a third party is enforceable.

[Ed. Note.—For other cases, see Contracts Cent. Dig. §§ 798-807; Dec. Dig. § 187.\*]

3. CONTRACTS (§ 117\*)—VALIDITY—RESTRAINT OF TRADE—FIXING RETAIL PRICES FOR GOODS.

An agreement for the benefit of a manufacturer of ground chocolate, who affixed to the packages a notice that the contents were sold on the express condition that the wholesaler or retailer would retain the fixed retail prices, and that the acceptance of the goods was an agreement to comply with such condition, made to secure the benefit of a reputation for producing a superior quality, in the absence of anything to show that such manufacturer's product controlled the market, was not invalid as a contract in restraint of trade.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554-569; Dec. Dig. § 117.\*]

4. CONTRACTS (§ 117\*)—CONTRACT IN RESTRAINT OF TRADE—WHAT CONSTITUTES.

The mere fact that some restraint of trade results from an agreement for the benefit of



the manufacturer fixing the wholesale and retail prices of his product does not render the contract void, if it is reasonable both as to the public and parties, and is limited to what is fairly necessary in the particular case for the protection of the covenantee; otherwise it will be void as against public policy, which is the first consideration.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 554-569; Dec. Dig. § 117.\*]

5. MONOPOLIES (§ 17\*)—RESTRAINT OF TRADE—FIXING RETAIL PRICES OF GOODS—STATUTE.

The Cartwright Act (St. 1907, p. 984), as amended by St. 1909, p. 593, section 1 of which defines the various kinds of combinations constituting a monopoly, and provides that no agreement or combination the object of which is to conduct its business at a reasonable profit shall be unlawful, does not prohibit a manufacturer from fixing retail prices for his product as a means of securing a reputation for its superior quality, and not to control the market.

[Ed. Note.—For other cases, see *Monopolies*, Cent. Dig. § 13; Dec. Dig. § 17.\*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action for injunction by the D. Ghirardelli Company against Jeremiah E. Hunsicker and another, copartners. Judgment for plaintiff, and defendants appeal. Affirmed.

Wm. M. Madden, of San Francisco, for appellants. Henry J. Brodsky, of San Francisco, for respondent.

ANGELLOTTI, J. This is an appeal from a judgment enjoining defendants from selling or offering to sell a product of plaintiff known as Ghirardelli's ground chocolate, except at prices in direct conformity with the schedule embodied in the notice or label attached to plaintiff's product, which declares the fixed minimum retail price to be 30 cents for one-pound tins and 80 cents for three-pound tins. The judgment was entered upon defendants' failure to answer, after their demurrer to the complaint had been overruled. The demurrer was practically a general demurrer for want of facts sufficient to constitute a cause of action.

The complaint seeking the injunction granted sets forth substantially the case which was presented in *Grogan v. Chaffee*, 156 Cal. 611, 105 Pac. 745, 27 L. R. A. (N. S.) 395, with the exception that the defendants did not purchase plaintiff's product which they offered to sell and did sell at retail to the public at prices below those fixed by the schedule from the plaintiff, but from one of the jobbers or wholesale grocers doing business in San Francisco who had purchased from plaintiff, upon the same general conditions on which Chaffee bought olive oil from Grogan in *Grogan v. Chaffee*, supra. The notice annexed to each box or case of such product sold by plaintiff was the same as the notice affixed by Grogan to each package of his olive oil, except in the specification of the product and price. The notice was as fol-

lows: "Important Notice. The goods contained in this case are sold on the express condition, made a part of the consideration of the sale, whether same is made by the manufacturer or wholesaler, that the purchaser, if he retails them, will maintain our fixed retail price on these goods, and if he wholesales them he will do so subject to the same condition. The acceptance of these goods is an agreement to comply with this condition and a guarantee not to retail them, under any circumstances for less than the established price. Our fixed minimum retail price on Ghirardelli's Ground Chocolate for the Pacific Coast is 30c per 1 lb. tins and 80c for 3 lb. tins. D. Ghirardelli Company."

In addition to the allegations contained in the complaint in *Grogan v. Chaffee*, supra, it is alleged that this notice is always brought by plaintiff conspicuously to the attention of the trade, and chocolate is purchased by the jobbers and dealers and all who buy under and subject to each and all the restrictions; that defendants purchased at wholesale from a jobber or wholesale grocer for the purpose of selling again at retail a certain quantity of said chocolate, which bore said notice on each case in a conspicuous place, and of which said notice defendant then and there had full knowledge; that "defendants purchased same under an agreement made at the time of such sale by and between the defendants and the jobber or wholesale grocer hereinbefore referred to, wherein and whereby and by the terms of which and for a valuable consideration it was understood and agreed that the defendants herein in purchasing the product of plaintiff, to wit, Ghirardelli's ground chocolate, did so upon the distinct understanding and agreement that they would maintain the fixed retail selling price, and \* \* \* that at the time said agreement was made and entered into it was understood and agreed that the same was made for the express benefit of the plaintiff herein, and the defendants thereby contracted and agreed that they would not sell said Ghirardelli's ground chocolate for less than 30 cents for one-pound tins and 80 cents for three-pound tins."

It is complained that nevertheless defendants are offering for sale and are selling said product for prices below those specified, to the great damage of plaintiff. There are specific averments as to the nature of the damage so caused.

[1] The fact alleged that the product is manufactured, prepared, and packed by plaintiff "in accordance with certain secret processes and formulæ of its own" is in no way material. Upon this point the reasoning of the Supreme Court of the United States in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376, 382, and 383, 55 L. Ed. 502, is unanswerable. Nor is the matter of trade-mark of any im-

portance. "A trade-mark, or a trade-name or trade dress, have no other effect than to prevent one from 'palming' off his goods for those of another." *Park & Sons Co. v. Hartman*, 153 Fed. 24, 28, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135. See, also, *Garst v. Hall*, 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631. No infringement of trade-mark or trade dress is here alleged. It is not alleged that the product is covered by letters patent, so we have no question of the rights conferred by statute upon a patentee of an article. The same was true as to the product involved in *Grogan v. Chaffee*, supra.

[2] In view of the allegations as to the agreement entered into by defendants with the jobber or wholesaler at the time of the purchase of the goods by them for the express benefit of the plaintiff, the case presented here is practically the same case that was presented in *Grogan v. Chaffee*, supra. It appears from the complaint that such wholesaler or jobber had acquired the goods from plaintiff upon the agreement on his part that, if he sold the same at wholesale, he would do so subject to the same conditions that had been imposed on him as to retail sales. If this was a valid undertaking on his part, he was not only authorized, but bound, to make such a contract as he is alleged to have made, for plaintiff's benefit, with any person to whom he sold the goods at wholesale. It is positively alleged that he did make such a contract with defendants, and that it was understood and agreed between them that the same was made for the express benefit of plaintiff. So far as appears such agreement was based on a sufficient consideration. No reason is apparent why it can be held that the contract thus alleged is not one of the class referred to in section 1559, Civil Code, where it is provided that "a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." See *Washer v. Independent M. & D. Co.*, 142 Cal. 708, 76 Pac. 654; *Malone v. Crescent City, etc., Co.*, 77 Cal. 44, 18 Pac. 858. If the goods in the hands of the wholesaler or jobber, who had purchased directly from plaintiff, were subject to the conditions we have specified, including the stipulation that, if he sold the same at wholesale, he would do so subject to the same conditions, the situation presented by the complaint is in all respects substantially the same as if defendants had purchased directly from plaintiff upon the same terms and conditions as the jobber or wholesale purchaser. Under these circumstances, we are not called upon to consider the question suggested, but not decided, in *Grogan v. Chaffee*, supra, whether such a contract between the manufacturer and his immediate vendee could be enforced against persons who might come into possession of plaintiff's product with notice of the restriction imposed by him on its sale, but without having any

direct agreement to respect such restriction. See *Garst v. Hall, etc., Co.*, 179 Mass. 589, 61 N. E. 219, 55 L. R. A. 631. It may be assumed, as said in *Park & Sons Co. v. Hartman*, 153 Fed. 39, 82 C. C. A. 173, 12 L. R. A. (N. S.) 135, that: "The restrictions imposed by complainant upon sales and resales, if valid at all, are only so because they constitute personal contracts upon which an action will lie only against the contracting party."

[3] It was held in *Grogan v. Chaffee*, supra, that, under the circumstances there appearing, the contract involved was not unenforceable as being in restraint of trade. Much consideration was given by the court to that question, a rehearing having been granted to give further consideration to the views of the United States Circuit Court of Appeals for the Sixth Circuit in certain patent medicine cases (153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. [N. S.] 135, and 164 Fed. 803, 90 C. C. A. 579), and all of the justices of this court except the Chief Justice and the writer of this opinion concurred in the judgment given and the reasons expressed therefor. Since that decision was rendered the Supreme Court of the United States has decided *Miles Medical Co., etc., v. Park & Sons Co.*, being the same case reported in 164 Fed. 803, 90 C. C. A. 579, affirming the judgment of the Circuit Court of Appeals (220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502). It may be conceded that in this case contracts of the manufacturer of certain proprietary medicines with his vendees, designed to fix the retail price of such product, of which he was the sole manufacturer, were held to be void as being in undue restraint of trade both under the common law and the act of Congress of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), the Sherman Anti-Trust Act, although, as suggested in the opinion in *Grogan v. Chaffee*, supra, it appears to us that neither this case nor the case of *Park v. Hartman*, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135, "involved the question here presented, i. e., the enforceability, as between the parties, of a contract of the kind here shown." But we think there is a distinction between these cases and the case at bar and *Grogan v. Chaffee*, supra, in at least one respect material to the question under consideration. In each of the federal cases, the contract involved the whole of a certain product, in one case the product being a certain well-known proprietary medicine named "Peruna," and in the other case the product consisting of certain well-known proprietary medicines. The opinion of Mr. Justice Lurton (then circuit judge) in *Park v. Hartman*, supra, quoted in part by the United States Supreme Court in *Miles, etc., Co. v. Park, etc., Co.*, supra, shows the effect of the contracts involved in that case to be the absolute prevention of any competition in respect to prices between retailers who supplied the public with the product named,



amounting to a complete restraint as to "Peruna" generally. The learned judge was here talking of a case where the whole supply of the article on the market, by whomsoever manufactured, was involved, for he said: "It is true that the complainant is not in a combination with other makers of 'Peruna.' There are no others. If there were, there would not be a complete or general restraint; for it might then happen that these others, not being bound by any covenants, could supply the public. If the supply to come from them was adequate for the public demand, the public might be in no wise affected. Now, if the complainant had absorbed all the sources from which the demand for lumber, or furniture, or stoves could be supplied, and then should say, 'I will sell only to those who will resell only to those I shall license to buy and only at the price I dictate,' could any voice be raised to say that the covenants which every dealer should sign in order to prevent exclusion from trade in such articles would be upheld by the courts?" *Grogan v. Chaffee*, supra, did not involve a contract affecting the whole or even any large proportion of the supply of olive oil available in the market. This feature was expressly recognized by the court in discussing the question of attempted monopoly and unreasonable restraint of trade. It was said: "The contract here relied on does not relate to any olive oil except that manufactured by plaintiff. There is no suggestion that this comprises all, or any large portion, of the olive oil manufactured or sold in the market supplied by plaintiff. While plaintiff alleges that he manufactures oil by a process of his own discovery, there is nothing exclusive in the product resulting from this process. All that he claims for his oil is that it is pure and wholesome. The court must assume as a matter of common knowledge that others may and do manufacture pure olive oil in considerable quantities." The same is substantially true of plaintiff's ground chocolate. That it comes anywhere near controlling the market in ground chocolate is not suggested, and as a matter of common knowledge we do know that others may and do manufacture and sell such chocolate in considerable quantities. Plaintiff simply claims to be producing a superior quality of ground chocolate. This feature, common to this case and that of *Grogan v. Chaffee*, supra, which was taken by the federal courts to be absent from the cases decided by them which we have referred to, is a most material matter in the determination of the question whether such restraint of trade as results from the contract is such as to render the contract void as imposing an unreasonable restraint.

[4] It is expressly recognized by the Supreme Court of the United States, in *Miles Medical Co. v. Parks*, supra, that the mere fact that some restraint results does not render the contract void. It was said by

the court, through Mr. Justice Hughes: "With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties, and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenant. Otherwise restraints of trade are void as against public policy. \* \* \* Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not, unreasonable [citing cases]." The opinion of Mr. Justice Lurton in *Park & Sons v. Hartman* indicates that he would uphold such a covenant as is here involved where it is "no more than necessary to afford a fair protection to the business of the complainant and not so large as to interfere with the interests of the public." He further said: "There can be no hard and fast rule by which the result can be reached in such cases. At last the question must come to this: 'What is a reasonable restraint with reference to a particular case?'" We do not think that the federal cases relied on should be construed as holding that such contracts as are involved in *Grogan v. Chaffee*, supra, and in this case are, under such circumstances as appear in these cases, unenforceable as being in restraint of trade, either under the common law or the act of Congress known as the Sherman Anti-Trust Act. Of course, we are not in this case concerned with any question of interstate commerce, so that any question as to the effect of that act is not involved. We see no reason for modifying the rules expressed in *Grogan v. Chaffee*, supra, upon the question there decided.

[5] It is urged that the agreement here sought to be enforced is within the prohibitory provisions of the so-called Cartwright Act of this state enacted in 1907 (Stats. 1907, p. 984), as amended in 1909 (Stat. 1909, p. 593). This is a question not decided in *Grogan v. Chaffee*, supra. It may be conceded purely for the purposes of this decision that the agreement was contrary to the policy of that law (Civ. Code, § 1667, subd. 2), as such law existed prior to the amendment of 1909. So conceding, it is clear that the proviso annexed by such amendment to section 1 of the act, the section defining the various kinds of combinations constituting a trust within the meaning of the act, and the only section upon which reliance can be based for a claim that the contract here involved is opposed to the policy of such act, entirely answers the contention of defendants. That

proviso, so far as material here, is: "Provided that no agreement, combination or association shall be deemed to be unlawful or within the provisions of this act, the object and business of which are to conduct its operations at a reasonable profit." The complaint here sufficiently shows that such was the only object of plaintiff in the matter of the agreement herein involved.

It is not urged that the complaint does not sufficiently show that the conditions imposed were necessary to afford a fair protection to plaintiff's business. In fact, the only points made in defendants' brief against the judgment are those we have discussed.

The judgment is affirmed.

We concur: SLOSS, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.

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stock at a stated price; the promise of one party being adequate consideration for the promise of another.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 348; Dec. Dig. § 59.\*]

### 3. CORPORATIONS (§ 82\*)—SALE OF STOCK—LACHES—REMEDY OF PURCHASER.

A contract of sale of corporate stock, that at any time after 6 months, on 90 days' notice, the seller would repurchase the stock at the price paid, but that the purchaser need not sell said stock at the price paid, contemplated that there would be some delay; and where proceedings were set in motion for a demand that the seller repurchase, before the statute of limitations had run, and the actual demand was made a few months thereafter, there was no such laches as would bar an action therefor.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 285-295; Dec. Dig. § 82.\*]

### 4. LIMITATION OF ACTIONS (§ 66\*)—CONTRACT TO REPURCHASE STOCK—ACCRUAL OF RIGHT OF ACTION—DEMAND—NECESSITY.

Under a contract of sale of corporate stock, that at any time after 6 months, on 90 days' notice, the seller would repurchase the stock at the price paid, but that the purchaser need not sell said stock at such price, the statute did not commence to run until a demand to purchase had been made; it being a contract to purchase personal property, and not a positive obligation to pay money.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 353-375; Dec. Dig. § 66.\*]

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by O. A. Vickrey and another against Simon Maier and another. Judgment for defendants, and plaintiffs appeal. Reversed.

Alton M. Cates and Stewart & Stewart, all of Los Angeles, for appellants. James P. Clark and Mott & Dillon, all of Los Angeles, for respondents.

SHAW, J. Appeal from the judgment on the judgment roll alone.

The complaint is in three counts upon three contracts of similar form. The first is dated November 14, 1905, and is for the sale of 10 shares of the Maier Packing Company, a corporation, at \$5,000. The second and third are dated, respectively, August 20 and November 10, 1906; the second being for 20 shares of said stock at \$10,000, and the third for 30 shares at \$15,000. A consideration of the first contract will be determinative of all questions presented, except that of the statute of limitations.

On November 14, 1905, plaintiffs subscribed for the 10 shares of stock, and paid \$5,000 to said company therefor; that being the par value. The shares were issued to them on February 20, 1906, and they have ever since held and owned the same. Upon the date they subscribed the plaintiffs and defendants executed a written agreement as follows: "This agreement made and entered into this 14th day of November, 1905, by and between Simon Maier and John T. Jones,

(164 Cal. 384)

## VICKREY et al. v. MAIER et al. (L. A. 2,956.)

(Supreme Court of California. Dec. 23, 1912.  
Rehearing Denied Jan. 22, 1913.)

### 1. CONTRACTS (§ 88\*)—CONSIDERATION—WRITTEN AGREEMENTS—PRESUMPTIONS.

Under Civil Code, § 1614, providing that a written contract is presumptive evidence of consideration, it will be presumed that the consideration consisted of something of value not mentioned in the agreement itself, unless the terms thereof forbid such assumption.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 403-405, 407; Dec. Dig. § 88.\*]

### 2. CONTRACTS (§ 59\*)—CONSIDERATION—MUTUAL PROMISES.

An agreement by a subscriber to stock to give the defendants a preferred right to buy it was a sufficient consideration for an agreement of defendants to pay dividends on the stock and, at the subscriber's option, to buy the



parties of the first part, and O. A. and B. L. Vickrey, party of the second part, witnesseth: That whereas said second party has subscribed for 10 shares of the capital stock of the Maier Packing Co., a corporation, the first parties are desirous of securing the first right to purchase said stock in the event second party may desire to sell the same: Now, therefore, said second party agrees that, before offering said stock for sale, he will first notify first parties and give them the first right to buy the same at the price offered by any bona fide intending purchaser. In consideration of which said first parties agree and obligate themselves to pay or cause to be paid to second party a dividend of six per cent. per annum on said stock, payable quarterly, and that at any time after six months from date hereof, on ninety days' notice, they will purchase said stock at the price paid therefor and six per cent. per annum from date of payment of last dividend, but the party of the second part shall not be obligated to sell said stock at the price paid therefor."

Dividends of 6 per cent. per annum were regularly paid by said company on said stock down to and including the quarterly dividend due on July 3, 1909. In each of the last two counts the date "July 3, 1909," is, by what is obviously a clerical error, written July 3, 1910. We attach no importance to this misprision and disregard it entirely. No other dividends have been paid on the stock. On March 4, 1910, the plaintiffs gave to the defendants the following notice: "Messrs. Simon Maier and John T. Jones—Gentlemen: In accordance with the provisions contained in three certain agreements between yourselves upon the one part and the undersigned upon the other, of date of November 14, 1905, August 20, 1906, and November 10, 1906, respectively, at which times the undersigned purchased from the Maier Packing Company, a corporation, ten (10), twenty (20), and thirty (30) shares of its capital stock, respectively, making a total purchase of sixty (60) shares of the capital stock of said Maier Packing Company for the sum of thirty thousand (\$30,000) dollars, we request and demand that you carry out the provisions of said agreements and each thereof by paying or causing to be paid to the undersigned all dividends now in arrears upon said stock at the rate of six (6) per cent. per annum, payable quarterly, and we further request and demand that you comply with the provisions of said agreements and each thereof by purchasing on or before ninety (90) days from date hereof said sixty (60) shares of stock and paying us therefor the price paid for the same, to wit, the sum of \$30,000, and in addition thereto all said sums now unpaid on account of dividends."

On September 12, 1910, plaintiffs tendered to defendants the said shares of stock, and demanded that the defendants should pay to plaintiffs the price paid by the plaintiffs

therefor, to wit, \$5,000, and the further sum of \$355.67 as interest on the \$5,000, from the date of payment of said last paid dividend to the date of the demand. The defendants refused and still refuse to perform said agreement of November 14, 1905, and have not paid said sums or any part thereof. The prayer of the complaint is for judgment for \$32,134.01, being the aggregate amount demanded upon the three contracts, including purchase price and dividends unpaid. The action was begun on the day of the tender and immediately thereafter.

The only defenses alleged in the answer are that there was no consideration for the agreements sued on, and that the action is barred by the provisions of section 337 of the Code of Civil Procedure, prescribing four years as the period of limitation. No evidence was offered in support of either of the defenses, and the plaintiffs offered no evidence to prove a consideration. Upon the foregoing facts the court below gave judgment for the defendants.

The complaint states facts sufficient to constitute a cause of action. The agreement bound the defendants to perform two things: First, to pay, or cause to be paid, quarterly, a dividend on the stock at the rate of 6 per cent. per annum; second, to repurchase the stock at the price which the plaintiffs had paid therefor, with interest from the date of the payment of the last dividend. No dividend has been paid for the year beginning July 3, 1909. The dividends for that year on the 10 shares of stock covered by the first contract amounted to \$300. The defendants had agreed to pay this sum to plaintiffs, and had failed to do so, although it was past due. It was a direct undertaking for the payment of money, and upon a breach thereof they were immediately liable. The plaintiffs were therefore at least entitled to recover the amounts of the quarterly dividends on all the stock due and remaining unpaid at the time the action was begun.

[1,2] There is no merit in the claim that the agreement was without consideration. Under the presumption in favor of written agreements, as provided by section 1614 of the Civil Code, in the absence of proof to the contrary, an adequate consideration must be presumed to have passed, and, if necessary, we must assume that it consisted of something of value not mentioned in the agreement itself, unless the terms of the agreement are such as to exclude or forbid such assumption. If the contract had not recited any consideration, the fact that it was in writing would therefore be sufficient evidence thereof. But the agreement, on its face, shows a consideration. It is a well-established rule of the law of contracts that a promise by one party may be a sufficient consideration for the promise of another; that where there are mutual or reciprocal promises in a written agreement each constitutes a consideration for the other, par-

ticularly where it is expressly so declared. *Gallagher v. Equitable, etc., Co.*, 141 Cal. 707, 75 Pac. 329; *Van Loben Sels v. Bunnell*, 120 Cal. 682, 53 Pac. 266; 1 *Parsons on Cont.* \*p. 449; 1 *Page on Cont.* § 296; 1 *Beach on Cont.* § 178. Here the plaintiffs agreed that if they chose to sell the stock they would give the defendants a preferred right to buy it over all other purchasers. The defendants deemed this a valuable thing, and in consideration therefor they agreed to pay dividends on the stock, and also to buy the stock at plaintiffs' option at any time after 6 months, on 90 days' notice, at a stated price. Under the authorities there was a sufficient consideration.

The remaining question is that of the statute of limitations, so far as the action proceeds for the recovery of the price agreed to be paid for the stock. The action was begun on September 12, 1910. With regard to the second and third contracts, dated, respectively, August 20, 1906, and November 10, 1906, it is clear that the four-year period of limitation had not expired at the time the action was begun. The third contract was made less than four years prior to the beginning of the action. The second contract was made more than four years before that date, but the six months therein specified as the earliest date at which the repurchase could be demanded did not expire until February 20, 1907. Under no circumstances could the cause of action upon this contract have accrued until the latter date, and it was less than four years before the action was begun.

[3] The claim that the first contract is barred is based on the theory that the demand for the repurchase was made after the statutory period had run. The general rule is that, where an actual demand is essential as a condition precedent to a complete right of action for the recovery of money, such demand must be made within a reasonable time after it can lawfully be made, or within a reasonable time after the contract by its terms contemplates that it should be made; and that, unless there are peculiar circumstances affecting the question, a time coincident with that of the statute of limitations will be deemed reasonable. *Thomas v. Pacific B. Co.*, 115 Cal. 142, 46 Pac. 899; *Williams v. Bergin*, 116 Cal. 60, 47 Pac. 877; *Meherin v. S. F. Produce Exch.*, 117 Cal. 217, 48 Pac. 1074; *Bills v. Silver K. M. Co.*, 106 Cal. 21, 39 Pac. 43, concurring opinion of Beatty, C. J.

It is argued that the 90 days' notice, under the terms of the contract, could have been given 90 days prior to the expiration of the first 6 months—that is, on February 13, 1906—so as to make performance demandable on May 14, 1906, and that to delay giving such notice until March 4, 1910, which was more than 4 years after it might have been given, brings the case within the rule above stated.

It is also suggested that, even if the 90 days' notice was not to be given prior to May 14, 1906, the plaintiffs, by giving it on that date, could have made the contract enforceable and a demand possible on August 12, 1906, and that giving the notice within the 4 years thereafter does not save them from the consequences of their laches, for the reason that they did not make any tender or demand until September 12, 1910, which was beyond the limit of 4 years from the time when they might lawfully have made it, if they had been prompt to assert their rights.

[4] It may be conceded, though we do not say it, that these arguments would be sound if the rule in question were applicable to cases of the character here presented. We do not think it applies to this case. The cases cited were all for the payment of money simply, and the money was positively owing, and would become due and payable upon a mere demand by the payee. We have found no case where the doctrine has been applied to a contract for the purchase and sale of property at a fixed price, at the option of the seller. Here there was no positive obligation to pay money. There was no obligation at all, unless the plaintiffs elected to sell the stock, and gave the notice, nor, even after such election and notice, until they had offered to deliver the stock in pursuance of the agreement. This case is in effect an action to enforce performance of a contract to buy personal property. We see no reason why it should be governed by a different rule from that which controls in the case of a sale of real property. The rule is thus stated: "Where a party may call for the performance of the agreement upon the part of another only by a tender or offer to perform his own agreement, there can be no breach of the contract by the one until such offer or tender by the other, and the statute will not begin to run until that time." 25 Cyc. 1210. This statement is supported by the authorities cited to the text. *Oaks v. Taylor*, 30 App. Div. 177, 51 N. Y. Supp. 775; *Deming v. Haney*, 23 Iowa, 77; *Hall v. Felton*, 105 Mass. 516; *Iron Co. v. Fink*, 41 Ohio St. 321, 52 Am. Rep. 84.

Furthermore, the contract shows by its terms that performance at the expiration of the six months was not of its essence. The circumstances show that some delay was contemplated. The plaintiffs had the option, which they could exercise "at any time after" the six months. It was obviously expected that events occurring after the six months might determine their choice. That period was named to prevent them from demanding a repurchase earlier, not to fix a limit upon the time after its expiration within which they might make the election. Even in cases involving contracts for the payment of money, if the contract shows by its terms that the right to demand it is to endure for a con-



siderable period, and that an indefinite delay in making it is contemplated, the rule that a demand must be made within the statutory period of limitation, counting that period from the time when the demand can first be made, has never, so far as we are advised, been held to control and bar the action as a stale demand. 25 Cyc. 1209; Wood on Limitations, § 118; Jameson v. Jameson, 72 Mo. 640; Thrall v. Mead, 40 Vt. 540; Stanton v. Stanton, 37 Vt. 411. The decisions declaring the rule recognize the fact that it may not apply to such cases. Thus, in the leading case establishing the rule, Palmer v. Palmer, 36 Mich. 494, 24 Am. Rep. 605, the court, after stating the rule, say: "It may be otherwise where delay is contemplated by the express terms of the contract." To the same effect, see Bills v. Silver K. M. Co., supra. We are of the opinion that as the plaintiffs, within the four years, set in motion proceedings for a demand for performance, and made the actual demand within a few months thereafter, they have not been guilty of laches sufficient to bar their action.

The point is urged upon this appeal that the plaintiffs have not kept the tender good by averring a readiness to deliver the stock and bringing it into court for delivery when performance by the defendants is enforced by the court. There are many authorities holding that where the tender is of specific articles of property it need not be kept good in this way, but that in such cases the title to the property is presumed to pass, and the vendor holds it as bailee for the purchaser. 38 Cyc. 159. It has been held that payment into court is not necessary where such payment is conditional upon the execution of a deed by the payee, which is the condition in the case at bar. McDaneld v. Kimbrell, 3 G. Greene (Iowa), 335. The chief reason for the exception relating to tender of specific articles is that the plaintiff cannot reasonably or conveniently bring bulky articles into court, or carry them about with him in readiness to make his tender good at any time it may be demanded. There are cases which reject the rule if the articles are bills or bonds, which are as easily carried about as money. We do not think it necessary to decide the question. The point does not seem to have been raised at the trial, where, if it had been mentioned, the plaintiff could readily have obviated the objection by producing the stock, or by submitting to a conditional judgment making the money payable only upon the deposit of the stock in court for the defendants' use. Upon a new trial the court may allow an amendment to the complaint on this point and require the production of the stock.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

164 Cal. 774

**VICKREY v. MAIER et al.**  
(L. A. 2,955.)

(Supreme Court of California. Dec. 23, 1912.)

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.  
Action by A. M. Vickrey and another against Simon Maier and another. Judgment for defendants, and plaintiffs appeal. Reversed.

Alton M. Cates, of Los Angeles, for appellants. Mott & Dillon and James P. Clark, both of Los Angeles, for respondents.

SHAW, J. The facts in this case are in all essential particulars the same in effect as in the second contract considered in the case of Vickrey v. Maier, 129 Pac. 273 (L. A. No. 2,956), this day decided. The parties to this appeal have stipulated that the decision of the appeal in that case shall control the decision here. Upon the reasons stated in the opinion in that case, it is obvious that the judgment of the court below in this case for the defendants was erroneous.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

164 Cal. 392

**SOUTHERN PAC. R. CO. v. JACKSON OIL CO. et al.** (L. A. 2,827.)

(Supreme Court of California. Dec. 24, 1912.  
Rehearing Denied Jan. 22, 1913.)

**1. PUBLIC LANDS (§ 108\*)—RAILROAD GRANT—CONSTRUCTION—DETERMINATION OF INTERIOR DEPARTMENT.**

Under the rule that a patent to a railroad grant must be construed in accordance with the government survey in force at the time the patent is issued, the Interior Department having determined that a patent to a specified description of public land under a railroad grant covered the land in controversy, and such determination having been accepted by the parties and by the Secretary of the Interior on the theory that it was dependent on the supplement to an indemnity list filed by the railroad, and not on the original selection, such determination was conclusive on the courts.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 304, 306; Dec. Dig. § 108.\*]

**2. PUBLIC LANDS (§ 103\*)—CONTEST—SECRETARY OF INTERIOR—JURISDICTION.**

Where a contest with reference to public land is pending before the Secretary of the Interior, he has jurisdiction to review all rulings theretofore made, but, after a patent is issued and the government has formally declared that it conveyed the land in question, no further interference by the department is possible; the Secretary's jurisdiction being limited to a request of the Attorney General to institute proceedings to annul the patent.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 298, 299, 307; Dec. Dig. § 103.\*]

Department 2. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Southern Pacific Railroad Company against the Jackson Oil Company and others. Judgment for defendants, and plaintiff appeals. Reversed.

Frank Thunen, of San Francisco (Wm. Singer, Jr., of San Francisco, of counsel), for appellant. C. L. Claffin, of Bakersfield, M. B. Harris and E. M. Harris, both of Fresno, and William P. Hubbard, of San Francisco, for respondents.

MELVIN, J. Plaintiff sued to recover possession and rent for the use of a certain tract of land in Kern county known as lot 4 of section 11 in township 30 S., range 21 E., Mt. Diablo base and meridian. Judgment was in favor of defendants, and plaintiff prosecutes this appeal therefrom.

Plaintiff bases its claim for title to and right of possession of said lot 4 upon a patent dated January 25, 1896, from the United States government to plaintiff for a tract of land designated as the N. E.  $\frac{1}{4}$  of section 11. The land in controversy is within the above-mentioned quarter section according to the official survey made by one Carpenter in 1893, but defendants contend, and the court evidently concluded, that the land conveyed by plaintiff's patent was the N. E.  $\frac{1}{4}$  of section 11 as designated by an earlier survey (also official) made by one Reed in 1869. Lot 4 is not included within the quarter section as shown by the Reed survey. Defendants claim the right to possession of the land under mining locations. Before this action was commenced, defendants had discovered and developed oil on the premises. If the Reed survey controls plaintiff's patent, lot 4 was not conveyed to that corporation. If the Carpenter survey is to be followed, then the land in question belonged to plaintiff, and was not subject to location for mining when defendants took possession thereof.

On February 17, 1892, the Southern Pacific Railroad Company applied, by list No. 48, to be permitted to select certain indemnity lands, including the N. E.  $\frac{1}{4}$  of section 11. At that time the Reed survey was the only official admeasurement of that section. Said survey had been approved April 27, 1869. On November 18, 1893, the Carpenter survey was approved. By it the former N. E.  $\frac{1}{4}$  of section 11 was preserved and marked on the Carpenter map as "S. P. R. R. Co., Lot 41." It was not attached to any section according to the Carpenter map, but subsequently to the issuance of plaintiff's patent, a section line was run through said lot 41, thereby placing a part of it in section 11, and the remainder in section 2. On June 24, 1902, plaintiff filed a supplemental indemnity list, No. 48, specifying the lot here in question. On January 14, 1896, indemnity selection list No. 48 was approved by the Interior Department. On January 25, 1896, patent No. 31 was issued from the government to plaintiff for the N. E.  $\frac{1}{4}$  of section 11. If that patent operates only as of the date of its issue, it includes lot 4 within the terms of its description. If it relates back to the date of the selection of the N. E.  $\frac{1}{4}$  of section 11, then its description covers not the quarter section in which lot 4 is lo-

cated, but that which is called on the Carpenter map "S. P. R. R. Co., Lot 41." The general rule is that such patents relate back to the date of selection of the land within the indemnity limits, with the approval of the Land Department. *Southern Pacific Co. v. Wood*, 124 Cal. 475, 57 Pac. 388; 32 Cyc. 960; *Weyerhaeuser v. Hoyt*, 219 U. S. 391, 31 Sup. Ct. 300, 55 L. Ed. 258. Therefore respondents contend that the patent was exactly like one which might have been issued December 23, 1891, when the Reed survey alone was in effect, in so far as the actual location of the land was concerned.

The Land Department has rendered conflicting decisions with reference to this lot. On July 16, 1902, Commissioner Hermann, after citing the decision in *S. P. R. R. Co. v. Bruns*, 31 Land Dec. Dept. Int. 272, rendered an opinion, which is in part as follows: "Following the ruling of the Department in the case cited which involved sec. 1 of this township, I must hold that the patent issued January 25, 1896, to the company for the N. E.  $\frac{1}{4}$  of sec. 11, covers lots 1, 4 and 9 of sec. 11, as that was the only public land in said quarter section at that date. While said lots 1, 4 and 9 were never selected by the company, yet the patent is unimpaired and the company will be required to specify from the lands lost within the primary limits of the grant a basis for the land so irregularly patented." This decision was approved by the Secretary of the Interior. The company subsequently gave formal acceptance to this ruling, and the commissioner declared the case closed. This was in 1903. Plaintiff contends that this decision and its acceptance were binding on all persons, and that no question may now be raised with reference to plaintiff's title. Defendants, on the other hand, insist that the matters decided were merely based upon questions of law, and, as plaintiff and nobody else has assented to their correctness, the defendants herein are not bound by the rulings of the Land Department. They also assert that the Bruns decision has been vacated and recalled, and that the Department of the Interior has adopted the view for which they contend. In *McKittrick Oil Co. v. Southern Pacific R. R. Co.*, 37 Land Dec. Dept. Int. 244, the Department, following *Gleason v. White*, 199 U. S. 54, 25 Sup. Ct. 782, 50 L. Ed. 87, reversed the ruling made in *Southern Pacific R. R. Co. v. Bruns*, and on March 17, 1911, the very selection now under discussion was reviewed by the Commissioner of the General Land Office, who held that the patent of the Southern Pacific Railroad Company dated January 25, 1896, did not convey any title to lots 1, 4, and 9 of section 11. The Department of the Interior, however, reviewed this ruling, and overruled *McKittrick Oil Co. v. Southern Pacific R. R. Co.*, supra, in the following opinion: "The Southern Pacific Railway Company has appealed from the decision of the Commission-



er of the General Land Office, dated March 17, 1911, wherein, as the result of a contest proceeding instituted by the Jackson Oil Company, it was found that lots 1, 4, and 9, being a part of the N. E.  $\frac{1}{4}$  section 11, township 30 S., range 21 E., M. D. M., Visalia land district, Cal., are oil lands; that said tracts were not embraced in any previous patent issued to said company; and that its selection therefor, which was held to be still pending, was rejected because of said mineral finding. The mineral character of the tracts in question seems to be conceded, but the railroad company earnestly contends that the tracts involved are not public lands, having been included in the patent issued to said company January 25, 1896. This township was originally surveyed by one Reed, whose survey was approved April 27, 1869. The township was later surveyed by one H. P. Carpenter, whose survey was approved November 18, 1893, and the plat thereof filed in the local land office at Visalia April 6, 1894. December 26, 1891, the Southern Pacific Railroad Company applied to select, among other tracts, the N. E.  $\frac{1}{4}$  of section 11 of this township. The selection was not acted upon until 1896, when patent was made to it of the N. E.  $\frac{1}{4}$  of section 11 of said township. The question involved is as to whether such N. E.  $\frac{1}{4}$  is to be understood according to the survey in effect when the company applied to select this land, or the survey in force at the time the patent was issued. It is well settled that no selection is complete until acted upon by the Department. At the time the Department acted on this application the Carpenter survey was in force, and there was no authority in law for issuing patents to the railroad in other than odd-numbered sections. It necessarily follows that the patent issued in 1896 to the railroad company must be interpreted according to the Carpenter survey. If a mistake was made in issuing the patent—which is not decided—it is too late to correct that mistake. It necessarily follows that lots 1, 4, and 9 did pass to the railroad under the patent of 1896, while no land now in section 2 under the Carpenter survey passed to the railroad. This holding is in consonance with the decision of the Department of January 23, 1903. Consequently the patent of 1896, issued to the railroad company, as held in said decision of January 23, 1903, conveyed the title to these lots to said company; and since then this Department has been without jurisdiction over the lands. Any expression to the contrary in the case of McKittrick Oil Co. v. Southern Pacific Railroad Co. (37 Land Dec. Dept. Int. 243) must be regarded as overruled. The decision appealed from is reversed, and the cause is dismissed."

[1] With the foregoing opinion we entirely agree. The United States government by its duly authorized agents declared the title

to this lot to be in the plaintiff and the whole matter finally settled and closed. This was in 1903 and the mining locations which are the bases of the title asserted by defendants were made in 1907 and 1908. This ruling was supported by the plaintiff's patent which in terms related to this very land. In 1903 the patent was ratified by mutual construction given by the parties thereto.

[2] While the matter was pending, the Secretary of the Interior had jurisdiction to review all rulings theretofore made (Gage v. Gunther, 136 Cal. 345, 68 Pac. 710, 89 Am. St. Rep. 141), but, after the patent had issued and the government had formally declared that it conveyed the land in question, no further departmental interference was legally possible. The Secretary of the Interior might have requested the Attorney General to institute proceedings for the annulment of the patent (Gage v. Gunther, supra), but that would have been the limit of his authority. He did not pursue such course, but, on the contrary, after a review of the facts, he declared the transaction between the government and the patentee to be closed. It was for him to determine whether the patent as finally issued was dependent upon the selection originally made or upon the supplement to indemnity list No. 48, which antedated the patent and in which lot 4 was specified by the Southern Pacific Railroad Company. Upon the facts presented he did not, in our opinion, err in his interpretation of the law. The judgment is reversed.

We concur: HENSHAW, J.; LORIGAN, J.

164 Cal. 368

In re NICCOLLS' ESTATE. (L. A. 3,294.)

(Supreme Court of California. Dec. 18, 1912.)

# 1. HOMESTEAD (§ 151\*)—SELECTION—SETTING APART—LIMITED PERIOD.

Code Civ. Proc. § 1468, as amended in 1881 (St. 1881, p. 8), relating to homesteads, provides that if property set apart is a homestead selected from the separate property of the decedent the court can set it apart only for a limited period, to be designated, and, subject to such homestead right, the property remains subject to administration. Held, that such provision is applicable to the setting apart of homesteads to widows in probate proceedings, where no homestead had been previously selected.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 286-292; Dec. Dig. § 151.\*]

# 2. HUSBAND AND WIFE (§ 262\*)—COMMUNITY PROPERTY—PRESUMPTION.

All property acquired by either spouse during the existence of the marriage is presumed to be community property; and the burden of overcoming the presumption by clear and satisfactory evidence is on the party claiming that the property is separate.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 913, 914; Dec. Dig. § 262.\*]

### 3. HUSBAND AND WIFE (§ 246\*)—PERSONAL PROPERTY—NATURE OF OWNERSHIP—WHAT LAW GOVERNS.

Where a husband and wife acquired personal property in Illinois, where there is no such a thing as community property as between husband and wife, and later removed with the property to California, neither the property accumulated while in Illinois, nor that for which it was exchanged in California, became community property in that state.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 878; Dec. Dig. § 246.\*]

### 4. HOMESTEAD (§ 150\*)—ASSIGNMENT—TITLE TO PROPERTY—JURISDICTION.

The superior court sitting in probate in determining an application of a widow to set aside to her certain property as a homestead, had no jurisdiction in that proceeding to determine the title to the property, or the validity of any claim of title adverse to that of the estate.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 294-305; Dec. Dig. § 150.\*]

Department 1. Appeal from Superior Court, San Diego County; *W. R. Guy*, Judge.

Judicial settlement of the estate of Robert Niccolls, deceased. From an order overruling objections to a widow's petition to set apart to her certain real property in fee as a homestead, the heirs appeal. Reversed, with directions.

W. J. Mossholder, Marks P. Mossholder, Mills & O'Farrell, all of San Diego, for appellants. Luce & Luce, of San Diego, for respondent.

SLOSS, J. Robert Niccolls, a resident of the county of San Diego, died intestate, leaving property in that county and elsewhere. His heirs were his widow, Frances Niccolls, and a number of nephews and nieces. Upon the nomination of the widow, W. R. Rogers was appointed administrator of the estate.

Included in the estate was a lot, with a dwelling thereon, in the city of San Diego. The widow petitioned to have this property set apart to her as a homestead. Objections were filed by various other heirs. After a hearing the court made its order setting said property apart as a homestead and vesting it absolutely in the widow. The contesting heirs appeal from the order, and from a subsequent order denying their motion for a new trial.

[1] The order setting apart the homestead contained findings that no homestead had been selected and recorded during the lifetime of the decedent, and that the property involved was community property. The latter finding is attacked as unsupported by the evidence. That the finding is material is not to be questioned. Where no homestead has been selected during the lifetime of the decedent, the court in probate, in setting apart a homestead from the separate property of the decedent, can set it apart for a limited period only. Under the provisions

of the Code of Civil Procedure, as originally enacted, the power of the court was not so restricted. *Mawson v. Mawson*, 50 Cal. 539. Section 1468 was, however, amended in 1881 (St. 1881, p. 8) by the addition of this clause: "If the property set apart be a homestead, selected from the separate property of the deceased, the court can only set it apart for a limited period, to be designated in the order, and the title vests in the heirs of the deceased, subject to such order." The added provision might seem, at first glance, to refer to the case of property which had been selected as a homestead during the lifetime of the decedent. It is, however, settled by the decisions of this court that this is not its proper construction. The new clause applies to homesteads set apart in probate proceedings; no homestead having been theretofore selected. Its effect, as to such cases, is to alter the rule declared in *Mawson v. Mawson*, supra, and to take from the court the power to assign a homestead absolutely, except where the property set apart is community property. In *re Schmidt*, 94 Cal. 334, 29 Pac. 714; *Lord v. Lord*, 65 Cal. 84, 3 Pac. 96; In *re Noah*, 73 Cal. 590, 15 Pac. 290, 2 Am. St. Rep. 834; In *re Lahiff*, 86 Cal. 151, 24 Pac. 850.

[2] We think the appellants are clearly right in their contention that the finding of the community character of the property in question is not supported by the evidence. It is undoubtedly the rule that all property acquired by either spouse during the existence of the marriage is presumed to be community property, and that the burden of overcoming the presumption by clear and satisfactory evidence rests upon the party claiming that the property is separate. *Smith v. Smith*, 12 Cal. 216, 73 Am. Dec. 533; *Althof v. Conheim*, 38 Cal. 230, 99 Am. Dec. 363; *Davis v. Green*, 122 Cal. 364, 55 Pac. 9. Here, however, the evidence regarding the acquisition of the property was without substantial conflict, and, giving it the strongest possible construction in favor of the respondent, it pointed indisputably to the conclusion that the house and lot in controversy were not community property.

Robert Niccolls, the decedent, and Frances Niccolls, the respondent, were married in Pennsylvania in 1854. Shortly after their marriage they took up their abode in Bloomington, Ill., and resided there until 1881 or 1882, when they moved to San Diego, in this state, where they remained until the husband's death. Testimony with respect to their property before and after marriage was given by Mrs. Niccolls. Concerning some details there was more or less uncertainty in her testimony. This was due, no doubt, as the witness herself said, to a slight impairment of memory—a condition which was not surprising in view of her ad-



vanced age and the length of time that had elapsed since the events of which she was speaking. But, taking her testimony in its aspect most favorable to her, it appears that at the time of the marriage Mrs. Nicolls owned real estate in the state of Illinois of the value of \$5,000. Her husband also owned some property. With the proceeds of the property of both, the husband purchased land in Illinois. From 1854 to 1860 or 1861 the husband, who was a physician, practiced his profession. From 1861 to 1865, the period of the Civil War, he was attached to the forces of the United States as an army surgeon, in which capacity he earned a fixed salary. After the war he resumed his residence in Bloomington. He did not again engage in medical practice, but occupied himself with buying and selling land and loaning money, generally on mortgage security. The capital employed in these ventures was made up of the proceeds of the property which his wife had owned before marriage, together with the property which he had owned and his subsequent earnings. No distinction was made between the husband's property and that belonging to his wife. All was handled and controlled by the husband. As Mrs. Nicolls expressed it: "Everything was his, and everything was mine. \* \* \* I expected him to do what was right." When the couple moved to California, Dr. Nicolls brought with him a part of the accumulations he had thus made, and with this he acquired the property in controversy and a ranch in San Diego county. He never practiced his profession in California; nor did he follow any other occupation in this state. The character of the property owned by himself and his wife did not, therefore, change after they had taken up their residence in San Diego.

[3] The question, then, is: What, according to the law of the state of Illinois, was the character of the property owned and acquired by Dr. and Mrs. Nicolls in that state, and by them brought to California? "If a husband and wife acquire personal property in one state, and then remove with the same into a state in which the community law prevails, the law of the state where they lived when the property was acquired will govern as to whether it be separate or community property." Ballinger, Com. Prop. § 47; *Kreamer v. Kreamer*, 52 Cal. 302; *Estate of Burrows*, 136 Cal. 113, 68 Pac. 488. The record before us contains testimony, which is uncontradicted, that "there is not in the state of Illinois, by statute or as common law, any such thing as community property, whereby the husband and wife both have a community interest in property accumulated during the marriage relation." It follows that the property accumulated during the marriage, whatever might have been its character if the parties had acquired it while domiciled in California, was not com-

munity property in Illinois. Consequently neither it, nor any property for which it was exchanged, became community property in this state. It was either the property (separate) of the husband, or of the wife, or it belonged to both in proportion to their respective contributions thereto. But neither of these conditions justifies the finding that it was community property.

[4] It is claimed by the respondent that the accumulations of the spouses were the product of the property owned by her before marriage, and thus constituted her separate property. From this premise she argues that she was entitled to the house and lot in any event, and that the appellants are not injured by the order, which merely sets apart to her her own property. There are two answers to this position. In the first place, the evidence does not compel, if, indeed, it would permit, the conclusion that all the property was the separate property of the wife. The court has not found that it was. On the contrary, the finding is that it was community property, and we cannot support the order based on this finding by supposing that the court might, or would, have found that it was separate property of the wife. But, beyond this, a finding that the house and lot were separate property of the wife would not have justified the order setting apart a homestead. In making such order, the court is dealing only with the property of the estate. It has no jurisdiction, in a proceeding of this character, to determine the title to the property, or the validity of any claim of title adverse to that of the estate. *Estate of Burton*, 64 Cal. 428, 1 Pac. 702; *Estate of Groome*, 94 Cal. 69, 29 Pac. 487; *Estate of Kimberly*, 97 Cal. 281, 32 Pac. 234. "It determines merely that the parcel named is selected from the estate of the deceased (whatever his interest therein may have been), and who are the persons entitled to the benefit of the homestead selection. \* \* \* Title to real estate cannot be tried in such proceeding." *Estate of Burton*, supra. The application of the respondent was therefore necessarily based upon the theory that the house and lot in question were a part of the estate of the decedent. She was invoking the power of the court to set apart to her the interest which the decedent had owned, whether as community or his separate estate, in the property. Any title that she might claim in it as her separate property was not involved and could not be adjudicated.

The appellants do not object to the assignment of this property to the widow as a homestead. They complain merely of the provision that sets it apart to her absolutely. They suggest that the order be modified so as to limit the homestead right to the life of respondent. This concession obviates the necessity of a new trial, and we think the course suggested a proper one.

The order setting apart the homestead is reversed, with directions to the court below to modify the same by striking therefrom, in the paragraph preceding the description of the property, the words "and is hereby vested absolutely in said widow," and substituting therefor the words "during her lifetime." The order denying a new trial is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

(164 Cal. 406)

WEST BERKELEY LAND CO. et al. v. CITY OF BERKELEY et al. (S. F. 5, 776.)

(Supreme Court of California. Dec. 26, 1912.)

1. EMINENT DOMAIN (§ 45\*)—PROPERTY SUBJECT—STREETS—TIDE LANDS—"LANDS"—"TERRITORY."

Street Opening Act 1889 (St. 1889, p. 70), granting power to the city council of any municipality to condemn and acquire any and all lands and property necessary or convenient for streets, conferred power on cities to open streets over tide lands; the word "lands" not being used in its ordinary signification as meaning the exposed surface of the earth, but in a technical sense as meaning "territory."

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 94-100, 102, 106; Dec. Dig. § 45.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 3975-3984; vol. 8, pp. 7700, 7701; vol. 8, pp. 6925, 6926.]

2. MUNICIPAL CORPORATIONS (§ 294\*) — STREETS—EXTENSION—TIDE LANDS—POSTING NOTICE.

Where, in proceedings for the extension of a street over tide lands, the street superintendent in a boat at high tide anchored notices attached to floats at proper intervals along the line of the proposed work over the tide lands, the floats being so constructed that the notices appeared about three feet above the surface of the water, such method of posting the notices was not objectionable as not calculated to give notice to the public.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 776-788, 791; Dec. Dig. § 294.\*]

3. MUNICIPAL CORPORATIONS (§ 487\*) — STREETS—EXTENSION OVER TIDE LANDS—NOTICE—RIGHT TO ATTACK.

Residents within an assessment district, affected by proceedings to extend a street over tide lands but who were not the owners of the property sought to be condemned, could not object to the manner of posting the notices of the proceedings.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1146; Dec. Dig. § 487.\*]

4. MUNICIPAL CORPORATIONS (§ 294\*) — STREET EXTENSION—TIDE LANDS—NOTICE—PRESUMPTIONS.

Where notices of proceedings to extend the street over tide lands were printed and attached to floats anchored in the water, it would not be presumed, from material on which the notices were printed, the manner of their attachment to the land, and the character of the lands, that the notices did not remain posted during the period contemplated by the statute.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 776-788, 791; Dec. Dig. § 294.\*]

5. MUNICIPAL CORPORATIONS (§ 450\*) — STREETS — EXTENSION — ASSESSMENT DISTRICT.

Where nothing was done by property owners between the date of filing a map of the city addition and the acceptance of the streets delineated thereon by the city to indicate a change in the owners' intention to devote such streets to the use of the public, and it did not appear that the intervening rights of third persons were involved, an assessment district described as bounded on one side by a street, delineated on the plat, the name of which was subsequently changed, was sufficient to describe the boundary of the district, though the property owner attempted to annul the dedication by filing a declaration that the map was filed simply for convenience, and not with an intention to dedicate any street delineated thereon.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 450.\*]

6. MUNICIPAL CORPORATIONS (§ 293\*) — STREETS — EXTENSION — DESCRIPTION — BOUNDARIES.

A resolution of intention to extend a street over certain tide lands to the western boundary line of state tide lands was not objectionable because a landowner could not ascertain from inspection and the resolution alone whether his land was affected; such question being ascertainable from the official map of the tide lands located elsewhere.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 773-775; Dec. Dig. § 293.\*]

Department 2. Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by the West Berkeley Land Company against the City of Berkeley and others. Judgment for defendants, and plaintiff appeals. Affirmed.

McKee & Tasheira, of Oakland, and R. M. F. Soto, of San Francisco, for appellant. Redmond C. Staats, F. W. Dorn and James M. Koford, all of Berkeley, and F. D. Stringham, of San Francisco (George L. Hughes, of Berkeley, of counsel), for respondents.

MELVIN, J. Plaintiffs sued to recover from the city of Berkeley money paid under protest to prevent the sale of certain lands by the superintendent of streets of that city because of delinquency in paying assessments upon said properties levied in the proceedings for the opening and extension of Snyder avenue under the provisions of the street opening act of 1889 (Stats. 1889, p. 70). From a judgment in favor of defendants, this appeal is taken.

[1] Appellants question the authority of the municipality to open or extend its streets over tide lands. By the first section of the street opening act of 1889, the city council of any municipality is granted power "to condemn and acquire any and all land and property necessary or convenient for that purpose." Appellants quote a number of sections of that statute in an effort to show that the words "land" and "lands" are em-



played in the act in their ordinary and popular meaning, rather than in a technical sense. They assert that "lands," in the ordinary acceptation of the term, is a word applicable to the exposed surface of the earth, and not to ground which is alternately covered and uncovered by the flow and ebb of the tide. They say that the Constitution and Codes of California make a distinction between public lands in the ordinary sense and tide lands (citing Const. art. 17, § 3; article 15, § 3; Pol. Code, § 3395 et seq.; Pol. Code, § 3443a), but they have evidently lost sight of the fact that the differences in treatment by the lawmaking power of tide lands and other public lands is due, partly at least, to the different sources of the state's original title; the lands above the shore having been acquired by direct grant from the general government, and the tide lands by reason of the state's sovereignty. *People v. Morrill*, 26 Cal. 352. Very early in the history of California, this court recognized and declared the right of the state to surrender into the jurisdiction and control of a city, and to sell into private ownership, not only tide lands, but those perpetually submerged. *Eldridge v. Cowell*, 4 Cal. 87. Jurisdiction over lands of this kind logically involves such incidental authority as the city may exercise in the condemnation of rights of way, the construction of streets, and the like. In *City of Oakland v. Oakland Water Front Co.*, 118 Cal. 185, 50 Pac. 286, the Chief Justice, delivering the opinion of this court, said: "It is true that the private ownership of the shore may prevent access to the navigable waters of the bay, but so does the private ownership of the upland prevent access to the shore and to the navigable waters in the same sense and to the same extent. This, however, is a minor and temporary inconvenience for which our laws and the laws of all civilized states provide an ample remedy. By the exercise of the right of eminent domain, all necessary means of access from the uplands to the water front may be condemned for the public use at a cost not in excess of the reasonable value of the land taken or subjected to the servitude." The right of a city to reserve portions of the lands lying below tide water within its limits for street purposes was fully recognized in *Shirley v. City of Benicia*, 118 Cal. 346, 50 Pac. 404. Both before and after the passage of the act under which the opening and extension of Snyder avenue was conducted, there were adjudications of a municipal corporation's power to extend streets across tide lands into deep water within the limits of such city. The Legislature has left the act in practically its original form, and we must conclude, in view of both prior and subsequent judicial decisions, that the words "land" and "lands" in that statute were used in the technical sense meaning "territory," and not with the definition for which appellants con-

tend. By the very first section of the act, the city council is given "full power to order the opening, extending \* \* \* or closing up \* \* \* of any street \* \* \* within the bounds of such city, and to condemn and acquire any and all land and property necessary or convenient for that purpose." It would be difficult to find general language more completely inclusive of municipal territory, both wet and dry, both exposed and submerged. There can be no rational doubt of the city's power to extend the street in question over tide lands.

[2] Appellants condemn the method adopted by the street superintendent in posting notices of the passage of the resolution of intention in the matter of opening Snyder avenue. According to the evidence, these notices seem to have been in due form and to have been printed in letters of requisite size. Guided by a surveyor on shore, the superintendent of streets went out in a boat at high tide and anchored notices attached to floats at proper intervals along the line of the proposed work over the tide lands. The floats were so constructed that the notices appeared 2½ or 3 feet above the surface of the water. This method of posting is the only part of the service of notice of which appellants complain. There is no contention that notice was not sufficiently given by publication in a newspaper and by posting along that part of the proposed street which was above the line of high tide; but appellants assert that no reasonable notice may be given by the anchoring of floats supporting small placards at intervals of 300 feet far out in the bay.

[3] Even if the notice given were not sufficient as against the owners of the tide lands (and we think it was ample), nevertheless these appellants could not reasonably complain because they were not owners of property to be condemned, but were residents within the assessment district affected. *Davies v. City of Los Angeles*, 86 Cal. 46, 24 Pac. 771. The sort of constructive notice authorized by the act here considered has been so long approved that there is now no doubt of its sufficiency where the requirements of the statute have been followed. *Davies v. City of Los Angeles*, supra. The constitutionality of the statute has been upheld frequently, notably in the case of *Clute v. Turner*, 157 Cal. 74, 106 Pac. 240.

[4] There is no force in the suggestion of appellants that, from the material upon which the notices were printed, the manner of their attachment to the tide lands, and the character of those lands, it must be presumed that the placards did not remain posted during the period contemplated by the statute. The presumption is just the opposite. Due performance of duty by an officer of the law is presumed, and the burden of proof is upon the person asserting official default. *County of Los Angeles v.*

Lankershim, 100 Cal. 532, 35 Pac. 153, 556. When, as in this case, an affidavit is made that notices have been posted as required by law, the presumption arises that they remained in place during the statutory period. Estate of Sbarboro, 70 Cal. 149, 11 Pac. 563; Crew v. Pratt, 119 Cal. 153, 51 Pac. 38.

[5] The next assignment of error made by appellants relates to the exterior boundaries of the district to be assessed for the work here considered. The appellants say that these boundaries are not so specified that they can be ascertained, and our attention is called particularly to that part of the description depending upon the location of the southerly line of Stuart street. It appears from the evidence that Stuart street had no existence as an open street upon the ground prior to the initiation of the proceedings to extend Snyder avenue. On August 7, 1888, Mrs. Mary D. Mathews caused the filing of a map of "Mathews tract, Berkeley, Oakland township," upon which was delineated certain streets, one of them designated as "Moss street." On June 27, 1892, the town of Berkeley accepted this dedication, and on October 16, 1893, the name of Moss street was changed by ordinance to "Stuart street." Between the time of the filing of the map and the acceptance of the proposed dedication by the city, the land was inclosed by a fence. No property was sold in accordance with the map, and the land was farmed until the death of Mrs. Mathews in 1900. After that it was not cultivated, and the fence was removed. On July 11, 1892, after the formal acceptance by the town of Berkeley of the dedication of the streets shown on the map of the Mathews tract, Mary D. Mathews filed a declaration of revocation by which she sought to annul her map of 1888. In this document she declared, among other things, that "said map was filed merely for the purpose of convenience and for no other or further purpose, and not for the purpose of dedicating, or offer to dedicate, any street delineated thereupon." The only question for us to determine is whether the reference to Stuart street, in describing the exterior boundaries of the assessment district, was a sufficient compliance with section 2 of the act of 1889. That section prescribes a description in the resolution of intention "specifying the exterior boundaries of the district of lands to be affected," etc. The act does not indicate the sort of monuments or measurements to be used in the description, nor that streets, whether formally dedicated or not, should be mentioned therein; but, assuming the formal dedication and acceptance of a street to be necessary in order that its lines should officially form any part of the exterior boundaries of the district, we are of the opinion that the resolution of intention in this case was sufficient. Between the date of the filing of the map and that of

the acceptance of the streets by the city, nothing was done by Mrs. Mathews to indicate a change in her declared intention to devote certain platted spaces to the use of the public as streets, nor does it appear that the intervening rights of third persons are involved. The matter is therefore covered by principles announced in *City of Los Angeles v. McCollum*, 156 Cal. 149, 103 Pac. 914, 23 L. R. A. (N. S.) 378.

[6] Appellants attack that part of the resolution of intention which declared the purpose to open and extend Snyder avenue "westerly to the westerly boundary line of state tide lands," on the ground that the owner is entitled to know, from an inspection of the resolution alone, whether his land is affected. It was in evidence that certain tide lands, commonly known as "state tide lands," were situated within the limits of the town of Berkeley. At the trial a certified copy of an official map, showing the western boundary of said lands, was introduced in evidence. While it is true that the original was intrusted to an official who was not located in Alameda county, the mere inconvenience to which a property holder might have been subjected in order that he might have learned the exact location of the westerly line of said lands does not invalidate the description. It was sufficient that means were available for making certain the general reference to a well-known tract. *Best v. Wohlford*, 144 Cal. 737, 78 Pac. 293; *Baird v. Monroe*, 150 Cal. 571, 89 Pac. 352; *Fox v. Townsend*, 152 Cal. 58, 91 Pac. 1004, 1007; *Houghton v. Kern Valley Bank*, 157 Cal. 291, 107 Pac. 113; *Campbell v. Shafer*, 162 Cal. 211, 121 Pac. 737; *Kehlet v. Bergman*, 162 Cal. 219, 121 Pac. 918; *Furrey v. Lautz*, 162 Cal. 399, 122 Pac. 1073.

Other specifications of alleged error were made by appellants, but, as they were not discussed in the brief filed, we will not review them in detail. We have examined them, however, and find them without merit.

The judgment is affirmed.

We concur: HENSHAW, J.: LORIGAN, J.

164 Cal. 398

WOOD v. CALAVERAS COUNTY et al.

(Sac. 1,913.)

(Supreme Court of California. Dec. 26, 1912.  
Rehearing Denied Jan. 24, 1913.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 21\*)—CITY "SCHOOL DISTRICT"—IDENTITY—SEPARATE FROM CITY.

A city school district is a corporation or a quasi municipal corporation, which is not merged in that of the city, though its territorial limits may be coterminous with those of the city.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 39, 40; Dec. Dig. § 21.\*

For other definitions, see *Words and Phrases*, vol. 7, pp. 6345-6347; vol. 8, p. 7795.]



## 2. SCHOOLS AND SCHOOL DISTRICTS (§ 30\*)—COUNTY HIGH SCHOOL DISTRICT—TERRITORY.

The fact that a school district is called a county high school district furnishes no reason why it should not contain less territory than a county.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 50; Dec. Dig. § 30.\*]

## 3. SCHOOLS AND SCHOOL DISTRICTS (§ 42\*)—HIGH SCHOOL DISTRICT—ESTABLISHMENT.

Under Pol. Code, § 1670, subd. 20, as it stood prior to 1909, and former section 1671, authorizing the creation of high school districts in counties having a county high school district, it was not essential that the county district be dissolved before the formation of a union high school district out of a portion of the territory within the county; and this notwithstanding the formation of union districts might have the effect of depriving the county district of a large part of its means of support.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 81–85; Dec. Dig. § 42.\*]

## 4. SCHOOLS AND SCHOOL DISTRICTS (§ 154\*)—HIGH SCHOOLS—STATUTES—CONSTRUCTION—"DISTRICT."

Pol. Code, § 1670, subd. 25, regulating high schools, provided that when, because of distance or of convenience in traveling, it is more convenient for pupils residing in any high school district to attend high school in another school district, the high school board in the latter district may admit such pupils on such terms as the two boards may arrange, and section 1671, prior to the amendment in 1909, declared that all high schools should be open to graduates of grammar schools of the county, and to all pupils of the county who could pass the examination for admission, to be conducted by the county board of education and principals of the county high school. *Held*, that the word "district," as used in section 1671, subd. 25, applies to territory to be served by county high schools as well as of union high schools.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 326, 327; Dec. Dig. § 154.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2136–2138; vol. 8, pp. 7639, 7640.]

## 5. STATUTES (§ 96\*)—TAXATION—SPECIAL TAXES—LIMITATION.

Taxes assessed for the support of high schools are special taxes, the assessment of which the Legislature has power to limit to the property within the respective districts to be served.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 107; Dec. Dig. § 96.\*]

## 6. STATUTES (§§ 73, 95\*)—LOCAL LAWS—TAXATION—EXEMPTIONS.

Pol. Code, former section 1670, subd. 20, exempting property within union high school districts from taxation for the support of county high schools, does not violate Const. art. 4, § 25, prohibiting local laws exempting property from taxation, nor article 1, § 11, requiring all laws of a general nature to be uniformly operative.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 73, 74, 75, 105, 106; Dec. Dig. §§ 73, 95.\*]

## 7. SCHOOLS AND SCHOOL DISTRICTS (§ 106\*)—INVALIDITY—ESTOPPEL—PRIOR PAYMENT.

That plaintiff, whose property within a union high school district had been erroneously assessed for a county high school, had paid

the tax, did not estop him to thereafter object to the validity of such county high school tax.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 149, 248–252; Dec. Dig. § 106.\*]

## 8. SCHOOLS AND SCHOOL DISTRICTS (§ 28\*)—HIGH SCHOOL DISTRICT—ESTABLISHMENT—DE FACTO DISTRICT.

Where a union high school district had been established, trustees elected, buildings erected, teachers employed, and taxes paid for the maintenance of the high school therein, and the same conducted generally as a duly organized district, it was a de facto high school district, the existence of which could not be collaterally attacked.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 46; Dec. Dig. § 28.\*]

## 9. SCHOOLS AND SCHOOL DISTRICTS (§ 22\*)—ORGANIZATION OF DISTRICTS—CURATIVE ACTS.

Pol. Code, § 1671, subd. 11, providing that the certificate of the county superintendent, when filed with the county clerk showing the establishment of a high school, at the expiration of the year shall be conclusive evidence that the school was legally established, and Pol. Code 1909, § 1724, validating all proceedings for the formation of high school districts, were valid curative acts curing all defects in proceedings for the prior organization of a union high school district.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 41; Dec. Dig. § 22.\*]

Department 2. Appeal from Superior Court, Calaveras County; A. I. McSorley, Judge.

Suit by Carlton H. Wood against Calaveras County and others to compel acceptance of money tendered in payment of his taxes less an assessment for the support of Calaveras County High School. Judgment for plaintiff, and defendants appeal. Affirmed.

J. P. Snyder and Snyder & Snyder, all of San Andreas, for appellants. Frank J. Solinsky, of San Andreas, and Paul C. Morf, of San Francisco, for respondent.

MELVIN, J. Plaintiff is a resident within Bret Harte union high school district. His property, being wholly within said district, was assessed for the support of said union high school and likewise for the Calaveras county high school. Deeming the latter assessment improper, he tendered to the tax collector of the county the amount of his tax less the sum demanded for county high school purposes. The tender being refused, he deposited the money so tendered in bank to the credit of the tax collector and gave notice to that official, all in accordance with section 1500 of the Civil Code. He then brought this action to have the tax for the support of the county high school declared invalid and to compel the tax collector to accept the money tendered. From a judgment granting his prayer, this appeal is prosecuted.

Prior to the formation of the Bret Harte union high school district, the Calaveras

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

county high school district was formed, including, territorially, the whole of the county of Calaveras. All of the property within the county was taxed for the support of that district. Appellants are of the opinion that: (1) The exemption of the property within the Bret Harte union high school district would be a fraud upon the owners of the remaining property of the county, and an unconstitutional confiscation of their property; that (2) the people of the Bret Harte high school district are estopped from questioning the legality of the tax for the county high school; and (3) that the union district was never legally formed.

It is conceded that the provisions of the Political Code in existence at the time of the formation of the Bret Harte union high school district exempted the property in such a district from taxation for the support of a county high school; but such exemption is attacked by appellants as being in violation of subdivision 20 of section 25, art. 4, of the Constitution, which prohibits local laws exempting property from taxation, and section 11 of article 1, requiring all laws of a general nature to have a uniform operation. Prior to 1909 the law with reference to the establishment and maintenance of county high schools provided (section 1671 of the Pol. Code as it then stood) as follows: "There may be established in any county in this state one or more county high schools; provided, that at any general or special election held in said county after the passage of this act, a majority of all the votes cast at such election, upon the proposition to establish a high school, shall be in favor of establishing and maintaining such county high school or schools at the expense of said county." Appellants contend that this language involves the inclusion of the whole county within the county high school district; that the words "county high school" mean exactly what they import—a school for the use of the inhabitants of the county. It will be noted, however, from an examination of the section, that, while the school is to be maintained at the expense of the county, the statute does not provide that all of the electors of the county shall or may participate in the election, nor that it shall be held *throughout* the county. Former section 1670, by subdivision 20 thereof, provided: "Nothing in this section shall be construed as preventing all of the school districts in any county from uniting to form one or more county high schools; provided, that when any city, incorporated town, school district, or union high school district shall vote to maintain a high school, such territory shall be exempt from taxation to support a county high school; and provided further, that when any city, incorporated town, school district, or union high school district shall establish a high school prior to the submission of the proposition to establish a county high school,

the electors of such city, incorporated town, school district, or union high school district shall be excluded from voting upon said proposition; provided further, that in counties where one or more city high schools, district high schools, or union district high schools, are maintained, the board of supervisors shall, upon the petition of two-thirds of the heads of families in a city high school district, union high school district, and in each school district composing the union high school district or districts, if there be more than one in the county, submit to all the qualified electors of the county the question of establishing and maintaining a county high school, and shall take such further steps as provided in section sixteen hundred and seventy-one of this act, relating to high schools. If the majority of all the votes cast on the proposition to establish a county high school are in the affirmative the board of supervisors shall, upon the establishment of the same, declare the high school or high schools existing in the county at the time of the election for a county high school, to be lapsed and the property of such lapsed high school or schools shall be held or sold by the board of supervisors for the benefit of the county high school."

By the fourth subdivision of former section 1671 the board of supervisors, in providing for the special tax therein authorized, was limited in making the levy to "all of the assessable property of the county, except as provided in subdivision twentieth of section one thousand six hundred and seventy of the Political Code." The above-quoted provisions indicate that the Legislature did not intend that a union high school district should be taxed for the support of its own school and for the maintenance of another school within the county. The two kinds of districts did not differ materially in the manner of formation. One was governed by the county board of education and the other by a district board; but there was and is no essential difference in the manner of their conduct and control.

[1] It has been held that a city school district is a corporation of a quasi municipal character, and, though its territorial limits may be actually coterminous with those of a city, its identity is not thereby lost nor merged in that of the city. *Los Angeles School District v. Longden*, 148 Cal. 381, 83 Pac. 246; *Hancock v. Board of Education*, 140 Cal. 561, 74 Pac. 44.

[2] So it may be said with equal force that, because a district is called a "county high school district," that fact furnishes no reason why it should not contain less than the territory of one county. It is evident from the provisions of the law as it stood at the time of the creation of the Bret Harte union high school district, and particularly subdivision 20 of section 1670 of the Political Code above quoted, that the Legislature



contemplated the existence of a county high school and other kinds, including union high schools, in the same county at the same time.

[3] The contention is made that there should have been a dissolution of the county high school district prior to the formation of the union district and that a school district in the territory of an established high school district may not seek to enter another high school district until after its withdrawal from the district with which it was formerly connected. *Moorpark School Dist. v. Reynolds*, 13 Cal. App. 171, 109 Pac. 149, is cited in this behalf. The court in that case was considering the sufficiency of certain petitions filed by residents of school districts for the formation of a new union high school district, and it was held that, as one of these districts was already in a union high school district, it could not come into a new union high school district. But there is no method provided by law for the formal withdrawal of a school district, as such, from a county high school district. Therefore that case is not in point here. It has been held that territory may pass from a union high school district otherwise than by formal withdrawal, namely, by operation of law when such territory is annexed to an incorporated city. *Frankish v. Goodrich*, 157 Cal. 614, 108 Pac. 685. The whole matter is one of legislative control, and the Legislature has clearly provided for the formation of a union high school district within a county where a county high school exists. In *Hughes v. Ewing*, 93 Cal. 417, 28 Pac. 1067, the court was considering the matter of a tax levy upon the property in a school district the limits of which had been changed between the time of an election by which a certain sum was voted for school purposes and the levy of the tax to raise said funds. It was held that property in the old but not included in the new district was not subject to the burden of a tax. In the course of the opinion the following language, which is applicable to the case at bar, was used: "The power to change the boundaries of the district, as well as to define them in the first instance, is of legislative origin, and, whether exercised immediately by the Legislature or mediately by a board of supervisors—the local Legislature—is, whenever exercised, a legislative act. It is well settled that the Legislature has the power to make such changes, and that in the exercise of this power it may make such provision respecting the property and obligations of the corporation as it may deem equitable or proper, and that its action in this respect is conclusive. It is also well settled that when the boundaries of such corporation are changed, either by forming a new corporation out of the territory of the original one or by transferring a portion of the territory to another corporation, in the absence of any provision on the subject, the old corporation will be entitled to all the property and be

solely liable for all the obligations, and that the territory taken therefrom will not be entitled to any of the corporate property or liable for any of the obligations of the old corporation." Counsel for appellants earnestly protest that the power of school districts within a county to carve out new union high school districts being conceded, a situation might arise whereby the territory remaining might be too small and too poor to continue in operation the original county high school. That, however, is a matter of legislative rather than judicial concern.

[4] The principal argument of appellants against the constitutionality of the sections under review is based upon the statement that the county high school was and is kept open for the benefit of the inhabitants of the entire county, and that therefore the property in said county should be subject to taxation for its support. It is true that prior to the amendments of 1909 the ninth subdivision of section 1671 of the Political Code contained this language: "All county high schools shall be open to the admission of graduates holding diplomas from the grammar schools of the county, and to all pupils of the county who can pass the examination for admission. The examination for admission shall be conducted by the county board of education and the principal of the county high school." This, however, was merely a declaration of the scholastic requirements for admission to a county high school. The matter of *attendance* was regulated elsewhere, for subdivision 25 of section 1670 of the Political Code was as follows: "When, in consequence of distance or of convenience in traveling, it is more convenient for pupils residing in any high school district to attend the high school in another high school district, the high school board of the latter district may admit such pupils to the high school in their district upon such terms as the two boards may arrange." This provision has been practically retained in section 1751 of the Political Code adopted in 1909. We can find no reason, either in the former or the present statutes applicable to high schools, why the word "district," as used therein, did not apply to territory to be served by county high schools as well as by union high schools.

[5, 6] The taxes for the support of schools are in their nature special taxes, and the Legislature has the power to limit their assessment to the property within the respective districts to be served. *Chico High School Board v. Board of Supervisors*, 118 Cal. 119, 50 Pac. 275; *Brown v. Visalia*, 141 Cal. 380, 74 Pac. 1042. In *People v. Lodi High School District*, 124 Cal. 700, 57 Pac. 662, this court said: "It is within the power of the Legislature to constitute these schools and to provide for their support by methods different from those adopted for like purposes as to other schools." And again, in

Hughes v. Ewing, supra: "It would be difficult, upon principle, to uphold the validity of a tax upon property which is without the district to be benefited by the expenditure of the moneys so to be raised." We are satisfied that the statutes exempting property within union high school districts from taxation for the support of county high schools were constitutional and that the decision of the superior court based upon them was correct.

[7] The people within the Bret Harte union high school district were not estopped to deny the validity of the tax in question. No special facts constituting estoppel are pleaded, and the general circumstance that the tax had been paid formerly without protest was not sufficient to prevent plaintiff from denying its validity. It was void and could not be cured by the application of the doctrine of estoppel. *Raisch v. City and County of San Francisco*, 80 Cal. 6, 22 Pac. 22; *Lukens v. Nye*, 156 Cal. 506, 105 Pac. 593, 36 L. R. A. (N. S.) 244, 20 Ann. Cas. 158.

[8, 9] The final contention of appellants is that the Bret Harte union high school district has no legal existence because of the failure of those seeking to create it to comply with all the requirements of the law. There are two complete answers to this objection to the recognition of the district. The first is that the existence of the union district as a de facto high school district cannot be attacked collaterally. *Hancock v. Board of Education*, 140 Cal. 560, 74 Pac. 44. The second answer is that the Legislature has passed validating or curative acts making unquestionable the legal existence of districts which have been operating as such. There is no question in the present case of the facts that in the Bret Harte district its trustees had erected school buildings and employed teachers and its inhabitants had paid taxes for the maintenance of the high school and that it had been conducted generally as a duly organized high school district. There was evidence that the superintendent of schools had properly certified the result of the election by which the inhabitants of the school districts included within the Bret Harte district had voted to establish said union high school district. Subdivision 11 of old section 1671 of the Political Code provided: "The certificate of the county superintendent mentioned in subdivision four of section one thousand six hundred and seventy of the Political Code when filed with the county clerk, when the result of the election as therein declared is in favor of the establishment of the high school, shall at the expiration of one year from the date of such filing be conclusive evidence that such high school district and high school has been legally established." The language of section 1724 of the Political Code, adopted in

1909, contains a broader provision as follows: "All proceedings for the formation and organization of high school districts and the establishment of county, city, city and county, union, joint union and district high schools, had prior to the taking effect of this section, are hereby validated and declared legal, and said high school districts and high schools, and any other high school districts which have been acting as such for more than one year previous to the taking effect of this section, are hereby declared to be legally formed, organized and established." Such curative acts have been held valid. *People v. School Dist.*, 101 Cal. 661, 36 Pac. 119; *Board of Education v. Hyatt*, 152 Cal. 519, 93 Pac. 117; *People v. Pacific Grove*, etc., Dist., 11 Cal. App. 213, 104 Pac. 586.

For the reasons above set forth, the judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

20 Cal. App. 377

CITY OF SIERRA MADRE v. LEHMER  
et al. (Civ. 1,203.)

(District Court of Appeal, Second District,  
California. Nov. 16, 1912.)

MUNICIPAL CORPORATIONS (§ 162\*) — CITY  
TREASURER—COMPENSATION.

Under Municipal Corporation Act (Hennings's Gen. Laws, p. 907) § 876, providing that a city treasurer shall be allowed 1 per cent. on all moneys received and paid by him as such treasurer, such percentage is to be computed only on the amount paid out by him from that which has been received.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 357-367, 369, 372, 374; Dec. Dig. § 162.\*]

Appeal from Superior Court, Los Angeles County; J. D. Murphey, Judge.

Action by the City of Sierra Madre against F. C. Lehmer and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Shaw & Stewart, of Los Angeles, for appellants. Charles C. Montgomery, of Sierra Madre, for respondent.

SHAW, J. The facts presented by the record herein are identical with those involved in the case of *City of Corona v. Merriam* et al., 128 Pac. 769, Civil, No. 1,195, an opinion in which was filed in this court October 25, 1912.

In each case the action was one prosecuted by the city against its treasurer to recover from him and his sureties moneys retained by him and claimed as compensation for services as such city treasurer. In the *Corona* Case the claim of the treasurer was based upon an ordinance providing that, in addition to a salary of \$15 per month, he should receive "one per cent. on all moneys received and paid out by him as treasurer." In the case at bar the claim of the treasurer, in the absence of an ordinance fixing



his compensation, is based upon section 876 of the Municipal Corporation Act (Henning's Gen. Laws, p. 907), which provides that he "shall be allowed one per centum on all moneys received and paid by him as such treasurer." It thus appears that, except in the one case the compensation is fixed by ordinance, while in the other it is fixed by statute, the provisions are identical. In each case the treasurer insisted that by virtue of the provisions quoted he was entitled to 1 per cent. not only upon the amount of money received by him as treasurer, but a like percentage upon the amount paid out, while the claim of the cities was that the percentage should be computed upon the amount paid out by him from that which he had received.

In the case at bar the trial court accepted the latter view, which is in accordance with the opinion of this court rendered in the case of *City of Corona v. Merriam et al.*, supra. Upon the authority of that case, the facts presented being the same, the judgment from which defendants appeal must be, and is, affirmed.

We concur: ALLEN, P. J.; JAMES, J.

20 Cal. App. 372

**BRIGGS v. HALL. (Civ. 978.)**

(District Court of Appeal, Third District, California. Nov. 14, 1912.)

**1. APPEAL AND ERROR (§ 856\*)—MOTION FOR NEW TRIAL—SETTING ASIDE ORDER.**

Only in rare instances and upon very strong grounds will the Supreme Court set aside an order granting a new trial, and other grounds for supporting such an order than those mentioned therein may be considered, except that the trial court may limit its order so as to exclude, as ground for its action, the insufficiency of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3406-3434; Dec. Dig. § 856.\*]

**2. BROKERS (§ 88\*)—MISLEADING INSTRUCTIONS.**

An instruction that, if the owner, in breach of his agreement sold his property for less than \$13,000, the agent was entitled to his commission was misleading so as to call for a new trial, where, after the sale of the land, a rebate to the purchaser was made by the owner in consequence of a survey having shown a shortage of half an acre; the question being whether the land was sold for \$13,000.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121-130; Dec. Dig. § 88.\*]

**3. NEW TRIAL (§ 71\*)—VERDICT—CONCLUSIVE-NESS—CONFLICTING EVIDENCE.**

The judge is not bound by the verdict of the jury where there is a conflict in the evidence in granting a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 144, 145; Dec. Dig. § 71.\*]

**4. EVIDENCE (§ 317\*)—HEARSAY—STATEMENTS BY PURCHASER TO AGENT.**

In an action by an agent for commissions on the ground that the owner had sold for less than the minimum agreed in his contract, providing that in such a case he would pay the agent a commission, testimony of the agent that

the purchaser had said to him that he would have bought the place from him, but had done better in dollars and cents, was inadmissible as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.\*]

Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by H. Briggs against A. J. Hall. Verdict for plaintiff, and, from an order granting defendant's motion for a new trial, plaintiff appeals. Affirmed.

T. J. Butts, of Santa Rosa, and L. G. Scott, of Sebastopol, for appellant. Perrier & Libby, of Sebastopol, for respondent.

**BURNETT, J.** This is an appeal from an order granting defendant's motion for a new trial. The action was brought to recover an agent's commission for the sale of real property. The jury found in favor of plaintiff, and the court awarded a new trial, making the following order: "In this action a new trial is ordered upon the ground that instruction No. 6, as well as other instructions to the same point, is not covered by the issues raised in the pleadings. It was also error of the court to admit evidence on that point, but the court was of the opinion, when it admitted the evidence and gave the instructions, that there was a count in the complaint that permitted it so to do."

[1] It has been said that "it is only in rare instances and upon very strong grounds that the Supreme Court will set aside an order granting a new trial." *Quinn v. Kenyon*, 22 Cal. 82. It is also true, as stated in *Morgan v. Robinson Co.*, 157 Cal. 352, 107 Pac. 697, that, "Even though the order declare in terms that the motion is granted for one or more reasons only, the appellate court is not precluded from considering any other assignment upon which the motion should have been granted." *Kauffman v. Maier*, 94 Cal. 269 [29 Pac. 481, 18 L. R. A. 124]. This rule is subject to the one limitation that the trial court may limit its order granting the motion so as to exclude, as a ground for its action, the insufficiency of the evidence (*Weisser v. Southern Pacific Ry. Co.*, 148 Cal. 426 [83 Pac. 439, 7 Ann. Cas. 636]), but such exclusion, to be effectual, must be declared in the order itself. *Weisser v. Southern Pacific Co.*, 148 Cal. 426 [83 Pac. 439, 7 Ann. Cas. 636]; *Ben Lomond Wine Co. v. Sladky*, 141 Cal. 619 [75 Pac. 332]; *Newman v. Overland Pac. Ry. Co.*, 132 Cal. 73 [64 Pac. 110]."

In the notice of motion for a new trial, and in the "statement to be used on said motion," are found specifications of error in relation to rulings of the court in admitting evidence, the insufficiency of the evidence to support the verdict, and the giving of various instructions to the jury. We may consider any of these assignments with the exception, possibly, of the insufficiency of the evidence. We

speak of the last with some hesitancy, because of the declaration made in *Newman v. Overland Pac. Ry. Co.*, 132 Cal. 74, 64 Pac. 110, that "when this is made one of the grounds of the motion, although other grounds are also presented, if the order does not by direct language exclude this from the grounds upon which the motion is granted, it will be assumed that it was one of the grounds for making the order, and the order will accordingly be affirmed." In the case at bar the said ground is not "by direct language" excluded, but only by implication. If it is to be held, therefore, that this ground must be considered unless expressly excluded by the terms of the order, under the admission of appellant that the evidence was conflicting, we would be constrained to affirm the order by virtue of the doctrine announced in the *Newman* Case that "the rule is fully established that the superior court is not only authorized, but that it is its duty, to grant a new trial whenever, in its opinion, the evidence upon which the former decision was made was insufficient to justify that decision. Its action in granting a new trial upon this ground is so far a matter within its discretion that, if there is any appreciable conflict in the evidence, it is not open to review in this court." But, conceding that this specification must be disregarded, does there remain a legal ground for sustaining the action of the court?

[2] The aforesaid instruction was as follows: "Defendant contracted with Lyman & Briggs that he would not offer his lands for a less price than that listed with said Lyman & Briggs, and this part of the contract is binding upon him, and by reason thereof defendant will not be permitted to sell his lands for a less price while the said contract is in force and while said Lyman & Briggs were attempting to negotiate the sale thereof, either by himself or through another agency, and thereby deprive the said Lyman & Briggs or their assigns out of the commission contracted to be paid; therefore, if you find that the defendant did sell his lands for a price less than \$13,000, without the consent of said Lyman & Briggs, while their contract was in force, said Lyman & Briggs will have earned their 5 per cent. commission, as provided in said contract, and plaintiff will be entitled to a judgment for the sum of \$650." We do not think it can be said that this instruction was erroneous for the reason assigned by the court. The complaint, considered in connection with the contract of agency, which was attached as an exhibit, was comprehensive enough to admit evidence of a sale made by the owner for a price less than \$13,000, and no separate count was required to cover this particular feature. *Hallock v. Jaudin*, 34 Cal. 174; *Rucker v. Hall*, 105 Cal. 425, 38 Pac. 962. But manifestly we are not controlled by the reason assigned by the court. Admitting the instruction to

be within the issues, and, moreover, to embody a correct legal principle, still there is force in respondent's contention that the jury were likely to make an erroneous application of the instruction by reason of the fact that, after the sale was consummated, a rebate to the purchaser was made by the owner in consequence of a survey having shown that there was a half acre less of land than was estimated. "The test of an instruction is not whether the instruction was erroneous but whether it was misleading." *Hayne*, New Trial and Appeal, § 122; *People v. Maughs*, 149 Cal. 253, 86 Pac. 187. If instructions, correct as abstract propositions, may have misled the jury, a new trial may be granted. *Hirschberg v. Strauss*, 64 Cal. 272, 28 Pac. 235; *In re Calkins*, 112 Cal. 296, 44 Pac. 577.

Defendant's theory at the trial was that the land was sold for \$13,000 through another agency than plaintiff's assignor, while plaintiff relied principally upon the position that the owner had sold for less than the price fixed in the contract of agency.

[3] It is admitted by appellant that "upon that point there was a conflict in the evidence," but it is contended that "the jury passed upon that, and the jury were the sole judges of the fact, and it is not grounds for a new trial." As to this, appellant is clearly in error, as the trial judge is not bound by the verdict of the jury where there is a conflict in the evidence. *Green v. Soule*, 145 Cal. 96, 78 Pac. 337. But the point we desire to emphasize is the importance of the question whether the land was sold for less than \$13,000. As we have seen, the owner agreed not to sell it for less than that while the contract of agency was in force. He reserved, however, the privilege of selling it for \$13,000; but, if he did so without the intervention of plaintiff's assignors, he was to pay the agents a commission of 2 per cent. His contention being that he sold the land for the full price without any participation on the part of said agents, he claimed that he owed them said 2 per cent. instead of 5 per cent., as demanded by them. It is apparent, of course, that the question whether he made a deduction would be unimportant if the evidence were conclusive that the sale was made through the agency of plaintiff's assignors, but it is admitted by appellant that as to this there was a conflict in the evidence. It was vitally important, therefore, that the consideration as to the price for which the land was actually sold by the owner should be properly presented to the jury. In this connection we may call attention to the fact that the court admitted improper evidence bearing upon this question, and it is quite likely, in view of said instruction No. 6, that said evidence may have determined the result in favor of appellant.

[4] The plaintiff was permitted to testify, over objection, to a conversation that he had with the purchaser after the latter had



agreed to buy the property and made a deposit, in which connection "he said he would like to have bought the place from us, but he done a little better in dollars and cents." This conversation, as is apparent, is not directed to any efforts made by the agents to secure a purchaser, but the testimony involved a hearsay declaration that might have been considered by the jury as evidence of a sale for less than \$13,000, to the prejudice of respondent.

As the record appears, we cannot say that there is no legal warrant for the order of the trial court granting a new trial, and the order is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

20 Cal. App. 341

**DOUGHERTY v. CLARKE et al.**  
(Civ. 1,084 [S. F. 6,423].)

(District Court of Appeal, First District, California. Nov. 12, 1912. Rehearing Denied by Supreme Court Jan. 10, 1913.)

**SCHOOLS AND SCHOOL DISTRICTS (§ 145\*)—EVIDENCE—EMPLOYMENT OF SCHOOL TEACHERS.**

In an action by a teacher against a school district, evidence held to warrant a finding that there was no contract of employment.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 315-317; Dec. Dig. § 145.\*]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by Alice Dougherty against J. W. Clarke and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Costello & Costello, Frank H. Gould, and Vincent Surr, all of San Francisco, for appellant. William H. Donahue, Dist. Atty., W. H. L. Hynes, Asst. Dist. Atty., and Walter J. Burpee, Deputy Dist. Atty., all of Oakland, for respondents.

HALL, J. This is an appeal from a judgment in favor of defendants and the order denying plaintiff's motion for a new trial.

The action was brought by plaintiff to recover one year's salary as upon a contract of employment as a school teacher. The determination of the appeal depends upon whether or not the evidence is sufficient to support the findings of the court that there was no contract of employment between the board of school trustees and the plaintiff in this action. We have carefully examined the record before us, and are of the opinion that there is sufficient evidence in the record to support the finding of the trial court. There certainly is a decided conflict in the evidence as to what took place at the board meeting on the night of August 3d, when plaintiff claims she was offered the employment and accepted the same. The minutes of the meeting on their face lend strong support to the

claim of plaintiff; but oral testimony was also introduced which, if true, shows that she did not then accept the employment. The testimony given by plaintiff upon the one hand, and the witnesses for defendants on the other, is in hopeless conflict as to what occurred subsequently to August 3d bearing upon the question as to whether or not she ever accepted the position offered her by the board. The evidence was sufficient to justify the trial court in finding that she never brought it to the knowledge of the board that she had accepted or would accept the offer the board had made her, and that there never was any meeting of minds between the board and the plaintiff such as would culminate in a contract of employment. It is without dispute that the board only offered her a position to teach a mixed class of the sixth and eighth grades. There is evidence that she positively refused to accept anything other than a class of the eighth grade. This statement she made as late as August 8th to one member of the board. It may be that she did intend to accept the position offered her, but her conduct was such as to justify the board in the belief that she had determined not to accept it. The board finally employed another person to teach the class, of which action they promptly notified plaintiff.

The judgment and order must be affirmed, and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J

20 Cal. App. 349

**OLCOVICH v. GRAND TRUNK RY. CO. OF CANADA.** (Civ. 1,051.)

(District Court of Appeal, First District, California. Nov. 14, 1912.)

**1. COURTS (§ 489\*)—JURISDICTION OF FEDERAL COURTS—OVERCHARGES.**

Under section 9 of the interstate commerce act (Act. Feb. 4, 1887, c. 104, 24 Stat. 382 [U. S. Comp. St. 1901, p. 3159]), which provides that any person claiming to be damaged by any common carrier may make complaint either to the State Commerce Commission, or may bring suit in any District or Circuit Court of the United States, the Interstate Commerce Commission or the designated federal courts have exclusive jurisdiction of an action for damages for overcharges or for any character of damage accruing out of the violation of section 8 making a carrier liable in damages for any violation of the act.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324-1341, 1372-1375; Dec. Dig. § 489.\*]

**2. COURTS (§ 489\*)—CONCURRENT JURISDICTION—STATE AND FEDERAL COURTS—INTERSTATE COMMERCE ACT—ACTION FOR LOSS OF GOODS.**

Section 20 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169]), as amended by the Hepburn act (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 906]), provides that any common carrier of in-

terstate shipments shall issue a receipt or bill therefor and be liable to the owner for any injury thereto caused by any connecting carrier, and that no contract shall exempt a carrier from such liability; section 8 makes a carrier subject to the act, liable to a person injured by any violation thereof; and section 9 provides that any person claiming to be so injured may complain to the Commission or sue in any district or circuit court. Act March 3, 1875, c. 137, 18 Stat. 470, as amended by Act August 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), gives the United States Circuit Courts jurisdiction concurrent with the state courts of certain civil suits, and Act March 3, 1911, c. 231, §§ 24, 289, 36 Stat. 1091, 1167 (U. S. Comp. St. Supp. 1911, pp. 135, 243), gave the District Courts the jurisdiction formerly exercised by the Circuit Courts. *Held*, in view of the acts defining the jurisdiction of the District and Circuit Courts, that an action under section 20 for damages to goods is not an action for a violation of the act, and hence not within the exclusive jurisdiction of the Commission or the federal courts, and that the state courts had concurrent jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324-1341, 1372-1375; Dec. Dig. § 489.\*]

### 3. PLEADING (§ 192\*)—DEMURRER—FORM AND REQUISITES.

Where a demurrer specifies uncertainties and ambiguities in a complaint rather than the insufficiency of the facts stated to constitute a cause of action, the sufficiency of such facts cannot be considered.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 408-427; Dec. Dig. § 192.\*]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Herman Olcovich against the Grand Trunk Railway Company of Canada. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Archibald Barnard, of San Francisco (H. W. Philbrook, of San Francisco, of counsel) for appellant. McGowan & Westlake, of San Francisco, for respondent.

LENNON, P. J. In this action the plaintiff seeks to recover upon two causes of action, separately stated, the aggregate sum of \$1,738.49, as damages for alleged injuries to two distinct lots of merchandise, claimed to have been consigned to plaintiff, and intrusted to defendant for transportation from Berlin, in the state of New Hampshire, to the plaintiff at the city and county of San Francisco. The defendant is a common carrier, incorporated and existing under the laws of the dominion of Canada, and is engaged in transporting passengers and freight from state to state in the United States over its own lines of railway, and by connection over the railway lines of other common carriers. The plaintiff's causes of action, by appropriate allegations, purport to be founded upon an obligation arising by operation of law out of the provisions of an act of Congress and the amendments thereto, known as the interstate commerce act. The defendant interposed a demurrer to the plaintiff's com-

plaint, which attacked the jurisdiction of the state court to hear and determine the action. The demurrer, which was based upon several grounds, was sustained without leave to amend being granted. Accordingly judgment was entered for defendant, from which the plaintiff has appealed.

We are of the opinion that the demurrer was not well taken upon any of the grounds specified, and that the lower court erred in its ruling sustaining the same. In support of the demurrer, the defendant contends that, by the very terms of the act upon which the liability of the defendant is predicated, jurisdiction to entertain the same is expressly and exclusively conferred upon the Interstate Commerce Commission and the federal courts specifically designated in the act. This contention is founded upon the language of section 9 of the act, which provides that "any person or persons claiming to be damaged by any common carrier, subject to the provisions of this act, may either make complaint to the Commission, as herein provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any District Court or Circuit Court of the United States of competent jurisdiction." Act Feb. 4, 1887, c. 104, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159).

[1] The defendant insists that by this section litigants are limited in the selection of a forum for the adjudication of all claims for damages arising out of the interstate commerce act, and the amendments thereto, either to the Interstate Commerce Commission or to the federal courts designated in the act. This construction of the act has been held to be correct in so far as it concerns the right to sue for damages for overcharges or for any character of damage accruing out of the violation of the provisions of section 8 of the act, which provides: "That in case any common carrier subject to the provisions of this act shall do, cause to be done or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing by this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act."

The plaintiff's claim for damages in the present case, however, is founded upon the provisions of section 20 of the interstate commerce act, as amended June 29, 1906, by an act of Congress known as the Hepburn bill, which provides: "That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful owner



thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad, or transportation company, to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage or injury shall have been sustained the amount of such loss, damage or injury as it may be required to pay to the owners of such property, as may be evidenced by receipt, judgment or transcript thereof."

It is well settled that the federal courts have exclusive jurisdiction of all suits arising out of a violation of the provisions of section 8 of the interstate commerce act hereinbefore quoted. *Van Patten v. Chicago, etc., Ry. Co.* (C. C.) 74 Fed. 981; *Sheldon v. Wabash Ry. Co.* (C. C.) 105 Fed. 785; *N. P. R. Co. v. Pacific Coast Lumber Mfg. Association*, 165 Fed. 1, 91 C. C. A. 39; *Union Pac. Ry. Co. v. Oregon, etc., Lumber Co.*, 165 Fed. 13, 91 C. C. A. 51; *Texas, etc., Railway Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075.

[2] It is equally well settled that a claim for damages, caused by injury to goods in transit, is not covered and controlled by the provisions of section 8 of the interstate commerce act, and therefore the provisions of section 9 of the act, which designate the forum in which claims arising out of a violation of the provisions of section 8 may be litigated, have no application to an action for damages founded, as is the present action, upon the provisions of the amendment to section 20 of the act. *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186-208, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7; *Galveston, etc., Ry. Co. v. Wallace*, 223 U. S. 481, 32 Sup. Ct. 205, 56 L. Ed. 516. To hold otherwise would be to deprive the plaintiff of the right to seek redress for the damages here claimed before any tribunal other than the Interstate Commerce Commission. That this is so is demonstrated by a consideration of other acts of Congress which define generally the jurisdiction of the federal Circuit and District Courts.

The act of Congress of March 3, 1875, defining the jurisdiction of the Circuit Courts of the United States as they formerly existed, was amended August 13, 1888, so as to read that: "The Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law

or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, and arising under the Constitution and laws of the United States." Act March 3, 1875, c. 137, 18 Stat. 470; Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508). An examination of the several acts of Congress conferring and defining the jurisdiction of the District Courts of the United States shows that such courts did not originally have jurisdiction to hear and determine civil actions involving a claim for damages of the kind now under consideration. 4 Fed. Stats. Annotated, 218 (U. S. Comp. St. 1901, p. 455). Very recently, however, the Circuit Courts of the United States were abolished (1 Fed. Stats. Annotated Supp. 1912, p. 249 [U. S. Comp. St. Supp. 1911, p. 243]), and thereupon Congress enlarged the jurisdiction of the District Courts by conferring upon them the jurisdiction formerly exercised by the Circuit Courts. By such enlarged jurisdiction, the District Courts were given cognizance of "all suits of a civil nature, at common law or in equity, \* \* \* when the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000 and arises under the Constitution or laws of the United States. \* \* \*" 1 Fed. Stats. Annotated Supp. 1912, p. 139 (U. S. Comp. St. Supp. 1911, p. 135).

This being so, it would follow—if it were true, as defendant contends, that all causes of action for damage against a common carrier arising out of the interstate commerce act and the amendments thereto fall within and are controlled by the provisions of sections 8 and 9 of the act—that the plaintiff's claim for damages under the provisions of the amendment to section 20 of the act could be litigated only before the Interstate Commerce Commission. That this result was not contemplated by Congress when it enacted the amendment to section 20 of the interstate commerce act, known as the "Hepburn act," and under which the present action was instituted, is clearly pointed out in the comparatively recent case of *Smeltzer v. St. Louis & S. F. R. R. Co.* (C. C.) 168 Fed. 420. In that case the precise point presented here with reference to the jurisdiction of the state courts was raised upon demurrer, and decided to be without merit. The opinion in that case reviews the scope and effect of the several sections of the interstate commerce act and the amendments thereto under discussion here; and the reasoning upon which the court arrived at the conclusion in that case, that the state courts had jurisdiction over actions for damages arising under the Hepburn act, so clearly and convincingly disposes of the jurisdictional phase of the present case that we feel justified in quoting extensively from the opinion of the learned judge who decided the case referred to. In its pertinent points that opinion is as follows:

"The case is here on removal from the circuit court of Crawford county, Ark. The contention is that under Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), and amendments thereto (Act June 29, 1906, c. 3501, 34 Stat. 384; U. S. Comp. St. Supp. 1907, p. 892), exclusive jurisdiction is conferred on the District and Circuit Courts of the United States, or upon the Interstate Commerce Commission, and therefore the state court had no jurisdiction of the case when brought, and this court acquired none by removal.

"In the opinion of the court, the contention is without merit. The following cases are cited to support the demurrer: *Haracovic v. Standard Oil Co.* (C. C.) 105 Fed. 785; *Kalispell Lumber Co. v. Great Northern Ry. Co.* (C. C.) 157 Fed. 845; *Van Patten v. Chicago, M. & St. P. R. Co.* (C. C.) 74 Fed. 981; *United States v. Mooney*, 116 U. S. 104, 6 Sup. Ct. 304, 29 L. Ed. 550; *United States v. Atchison, T. & S. F. Ry. Co.* (C. C.) 142 Fed. 187; *Central Stock Yards Co. v. Louisville & N. R. Co.* (C. C.) 112 Fed. 823; *Northern Pac. Ry. Co. v. Pacific Coast Lumber Mfrs.' Ass'n* [91 C. C. A. 39], 165 Fed. 1. I do not think any of these cases in point. They relate to actions brought under sections 8 and 9 of the act of February 4, 1887, known as the 'Interstate Commerce Act.' When that act went into effect, no such suit as the one now under consideration was authorized under then existing laws. This suit was brought under section 7 of the act of June 29, 1906, known as the 'Hepburn Act,' 34 Stat. 584, c. 3591 (U. S. Comp. St. Supp. 1907, p. 892.) That section, it is true, is an amendment of section 20 of the act of February 4, 1887, but the section, as it stood in the original act, contained no provisions such as that under which this suit is brought. \* \* \* relates solely to suits to be brought by shippers over interstate lines for loss or damage to their goods. No provision is made by the section as to what courts the suits shall be brought in for losses or injuries so sustained. The contention is that the provisions found in sections 8 and 9 of the act of February 4, 1887, and the provision found in the previous part of the section from which the above quotation is taken, applies to this class of actions. I am clearly of opinion that this contention is unsound. \* \* \*

"Sections 8 and 9 of the original interstate commerce act of February 4, 1887, must be considered with reference to the provisions of the act as it stood when enacted, and to the purpose and scope of the act. There was not the remotest reference in that act to the liability of an initial carrier for losses on its connecting lines, nor any provision requiring a railroad engaged in interstate commerce to give a through bill of lading, or withdrawing its power to limit by rule, regulation, or contract its liability to losses occurring on its

own lines. Sections 8 and 9 of the act of February 4, 1887, therefore, when enacted, could not have had any application to such an action as the one at bar, because no such action then existed. The very language used makes it clear that those sections have no application to such an action as this. \* \* \*

"Manifestly they relate to the right of any one who has been injured to recover such damages as he may have suffered by the failure of the carrier to do what the act required, or for doing the things the act forbids.

"But this suit is not brought because the carrier did something it was forbidden by the act to do, or neglected to do anything that the act commanded. All the cases cited above are of the character indicated, and have no application to a case like the one at bar. This is simply a suit for damages for breach of a contract, either entered into voluntarily without reference to the act, or in pursuance of, or in conformity to, it. In either event, it does not fall under the sections quoted, and hence is not required to be brought in a District or Circuit Court of the United States, or before the Interstate Commerce Commission.

"The question then arises, If Congress creates a new cause of action, and, by the act creating it, designates no court in which the suit shall be brought, what courts have jurisdiction? This question was before the Supreme Court in *Norwich Co. v. Wright*, 13 Wall. 104, 20 L. Ed. 585. An examination of the act under which that suit was brought will show that it creates a new cause of action which under the general law belonged to the admiralty jurisdiction. It related wholly to losses and damages sustained on the high seas. That act did not designate any court in which cases created by the act might be tried, but did say, 'The owner or owners of the ship or vessel, or any of them, may take the appropriate proceeding in any court,' for certain purposes provided. The act differs from the one under consideration in that respect only, for the latter makes no reference to courts in which the shipper may institute suits for the relief provided. The Supreme Court in that case said, on the question of jurisdiction:

"The act does not state what court shall be resorted to, nor what proceedings shall be taken; but that the parties or any of them may take 'the appropriate proceedings in any court, for the purpose of apportioning the sum for which,' etc. Now no court is better adapted than a court of admiralty to administer precisely such relief. It happens every day that the proceeds of a vessel, or other fund, is brought into that court to be distributed amongst those whom it may concern. Claimants are called in by monition to present and substantiate their respective claims, and the fund is divided and distributed according to the respective liens and rights of all the parties. Congress might have



invested the Circuit Courts of the United States with the jurisdiction of such cases by bill in equity, but it did not. It is also evident that the state courts have not the requisite jurisdiction. Unless, therefore, the District Courts themselves can administer the law, we are reduced to the dilemma of inferring that the Legislature has passed a law which is incapable of execution. This is never to be done if it can be avoided. We have no doubt that the District Courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter, and this court undoubtedly has the power to make all needful rules and regulations for facilitating the course of proceeding.'

"This decision was followed in *Elwell v. Geibel and Another* (C. C.) 33 Fed. 71, and was also approved by the Supreme Court in *Providence & N. Y. Steamship Co. v. Manufacturing Co.*, 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038. The statute under which those suits were brought ousted the jurisdiction of all courts, state and federal, except the District Courts of the United States, because the subject-matter was maritime, and the general jurisdiction of the federal courts in all admiralty matters (with certain specified exceptions) is conferred by general statutes of the United States on the United States District Courts. \* \* \* These cases, I think, decide the principle involved here.

"We must look, then, to the judiciary act to see what courts, under the general law, have jurisdiction in like cases, otherwise we should have the anomaly spoken of in *Norwich Co. v. Wright* 'that the Legislature has passed a law which is incapable of execution,' which the court in that case said 'is never to be done if it can be avoided.' By Act March 3, 1875, c. 137, 18 Stat. 470, as amended by the Act of March 3, 1887, c. 373, 24 Stat. 552, as corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), it is provided:

"That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid,' etc.

"By this statute it is plain that the jurisdiction is concurrent in the Circuit Courts of the United States and the state courts in all common-law cases where the amount in dispute, exclusive of interest and costs, exceeds the sum of \$2,000, if the suit is between citizens of different states or arises under the

Constitution and laws of the United States, \* \* \* and suits for \$2,000 and less must be brought in the state courts, otherwise jurisdiction obtains in no court, state or federal, for that class of cases, and the act of Congress to that extent is unenforceable. Any other conclusion would not only nullify the twentieth section of the Hepburn act under consideration, but many other acts of deep concern to the country, among others Act May 30, 1908, c. 225, 35 Stat. 476 (U. S. Comp. St. Supp. 1911, p. 1326), 'to promote the safety of employes on railroads,' Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), known as the 'Employer's Liability Act,' Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), known as the 'act to prevent cruelty to animals while in transit,' and others which might be cited."

The case just quoted from was not cited to us by counsel in their briefs or upon the oral argument, and the case of *Galveston, etc., Ry. Co. v. Wallace*, supra, was discovered and appended to the briefs by counsel for the plaintiff shortly before the submission of the case here. It must be assumed, therefore, in fairness to the judge of the lower court, that these two cases were not called to his attention. In addition to the jurisdictional point just disposed of, the defendant insists that the demurrer was properly sustained upon the ground that neither count of plaintiff's complaint states facts sufficient to constitute a cause of action. In this behalf it is one of defendant's contentions that the complaint should contain an allegation that the damage sued for "occurred on the road of the defendant or on its portion of the through route," because the shipping receipts issued by the defendant are made a part of the complaint, and expressly provide that no carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route. A complete and conclusive answer to this contention is to be found in the very language of the act itself upon which this action is founded. It declares that "no contract, receipt, rule or regulation shall exempt such common carrier \* \* \* from the liability hereby imposed."

[3] In regard to the several remaining particulars in which the defendant claims that the complaint is deficient in its statement of a cause of action, it will suffice to say that in each instance the specifications of insufficiency relate solely to matters which go only to the uncertainty and ambiguity of the complaint rather than to the sufficiency of the facts stated to constitute a cause of action; and, as they were not specified in the demurrer, they cannot now be considered.

For the reasons stated, the judgment is reversed, with instructions to the lower court to overrule the demurrer and require the defendant to answer.

We concur: HALL, J.; KERRIGAN, J.

(20 Cal. App. 360)

**Ex parte ZANY. (Crim. 198.)**

(District Court of Appeal, Third District, California. Nov. 14, 1912. Rehearing Denied by Supreme Court Jan. 13, 1913.)

**1. INTOXICATING LIQUORS (§ 11\*)—CONFLICTING STATE AND COUNTY REGULATION — "GENERAL LAW."**

Local Option Law April 4, 1911 (St. 1911, p. 599), which provides a state-wide scheme, by which any incorporated city or town, or that portion of any supervisorial district not within the boundaries of any incorporated city or town, may petition for an election whether the sale of alcoholic liquors shall be licensed therein, the obvious intention of which was to authorize any incorporated city or town, or the part of the county outside incorporated cities and towns, to act independently of each other in that matter, is a "general law," within Const. art. 11, § 11, which provides that any county, city, or town may make and enforce such police and other regulations as are not in conflict with general laws.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 13; Dec. Dig. § 11.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3065-3071; vol. 8, pp. 7669, 7670.]

**2. INTOXICATING LIQUORS (§ 11\*)—CONFLICTING STATE AND COUNTY REGULATION.**

Local Option Law April 4, 1911 (St. 1911, p. 599), a general law within Const. art. 11, § 11, which provides that any county, city, or town may make and enforce such police and other regulations as are not in conflict with general laws, provides that electors of any city or town, or of that portion of any supervisorial district not within the boundaries of any city or town, may petition for an election whether the sale of alcoholic liquors in such city, town, or district shall be licensed therein, by sections 13 and 19, makes a sale in no-license territory a misdemeanor, and by section 22 provides that nothing in the act shall be construed as putting limitations, except such as are positively stated herein, upon the existing police powers of cities, towns, and counties. Act April 3, 1911 (St. 1911, p. 577), as amended by Act Jan. 2, 1912 (St. 1912, p. 125), added to Pol. Code, § 4058, providing for direct legislation and including initiative and referendum in counties, and an ordinance was enacted pursuant thereto "by and for the county" of S. by the electors of the county, making it unlawful to sell intoxicating liquor in the county. *Held*, on habeas corpus by petitioner held in custody for a violation of such ordinance, that the legislative power given by the referendum act was intended to be given to the people of the entire county as to other matters of general concern, that the limitations "positively stated" in the local option act were those upon the power of electors of incorporated towns or cities, or supervisors of the districts, to independently determine the sale of alcoholic liquors, and that the ordinance attempting to determine the question for the county as a whole, and not for the cities, towns, or districts therein to be affected, was void as in conflict with the general local option law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 13; Dec. Dig. § 11.\*]

**3. STATUTES (§ 206\*) — CONSTRUCTION — GIVING EFFECT.**

A statute should be so construed as to give a sensible and intelligent meaning to every part, and, if possible, so as to make it valid and effective, and Civ. Code, § 3541, is declaratory of this rule of construction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 283; Dec. Dig. § 206.\*]

**4. HABEAS CORPUS (§ 32\*)—GROUNDS OF RELIEF—WANT OF JURISDICTION.**

Under the express provisions of Pen. Code, § 1487, the unconstitutionality of a law or ordinance is ground for discharge on habeas corpus before trial and conviction.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 29; Dec. Dig. § 32.\*]

Application by Charles Zany for a writ of habeas corpus. Ordered that the petitioner be discharged.

Ben Berry and Gordon A. Stewart, both of Stockton, for petitioner. L. J. Maddux, of San Francisco, for the People.

**CHIPMAN, P. J.** It appears from the petition that petitioner, Charles Zany, is imprisoned by the authority of a warrant of arrest issued on July 11, 1912, upon a complaint filed that day in the justice's court of Modesto township, county of Stanislaus. It is alleged in the petition that said complaint is invalid, illegal, and void in that it fails to charge a public offense and conferred no authority on the said justice of the peace to issue said warrant; "that said complaint is founded upon and charges a violation of the terms and provisions of an ordinance enacted by the people of the county of Stanislaus, state of California, on the 14th day of May, 1912, which ordinance marked 'Exhibit B,' is expressly referred to and made a part of this petition"; that no authority "is conferred by law upon the people of the county of Stanislaus to enact or adopt said ordinance and the same is invalid, illegal, null, and void."

The charging part of said complaint, after reciting the circumstances of the sale of certain two quarts of wine, is as follows: "Which said selling and furnishing as aforesaid was then and there in violation of 'An ordinance for police regulation relating to places where alcoholic liquors are sold, stored, delivered, kept, served, disposed of, or distributed or given away within the county of Stanislaus, state of California, making unlawful the selling, storage, delivery, possession, disposal, distribution, or giving away of such liquors (with certain exceptions), within such portions of the county of Stanislaus as are subject to the police powers of said county, providing a penalty for the violation thereof, and repealing all ordinances or parts of ordinances in conflict herewith.' Said ordinance enacted by a vote of the people of the county of Stanislaus on the 14th day of May, 1912, which said ordinance went into effect on the 31st day of May, 1912; said claret wine then and there being an alcoholic liquor."

The title and enacting clause of the said ordinance are as follows: "An ordinance for police regulation relating to places where alcoholic liquors are sold, stored, delivered, kept, served, disposed of, or distributed or given away within the county of Stanislaus,



state of California; making unlawful the selling, storage, delivery, possession, disposal, distribution, or giving away of such liquors (with certain exceptions) within such portions of the county of Stanislaus as are subject to the police powers of said county, providing a penalty for the violation thereof and repealing all ordinances or parts of ordinances in conflict herewith. The people of the county of Stanislaus (state of California), do ordain as follows." Section 1 of the ordinance, as shown by petitioner's Exhibit B, is as follows: "That it shall be unlawful for any person \* \* \* within such portions of the county of Stanislaus, state of California, as (are) subject to the police powers of said county, to sell \* \* \* any alcoholic liquors, except as hereinafter provided." Section 7 reads as follows: "Any person violating any of the terms or provisions of this ordinance or failing to observe and perform any of the requirements hereof shall be guilty of a misdemeanor thereunder and upon conviction thereof shall be fined not more than five hundred dollars or be imprisoned in the county jail not more than six months or be punished by both such fine and imprisonment." Section 12 reads as follows: "This ordinance shall go into effect from and after ten days after its adoption." Following this section is the following: "Be it further resolved that said election shall be held at the same polling places, in the same precincts and conducted by the same election officers as have been appointed for the May presidential primary election to be held on Tuesday, the 14th day of May, 1912. The above resolution was adopted by the following vote of the board: M. A. Lewis—Yes. W. R. Service—Yes. J. J. McMahon—Yes. A. E. Clary—Yes. John Dunn—Yes. Thereupon the board adjourned for the term. Attest: H. Benson, Clerk. By C. C. Eastin, Jr., Deputy."

In his return to the writ, respondent "admits that said complaint is founded upon and charges a violation of the terms and provisions of an ordinance enacted by the people of the county of Stanislaus, state of California, on the 14th day of May, 1912, which ordinance, marked 'Exhibit B,' is attached to said petition, except the last paragraph of said ordinance, beginning with 'Be it further resolved' down to and ending with 'deputy.'" The return further shows: "Said sheriff alleges that said ordinance, after due and legal proceedings had before the board of supervisors, said (ordinance was) submitted to a vote of the qualified electors of said county who had a right to vote at said election, on the 14th day of May, 1912. That at said election a majority, who had a right and were entitled to vote on said ordinance, voted in favor of the adoption of said ordinance. \* \* \* That said ordinance went into effect from and after ten days after its adoption, and ever since has been and now is in

effect in said county of Stanislaus, as provided in said ordinance."

There are certain provisions of the Constitution and statutes brought into review:

"Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Section 11, art. 11, Const.

The act of April 4, 1911 (Stats. 1911, p. 599) is an act entitled "An act to provide for the regulation of the traffic in alcoholic liquors by establishing local option," etc. Section 1 provides that: "Qualified electors of any city or town, or of that portion of any supervisorial district not included within the boundaries of any incorporated city or town, \* \* \* may petition the city council, board of trustees or other legislative body of such city or town or the board of supervisors of the county in which such supervisorial district is situated, to call an election to vote upon the question, whether the sale of alcoholic liquors shall be licensed in such city, town, or supervisorial district outside of incorporated cities and towns." The sections following comprise complete directions for carrying out the objects of the statute. Section 13 declares that: "It shall be unlawful for any person \* \* \* within the boundaries of any no-license territory to sell \* \* \* any alcoholic liquors except as provided in section 16 hereof." Section 19 declares that the violation of the statute shall be deemed a misdemeanor punishable "by a fine not exceeding six hundred dollars, or by imprisonment in the county jail not exceeding seven months, or by both such fine and imprisonment." Section 22 reads: Nothing in this act shall be construed as putting any limitations, except such as are positively stated herein, upon the police powers now possessed by cities, towns and counties."

The act of January 2, 1912, is entitled "An act to amend section 4058 of the Political Code, relating to direct legislation and including initiative and referendum by electors of counties" (Stats. 1912, p. 125). The amended section 4058 was originally enacted as a new section to the Political Code, April 3, 1911 (Stats. 1911, p. 577), and the act was entitled "An act to provide for direct legislation, including initiative, referendum, and recall by electors in counties, by adding two new sections to the Political Code to be numbered sections 4058 and 4021a, respectively." Section 4021a provides that "the holder of any elective office of any county may be removed or recalled at any time by the electors; provided he has held his office at least six months," and provides the procedure for such removal. Section 4058, as it now reads, provides as follows: "Ordinances may also be enacted by and for any county of the state in the manner following." Then follow provisions by which "qualified electors of the county," in number as pre-

scribed, may by petition submit to the board of supervisors any proposed ordinance. "If the petition accompanying the proposed ordinance be signed by electors not less in number than twenty per cent. of the entire vote cast within such county for all candidates for Governor of the state, at the last general election at which such Governor was voted for, and contains a request that such ordinance be submitted forthwith to a vote of the people at a special election, then the board of supervisors shall either: (a) Pass such ordinance without alteration at the regular session at which it is presented and within ten days after it is presented; or (b) forthwith the supervisors shall proceed to call a special election at which said ordinance, without alteration, shall be submitted to a vote of the electors of the county." Then follow provisions for conducting the election not necessary to be stated. Among other things, it is provided that "the enacting clause of an ordinance passed by the vote of the electors shall be substantially in the following form: 'The people of the county of ..... do ordain as follows.'" It is also provided that, "if a majority of the qualified electors voting on said proposed ordinance shall vote in favor thereof, such ordinance shall thereupon become a valid and binding ordinance of the county and be considered as adopted upon the date that the vote is cast and declared by the board of supervisors and go into effect ten days thereafter."

Some significance is attempted to be given the fact that section 4058, introducing the initiative, was originally passed April 3, 1911, while the local option law was passed April 4, 1911. Section 4058, with which we are now to deal, was passed January 2, 1912, and is the law governing so far as it relates to the proceedings now under review, which were initiated since that date. This we deem sufficient answer to any inference which might be drawn had section 4058 remained unamended.

Respondent says in his brief: "It has never been claimed, nor has any one contended, that it (the ordinance) was passed by the board of supervisors. It is admitted that it was passed by the vote of the people." In his return respondent alleges that the ordinance was "submitted to a vote of the qualified electors of said county who had a right to vote at said election, on the 14th day of May, 1912; that at said election a majority, who had a right and were entitled to vote on said ordinance, voted in favor of the adoption of said ordinance." We are asked to infer from this statement that only those electors residing without the boundaries of any incorporated town or city voted at the election, and that section 4058 "refers to that part of the county over which the board of supervisors has jurisdiction"; that the board has no jurisdiction over incorporated cities and towns, and hence, in submit-

ting the ordinance, the board submitted it only to electors outside such cities and towns.

The ordinance declares that "the people of the county of Stanislaus, state of California, do ordain as follows." The act declares that "ordinances may also be enacted by and for any county of the state in the manner following." The act contemplates the enactment of ordinances by the electors of the county on the principle of the initiative and referendum. The ordinance shows on its face that it was enacted "by and for the county" in conformity with the statute and is the enactment of "the people of the county." It is perfectly clear that the ordinance was passed pursuant to section 4058 and not under the local option law.

It is immaterial, in the view we take of the section, whether the electors of the entire county participated in the election or only those residing outside incorporated cities and towns. It was not an election by the districts to be affected. We have, then, the question: Is the licensing of the liquor traffic governed by the local option law of 1911 or by section 4058 of the Political Code?

[1] The act of 1911 is a general law. *Ex parte Beck* (Sup.) 124 Pac. 543. As will be seen from its terms, quoted above, it provides a state-wide scheme by which "any incorporated city or town, or of that portion of any supervisorial district not included within the boundaries of any incorporated city or town," may petition to the appropriate legislative body to call an election to determine "whether the sale of alcoholic liquors shall be licensed in such city, town or supervisorial district outside of incorporated cities and towns." No provision of the act authorizes any county in its entirety, either exclusive or inclusive of incorporated cities and towns, to petition any legislative body to call an election for such purpose. The obvious intention of the Legislature was to authorize each of the mentioned subdivisions of the county to act independently of every other in determining the question for itself, unaffected by the votes of any other of the subdivisions named.

[2] Hence any ordinance passed by the people of the county or by the board of supervisors in conflict with this general law would be violative of section 11, art. 11, of the Constitution, *supra*, and void. In *re Desanta*, 8 Cal. App. 295, 96 Pac. 1027; *Ex parte Stephen*, 114 Cal. 278, 46 Pac. 86; In *re Sic*, 73 Cal. 142, 14 Pac. 405. That the ordinance in question is in conflict with the act of 1911 admits of no doubt. We have an apt illustration of this fact in the recent general election as well as in numerous previous elections in counties. In several counties, proceeding under the local option law, the electors of incorporated cities and towns and of supervisorial districts voted on the question whether they would license the sale of intoxicating liquors. The result was that,



in the vernacular of the day, some voted "wet" and others voted "dry," so that in the same county there is now "wet" and "dry" territory. Obviously, an ordinance enacted by a county-wide vote must necessarily result in nullifying the decision of one or more districts, whichever way the county as a whole might vote, and would thus thwart the underlying principle of the act of 1911, namely, local option by districts. It is easily conceivable that the electoral vote of the entire county might be invoked at any time to accomplish this very object. It might happen that, in a county-wide vote, the electors of a town or city would be able to determine the question for every other district in the county, or the combined vote outside the town or city might settle the question for the town or city. Was it the intention of the Legislature to authorize this to be done by the enactment of section 4058? We cannot believe that the Legislature so intended, or that such an intention necessarily results from anything to be found in that section. This section, as it now reads, differs but little and in no respect affecting the present question, from the section as originally passed. It was first enacted April 3, 1911, and the local option law was passed the next day, April 4, 1911. The local option law relates to a specific single subject and is a carefully worked-out plan by which the people of the supervisorial subdivisions of the county and the incorporated cities and towns may license the liquor traffic. The powers given by section 4058, we think, were given, and intended to be given, the people of the entire county, to legislate by the initiative upon other subjects of general concern to the whole county. To give the section the construction contended for would permit a county by its votes to repeal an ordinance passed by a district of the county under the local option law; or it might by its vote make it impossible for a district to enact an ordinance on that subject different from that enacted by the county.

The local option law requires "the petition of twenty-five per cent. of the number of votes cast for all candidates for Governor of the state," i. e., 25 per cent. of the votes cast in the supervisorial district or in the boundaries of the incorporated city or town. Section 4058 requires the petition to be "signed by electors not less in number than twenty per cent. of the entire vote cast within the county \* \* \* at the last preceding general election at which a Governor is voted for." For the reasons suggested, and others might be added, if section 4058 is given the construction contended for by respondent, the two acts are in irreconcilable conflict and one or the other must give way.

[3] "Interpretation must be reasonable." Civ. Code, § 3542. "An interpretation which gives effect is preferred to one which makes void." Civ. Code, § 3541. A statute should

be so construed as to give a sensible and intelligent meaning to every part, to avoid absurd and unjust consequences, and, if possible, so as to make it valid and effective. 2 Sutherland, Stat. Const. § 516. The legislation inaugurating the initiative and referendum and recall can find ample scope for its operation by giving it a reasonable interpretation and confining its operation to matters not elsewhere specifically provided for, and limiting its application to subjects of general concern to the people of the entire county over which they may properly legislate. For example, they may vote on the question of the removal of the county seat. Pol. Code, § 3976. The county may vote bonds to provide funds for the construction of roads, bridges and highways. Id. § 4088. There are numerous powers given the board of supervisors, as the legislative body of the county, enumerated in section 4041 of the Political Code, some of which would probably be held to be within the province of the people to initiate under section 4058.

However, the view we have taken gives effect to both laws without doing violence to either, and this we think it our duty to do. Any other view would lead to great confusion in the administration of the law and would inevitably bring about a repeal of ordinances in force in some of the counties and prevent their successful enactment in others. In short, it would render the local option law of little or no value. We can find no warrant for bringing about such regrettable results.

Our attention is called to the recent decision in the case of *Giddings v. Board of Trustees of San Buenaventura*, 133 Pac. 479, and also to section 22 of the local option law, *supra*, which provides that "nothing in this act shall be construed as putting any limitations, except such as are positively stated herein, upon the police powers now possessed by cities, towns and counties." The limitations "positively stated" in the act can be none other than the powers given to the "qualified electors of any incorporated city or town, or the electors of that portion of any supervisorial district not included within the boundaries of any incorporated city or town," to petition the appropriate legislative body "to call an election to vote upon the question, whether the sale of alcoholic liquors shall be licensed in such city, town or supervisorial district outside of incorporated cities or towns." The section simply means that the police powers of cities, towns, and counties are not limited by the act except that the question "whether the sale of alcoholic liquors shall be licensed" is a matter which the act has specifically conferred upon the incorporated cities or towns and the supervisorial districts outside such cities and towns to be acted upon by each in its separate capacity. In other words, the county as such cannot, under its general police

power, deprive the electors of incorporated cities or towns or the electors of a supervisorial district outside such cities and towns, from deciding for themselves the question confided to them by the act. Had the Legislature intended to extend the operation of the local option law to counties to pass ordinances on the specific subject dealt with in the act, the Legislature would have so said in section 1, where the power is given to the enumerated subdivisions of the county. In mentioning the subdivisions of the county to which was given the power, the county as a whole was excluded. *Expressio unius, exclusio alterius*. We cannot impute to the Legislature the intention by section 22 to reserve to the county, by a vote of all the electors therein, the power to prevent or undo legislation which the act empowers incorporated cities and towns and supervisorial districts only to enact.

The Giddings Case, above cited, does not, as respondent claims, "settle the question in the present matter." In August, 1911, the electors of San Buenaventura, under the local option law, voted in favor of licensing the sale of alcoholic liquors, and the board of trustees passed an ordinance accordingly. On April 1, 1912, a petition by electors of the city was presented to the board, requesting it either to enact the accompanying ordinance, prohibiting the traffic in alcoholic liquors in said city, or submit the question to a vote of the electors of the city. The petition was presented under the provisions of the act of January 2, 1912 (Stats. 1912, p. 131), which gives to incorporated cities and towns the initiative and referendum as does the act of the same date to counties. The board refused to comply with the petition "upon the theory that under the local option act the people at a popular election once determined the question and under the provisions of such act a second election should not be called until after the lapse of two years." But the court held that this local option law "only purports to wrest from such board of trustees the power to grant licenses after the electors shall have determined not to make such city 'no-license territory.'" Said the court: "It does not interfere with their power, in the event no election has been held under the act, nor where one has been held and the electors have determined not to make such city 'no-license territory.'" The writ of mandate was issued for the reason that the ordinance enacted in April, 1911, was not such expression as was prohibited by the act from being resubmitted. Had the vote been in favor of "no-license territory," the opinion shows, by implication, that the local option act would have prevented its resubmission until after the lapse of two years. The court said that the question of the repeal by implication of the local option law by virtue

of the initiative act was not involved. Indeed, that act was not involved except that under it the board of trustees were asked to do what it had the undoubted right to do under its general police powers with which its action in April, 1911, in no wise interfered. The initiative act gave the electors the right to compel action on the question submitted, but the right or power to act on the particular subject did not come from the initiative act; that power was already lodged in the board.

[4] Respondent concedes that habeas corpus will lie to test the constitutionality of an ordinance, but he contends that "the rule should be that the constitutionality of a law or ordinance should only be considered after a conviction or after the judgment in the lower court." Why should the liberty of a citizen be taken from him and he be put to the expense and ignominy of a criminal prosecution upon a complaint having no warrant of law to support it? A void law is no law, and a prosecution under it is a prosecution without the authority of law. But the rule is otherwise. Pen. Code, § 1487; *Ex parte Keeney*, 84 Cal. 304, 24 Pac. 34; *In re Smith*, 143 Cal. 368, 77 Pac. 180.

The prisoner must be discharged, and it is so ordered.

We concur: BURNETT, J.; HART, J.

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### 3. NEW TRIAL (§ 150\*)—APPLICATION—NEWLY DISCOVERED EVIDENCE.

An application for a new trial for newly discovered evidence is ineffective where it is not sustained by showing that the proposed evidence was not known to the applicant at the time of the trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 306-310; Dec. Dig. § 150.\*]

Department 1. Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by Charles Olaine against Charles McGraw and another. From an order denying plaintiff's motion for new trial, he appeals. Affirmed.

B. K. Collier and Jas. D. Fairchild, both of Yreka, for appellant. Taylor & Tebbe, of Yreka, for respondents.

ANGELLOTTI, J. This is an action for damages and for an injunction. Plaintiff alleged that ever since June 15, 1909, he has been entitled to the exclusive possession of certain described territory known as the Eastern Star Quartz Mining Claim, the same constituting a quartz mining location chiefly valuable for the gold-bearing rock and earth contained therein; that defendants on or about October 3, 1910, wrongfully entered thereon, took and appropriated to their own use large quantities of such rock and earth, and are continuing so to do, to his damage in the sum of \$100; that defendants threaten to continue to so do; and that the consequent injury to plaintiff will be irreparable. Defendants by their answer denied the allegations of the complaint, and further alleged that defendant Charles McGraw, Jr., is, and ever since October 3, 1910, has been, the owner in the possession of, and entitled to, the exclusive possession of that certain quartz mining claim known as Leroy Fraction, which includes a portion of the land claimed by plaintiff to be within the limits of his alleged Eastern Star location. The case was tried by the court without a jury, and the findings were in favor of defendants. Judgment was given that plaintiff take nothing by his action. This is an appeal only from an order denying plaintiff's motion for a new trial. We are therefore here concerned with such points only as are available on motion for a new trial.

[1] Plaintiff's attempted location of a quartz mining claim was made June 15, 1909. The land described in the notice was a piece of land triangular in shape, running northwest and southeast, 600 feet wide on the northwest and running to a point at the southeast end. The plaintiff claimed that, prior to making his location, he made a sufficient discovery of gold-bearing quartz in place in the northwesterly portion of this triangular piece. The trial court found that plaintiff's claim overlapped a portion of a certain placer mine which had been, since the year 1888, owned and continuously worked

(164 Cal. 424)

OLAINE v. MCGRAW et al. (Sac. 1,969.)  
(Supreme Court of California. Jan. 2, 1913.)

### 1. MINES AND MINERALS (§ 38\*)—TRESPASS—FINDINGS—EVIDENCE.

In an action to recover damages for and an injunction to restrain a trespass on plaintiff's quartz mining claim, evidence held to sustain findings that plaintiff's claim overlapped a portion of a conflicting placer claim, that the ore taken by defendant was taken from the overlap, and that plaintiff made no discovery at the time of the location of his alleged claim.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.\*]

### 2. HIGHWAYS (§ 80\*)—LOCATION ON MINING CLAIM—EFFECT.

Location of a highway by a board of supervisors over a located mining claim does not affect the claim further than to establish an easement over the same to the extent necessary for public use as a highway.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 288, 290; Dec. Dig. § 80.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

by Charles McGraw and his predecessor in interest, and that the contact between the said claims comprised a piece of land on the west border of said placer mine about 1,500 feet in length and about 66 feet in width. It is stated generally in appellant's brief that this finding is not supported by the evidence, but it is not pointed out wherein it lacks such support. An examination of the record discloses that there was ample evidence to sustain a conclusion that plaintiff's alleged claim overlapped, to the extent stated, a portion of the Ashantee Placer Mining Claim, located by James McGraw on May 16, 1888, and transferred by said James McGraw to Charles McGraw on February 6, 1903, and that said claim had been continuously worked by Charles McGraw and his predecessors ever since the year 1888.

It was found that, at the time said quartz claim was located by plaintiff, there was no discovery made by plaintiff of gold-bearing rock or mineral in place. This finding is earnestly attacked as being without sufficient support in the evidence. We have carefully read so much of the record as bears upon this point, and, while it may be that a contrary finding would have been amply supported, we are satisfied that it cannot be held that there is not sufficient support in the evidence for the conclusion reached by the trial court. It must be borne in mind that the alleged discovery was purely a surface discovery; plaintiff not opening up the ground at all, but basing his conclusions almost entirely upon the appearance of the surface. The testimony of witnesses for defendants, who subsequently examined the claim, was squarely opposed to that of plaintiff and his witnesses as to "croppings, iron, quartz, or anything that would indicate mineral." The situation was such that we cannot say that the court was not warranted in failing to give any particular weight to plaintiff's testimony that he "found gold in rock" that he took from the surface at his alleged point of discovery. As to this finding, we have at best simply the usual situation of conflicting evidence, upon which a finding either way would be held by an appellate court to be sufficiently sustained by evidence.

The fourth and fifth findings, which are also attacked as being without support in the evidence, are, so far as material, substantially as follows: Plaintiff never performed any work upon his claim except as hereinafter stated. During 1909 and 1910 he authorized one Butler to work thereon, on his (Butler's) own account, with the understanding that he (plaintiff) could claim Butler's work as his assessment work on said Eastern Star claim. Butler associated Charles McGraw, Jr., with him in the work, and they made a great number of small excavations upon the land described in plaintiff's complaint, most of which were made upon the McGraw placer claim. All the work done upon such placer

claim by Butler and McGraw, Jr., was done under an agreement with McGraw, Sr., by which the latter was to receive 20 per cent. royalty upon all gold or precious minerals extracted therefrom. They discovered "upon said placer mine stringers of quartz, and extracted therefrom the sum of \$2,600, 20 per cent. of which was paid to defendant Charles McGraw." This work and labor was performed at a point about 600 feet from said "alleged discovery." As to these findings, the evidence was clearly sufficient to support the conclusion that the work and labor of Butler and McGraw, Jr., was done more than 300 feet from plaintiff's "alleged discovery." The testimony was such that we cannot hold that it does not sufficiently support the conclusion that most of their work was on the land covered by McGraw's placer claim, and that the discovery made by them was made on such land. In no other material respect does plaintiff claim these findings to be unsupported by the evidence.

The sixth finding is to the effect that on or about October 10, 1910, with the consent of McGraw, Sr., McGraw, Jr., located a quartz mine, known as the Leroy Fraction, based on the discovery referred to in the fourth and fifth findings, and that such Leroy Fraction was properly marked on the ground, etc. We are unable to see wherein this finding is without sufficient support in the evidence given by Charles McGraw, Jr., and in the recorded copy of the notice of location. There was no error in permitting defendants to show the facts as to the ownership and occupancy by McGraw of the Ashantee placer mine, although they had not specifically set up the same as a defense in their answer. They had denied plaintiff's allegation of ownership, as well as all the other allegations of his complaint, and evidence of McGraw's ownership and occupancy of the land embraced in the Ashantee placer claim was clearly relevant and material evidence in support of such denials.

[2] We are unable to perceive the materiality of certain proposed evidence to the effect that on January 5, 1909, the board of supervisors of Siskiyou county declared 12 feet of the bed of Ash creek, included in McGraw's placer mining claim, to be a public highway. Such action by the board of supervisors could not affect the claim further than to establish an easement over the same, to the extent stated, for public use as a highway. The trial court did not err in excluding the proffered evidence.

[3] Various affidavits were presented on the motion for a new trial in support of the claim that the motion should be granted on the ground of newly discovered evidence. There is absolutely no pretense of a showing that any of the proposed evidence set forth in the affidavits was not known to plaintiff at the time of the trial except the proposed evidence of Mr. H. N. Bean as to a conversation with one of defendants' witnesses after



the trial, or, if not then known, could not with reasonable diligence have been discovered and produced at the trial. It is, of course, well settled that such a showing is essential to warrant the granting of a new trial on the ground of newly discovered evidence. The provision of the Code of Civil Procedure on the subject is that a new trial may be granted on account of "newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial." Code Civ. Proc. § 657, subd. 4. It cannot reasonably be claimed that the proposed evidence of Mr. Bean was of such a nature as to require the trial court to grant a new trial on this ground.

The order denying a new trial is affirmed.

We concur: SHAW, J.; SLOSS, J

164 Cal. 419

GOLDMAN v. MURRAY et al. (S. F. 5,891.)

(Supreme Court of California. Dec. 30, 1912.  
Rehearing Denied Jan. 29, 1913.)

1. ASSIGNMENTS (§ 79\*)—ACTS CONSTITUTING.

Where a bona fide creditor of a corporation took from it promissory notes evidencing its debt to him, and he believed that the notes were valid, while in fact they were invalid as corporate obligations, and he transferred them by indorsement in due course to a third person, who received them in payment of a debt due him, the assignments as between the creditor and the third person carried with them the original indebtedness of the corporation.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 146; Dec. Dig. § 79.\*]

2. ASSIGNMENTS (§ 48\*)—ACTS CONSTITUTING.

No precise form of words or writing is necessary to the establishment of an equitable assignment of an indebtedness due the assignor.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 133; Dec. Dig. § 48.\*]

3. ASSIGNMENTS (§ 58\*)—ACTS CONSTITUTING—ACCEPTANCE.

Where a bona fide creditor of a corporation took from it notes evidencing its debt to him, and he, believing that the notes were valid, while in fact they were invalid as corporate obligations, indorsed them in due course to a third person in payment of a debt due him, an acknowledgment and acceptance by the corporation of the assignment of its indebtedness were not essential to the validity of the assignment created by the indorsement.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 121-123; Dec. Dig. § 58.\*]

4. ASSIGNMENTS (§ 49\*) — ASSIGNMENTS OF PART OF FUND OR DEBT—OPERATION.

A nonnegotiable order for part of a fund or debt operates as an equitable assignment pro tanto as between the drawer and payee.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 85-98; Dec. Dig. § 49.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2434-2437; vol. 8, p. 7652.]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Joseph H. Goldman against

James A. Murray and others. From a judgment for plaintiff, defendant named appeals. Affirmed.

Garber, Creswell & Garber and Hillyer, Stringham & O'Brien, all of San Francisco, for appellant. C. H. Wilson, of San Francisco, for respondent.

HIENSHAW, J. This is an action to enforce a stockholder's liability for his proportion of certain debts of the corporation. The complaint charged in separate causes of action upon different items of indebtedness. One will serve as a type of all. After the allegations of the corporate existence and capacity of the corporation, the number of outstanding shares, and the number of those shares owned by defendant Murray, it is alleged that the corporation became indebted to Alfred D. Bowen "for cash loaned and advanced for its use and benefit in the sum of \$20,000"; that the corporation then made its promissory note as evidence of the indebtedness, and promised to repay Alfred D. Bowen the sum of \$20,000 on demand; "that Alfred D. Bowen thereafter, and before the maturity of said note, for value received, indorsed the same to this plaintiff, and duly assigned to this plaintiff the aforesaid indebtedness of said corporation." The other causes of action charge in similar language upon like indebtednesses, also evidenced by promissory notes. Upon the trial, the existence and validity of the indebtedness from the corporation to Bowen stood unchallenged. Defendant Murray, however, attacked the validity of the promissory notes. The trial court found in favor of the plaintiff on all the issues, saving that it found that the promissory notes were not duly or at all authorized by the corporation or the board of directors thereof. But still further the court found that the corporation was indebted to Bowen for moneys loaned to it in the amount sued for, and that Bowen duly assigned to the plaintiff this indebtedness. It found defendant Murray liable as a stockholder, and gave judgment accordingly.

Appellant's attack is directed against the finding of the assignment by Bowen of the debt due the latter from the corporation. If this finding is supported, there is an end to the controversy. Preliminary to the consideration of the question, it should be noted that the invalidity of the corporation's notes arose from the fact that Bowen, creditor of the corporation and payee of the notes, was also a director; that as a director he voted for the issuance of the notes; and that without his vote the issuance would not have been ordered. A second fact is that the amounts mentioned in the notes were not, at the times when they were drawn, the full amounts of the indebtednesses due from the corporation to Bowen, or, phrasing it differently, they were in the nature of orders for

a part of the indebtedness or fund due to the creditor at the time they were drawn.

[1] The evidence, and all of the evidence, touching the equitable assignment by Bowen to plaintiff is that the notes were intended to cover the advancements made by Bowen to the corporation; that Bowen was indebted to plaintiff in the amounts evidenced by the promissory notes; and that he indorsed them to plaintiff and delivered them to plaintiff "for payment of advances." Appellant's contention is that "a bill of exchange or draft payable generally, and not out of any particular fund or debt, will not, before acceptance, operate as an assignment to the holder of the bill or draft of a debt due from the drawee to the drawer." *Lewis v. Traders' Bank*, 30 Minn. 134, 14 N. W. 587; 4 Cyc. pp. 47, 49. "That an order drawn on a fund for a part only does not amount to an assignment." *Moore v. Gravelot*, 3 Ill. App. 442. That "a bill itself, before acceptance, has no tendency to prove the assignment, but the contrary." *Cashman v. Harrison*, 90 Cal. 297, 27 Pac. 283. In argument it is said that a general indorsement, such as these promissory notes bore, affords no evidence of an assignment of any fund or indebtedness, and that the oral testimony failed utterly to show any such assignment. Finally appellant argues, placing much reliance on *Cashman v. Harrison*, supra, that a deliberate and established effort to assign would have been inefficacious without the acceptance of the debtor, which acceptance, in this case, admittedly was not established. But while *Cashman v. Harrison* does support this view, its declarations are at variance with the earlier decisions of this court. *Wheatley v. Strobe*, 12 Cal. 92, 73 Am. Dec. 522; *Pierce v. Robinson*, 13 Cal. 116; *Pope v. Huth*, 14 Cal. 403. In *Lawrence Nat. Bank v. Kowalsky*, 105 Cal. 43, 38 Pac. 518, there was under consideration an inland bill of exchange or draft which had not been accepted. This court said: "An equitable assignment of a specific remand or particular indebtedness may be effected by means of an instrument having the form of an order or bill of exchange drawn by the creditor upon the debtor for its full amount, when such is the intention of the drawer and payee, and it is not essential that the intention to make such assignment should appear on the face of the order or bill of exchange (*Bank of Commerce v. Bogy*, 44 Mo. 13, 100 Am. Dec. 247; 1 *Daniel on Negotiable Instruments* [4th Ed.] § 20; *Wheatley v. Strobe*, 12 Cal. 92, 73 Am. Dec. 522), and it was not the intention of this court to overrule the latter case by anything said in the course of the opinion in *Cashman v. Harrison*, 90 Cal. 297 [27 Pac. 283]." Touching the evidence establishing such an equitable assignment, it is said in *McIntyre v. Hauser*, 131 Cal. 11, 63 Pac. 69: "In order to constitute an equitable assignment of a debt, no express words to that effect are necessary.

If from the entire transaction it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment will be held to have taken place." We have before us, then, a case where the bona fide creditor of a corporation takes from it promissory notes evidencing its debt to him, in the belief of the validity of the notes, and passes them on in due course of business to his creditor; the notes being given to, and received by the indorsee in payment of the indorser's indebtedness to the indorsee. The assignments of the notes, so far as Bowen and the plaintiff were concerned, carried with them the original indebtednesses. *Redington v. Cornwell*, 90 Cal. 63, 27 Pac. 40; *Knowles v. Sandercock*, 107 Cal. 640, 40 Pac. 1047; 7 Cyc. 816. The intent of the parties—of Bowen on the one hand to assign and of the plaintiff, on the other to accept the assignment of the corporation indebtedness—thus clearly evidenced by the transaction between them, is not affected by the fortuitous circumstance that the notes themselves were invalid as corporation obligations. They still had validity, not as negotiable instruments, but as evidencing the contract between Bowen and the plaintiff, and this contract amounted to a valid equitable assignment.

[2-4] First, since no precise form of words or writing is necessary to the establishment of an equitable assignment, it mattered not whether the notes were or were not the valid obligations of the corporation. They still afforded evidence of what, as between themselves, the plaintiff and the witness Bowen proposed to do and did with the indebtednesses owed to the latter by the corporation. Second, as we have seen, the acknowledgment and acceptance by the corporation of the assignment of the debt of Bowen to plaintiff was not essential to the validity of the assignment. And, third, while authority is divided upon the question of the equitable assignability of a portion of a debt or fund before acceptance, the sounder view we take it is that expressed in 1 *Daniel on Negotiable Instruments*, § 23, and upon this point we cannot do better than to quote the learned author at length: "This doctrine is clearly correct in so far as it applies to legal assignments. The holder of the bill or order cannot sue the drawee-at-law in his own name, as he would thus divide the cause of action and leave a balance due the creditor. He cannot sue in the creditor's name, except by his consent, as, at best, he is only entitled to a part of the debt due him. But it has been held in numerous cases, and we think should now be regarded as law, that a nonnegotiable order for part of a fund operates as an equitable assignment pro tanto. Clearly this is the case when it has been accepted or assented to by the drawee. And when it has not been accepted, our own view is this: That a nonnegotiable order for part of a fund does



operate as an equitable assignment pro tanto as between the drawer and payee, because obviously so intended. But as between drawer and payee on the one side, and the drawee on the other, it creates no obligation on the latter to pay it, as he has a right to insist on an integral discharge of his debt. And, if the creditor give a subsequent order for the whole amount, he may pay it with impunity, as he thus discharges his debt in its entirety at once. But if the payee or indorsee goes into equity, or the parties are brought therein by any proceeding, so that all of them are before the court, the holder of the order may enforce it as an equitable assignment as against all subsequent claimants, whether by assignment from the drawer or by legal process served upon the drawee. Mr. Justice Story has stated the principle, as we conceive it, more correctly in his treatise on Equity Jurisprudence than in the cases hitherto cited, and he there declares that, while a draft for part of a fund operates no assignment at law, the same principle applies in equity to a draft for part of a fund that applies to a draft for the whole, and that 'in each case a trust would be created in favor of the equitable assignee of the fund, and would constitute an equitable lien upon it.' We can perceive no sufficient reason for excluding a bill for a part of a fund, whether it be negotiable or not, from operating as an equitable assignment within the limitations of the text. It would only carry out to its legitimate sequence the theory of the bill."

For these reasons, the judgment and order appealed from are affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(164 Cal. 429)

**GJURICH v. FIEG.** (Sac. 1965.)

(Supreme Court of California. Jan. 3, 1913.  
Rehearing Denied Jan. 31, 1913.)

**1. APPEAL AND ERROR (§ 1001\*)—REVIEW—VERDICT.**

A verdict attacked for insufficiency of evidence cannot be interfered with on appeal, where there is substantial evidence in its support.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

**2. WORK AND LABOR (§ 7\*)—IMPLIED CONTRACT.**

While ordinarily the law implies a promise to pay from the rendition and acceptance of services, the presumption may be rebutted by the existence of meretricious relations between the parties, which raises a presumption to the contrary.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 11½-22; Dec. Dig. § 7.\*]

**3. WORK AND LABOR (§ 28\*)—ACTIONS—EVIDENCE—SUFFICIENCY.**

In an action for work and services, evidence held sufficient to support a finding for defendant on the ground that no agreement to pay had ever been made.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 55; Dec. Dig. § 28.\*]

**4. WITNESSES (§ 275\*)—EXAMINATION—CROSS-EXAMINATION.**

In an action for compensation for services rendered, where plaintiff on direct examination testified that he had worked for defendant under circumstances from which an obligation on her part to pay for such services could be implied, cross-examination as to his sexual relations with her was proper, tending to rebut this implication.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 924, 926, 967-975; Dec. Dig. § 275.\*]

**5. WORK AND LABOR (§ 27\*)—ACTIONS—EVIDENCE.**

In an action for work and labor, evidence of the sexual relations between defendant and plaintiff, while meretricious, is admissible to rebut the presumption that compensation was intended, arising from the rendition of services.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 50-54; Dec. Dig. § 27.\*]

**6. APPEAL AND ERROR (§ 882\*)—ESTOPPEL TO ALLEGE ERROR.**

An unsuccessful party cannot complain on appeal of the improper admission of evidence offered by himself.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

**7. APPEAL AND ERROR (§ 1046\*)—REVIEW—HARMLESS ERROR.**

Statements by the court as to findings in a former action between the parties are harmless, where the findings subsequently admitted showed the statements to be correct in fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4128-4134; Dec. Dig. § 1046.\*]

**8. TRIAL (§ 121\*)—ARGUMENT OF COUNSEL—SCOPE OF ARGUMENT.**

Where the findings in a former action between the parties are admitted in evidence, counsel may refer to the matters covered by them.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 294-298, 300; Dec. Dig. § 121.\*]

**9. WORK AND LABOR (§ 30\*)—ACTIONS—INSTRUCTIONS.**

In an action for work and labor, where defendant contended that the relations of the parties was such that no inference that the services had been performed for pay could be drawn, instructions might properly state other relations from which an inference that the services were to be performed gratuitously could be drawn.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 59-65; Dec. Dig. § 30.\*]

**10. WORK AND LABOR (§ 30\*)—ACTIONS—INSTRUCTIONS.**

In an action for services, where defendant denied indebtedness and employment, instructions referring to the sexual relations of the parties were proper; such relations being material to that issue.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 59-65; Dec. Dig. § 30.\*]

**11. WORK AND LABOR (§ 30\*)—TRIAL—INSTRUCTIONS.**

In an action for work and labor, where defendant contended that her sexual relations with plaintiff should be considered only in determining whether a claim for wages existed, instructions that sexual favors would not constitute a payment for services were properly refused.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 59-65; Dec. Dig. § 30.\*]

**12. APPEAL AND ERROR (§ 1068\*)—REVIEW—HARMLESS ERROR.**

In an action for services, improper instructions on the statute of limitations are harmless,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

where the jury found there was no liability whatever on the part of defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225–4228, 4230; Dec. Dig. § 1068.\*]

Department 1. Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Action by Emanuel Gjurich against Fanny Fieg. From a judgment for defendant, plaintiff appeals. Affirmed.

A. H. Carpenter, of Stockton, for appellant. Webster, Webster & Blewett, of Stockton, for respondent.

SLOSS, J. The action was brought to recover a balance of \$5,000 claimed to be due to plaintiff from defendant "upon an open book account and an open, mutual, and current account" for work and services rendered by plaintiff at defendant's request, "for which said services the defendant promised and agreed to pay plaintiff the said balance of said account and the amount so alleged to be due thereon." The answer denied the indebtedness. A trial before a jury resulted in a verdict in favor of the defendant. The plaintiff appeals from the judgment, bringing up the evidence under the method provided in section 953a of the Code of Civil Procedure.

[1-3] 1. There is no merit in the contention that the verdict is not sustained by the evidence. There was testimony tending to show that in 1897 the defendant, pursuant to plaintiff's advice, purchased a small tract of land a few miles from Stockton, and established a roadhouse and saloon there. Thereupon she and the plaintiff took up their residence upon the premises and lived there for some 10 years. During this time the plaintiff was engaged in working on the place, devoting his time to the care of the grounds, planting of trees and vines, construction of arbors, building additions to the house, and other things. The defendant tended bar and took care of the saloon. From the outset of their residence on the premises, and for a number of years thereafter, the parties occupied the same bedroom, living together as husband and wife. An offer of marriage had been made by plaintiff to defendant and accepted by her. No marriage was ever solemnized, however. These relations commenced and continued without any specific agreement for the payment of wages by defendant to plaintiff. Gjurich was given money, from time to time, for the purpose of purchasing articles and supplies required on the place, and out of this money he retained what he desired for his own use.

The foregoing statement is based, in large part, upon the testimony of the defendant. In many particulars, the evidence offered by plaintiff was in conflict with that of the defendant. But where the verdict is attacked for insufficiency of evidence, our power

begins and ends with the inquiry whether there is substantial evidence, contradicted or uncontradicted, which, in and of itself, would support the conclusion reached by the jury. If, on any material point, the testimony is in conflict, it must be assumed that the jury resolved the conflict in favor of the prevailing party. For this reason we attach no importance to an alleged written agreement by the defendant to pay plaintiff \$3 per day. The defendant denied the execution of the writing, and her denial was enough to authorize the jury to find, as it impliedly did, that the agreement relied upon had never been made. The same observation may be applied to the claim of an antecedent oral agreement to pay wages.

The facts, as hereinabove stated, clearly justified the verdict. Ordinarily, no doubt, the law will imply a promise to pay for services rendered and accepted. But this rule is founded "upon a mere presumption of law, and is liable to be rebutted by proof of a special agreement to pay therefor a particular amount or in a particular manner, or by proof that the services were intended to be gratuitous, or even by particular circumstances from which the law would raise the counter presumption that the services were not intended to be a charge against the party who was benefited thereby." *Moulin v. Columbet*, 22 Cal. 508. Thus, where there is a blood relationship between the parties, it may well be inferred, in the absence of a direct understanding to the contrary, that pecuniary compensation was not expected by the one performing the services. *Page v. Page*, 73 N. H. 305, 61 Atl. 356, 6 Ann. Cas. 510; *Murdock v. Murdock*, 7 Cal. 513; *Friermuth v. Friermuth*, 46 Cal. 42; *Crane v. Derrick*, 157 Cal. 667, 109 Pac. 31. "The question is one that must be determined on the circumstances of the particular case; the question in each case being whether it can reasonably be inferred that pecuniary compensation was in the view of the parties at the time the services were rendered." *Crane v. Derrick*, *supra*. These principles were embodied in the instructions to the jury. The general verdict in favor of the defendant carried with it implied findings that there had been no express agreement, oral or written, for compensation, and that, in view of the circumstances under which the parties had gone to the land and lived and labored together there, the plaintiff had rendered services without any expectation of pecuniary payment therefor. These were legitimate conclusions from the evidence. The testimony of the defendant was direct to the point that there had been no express agreement for compensation. And, if that were so, the fact that the parties had gone to the premises to live together, and had lived together as husband and wife, afforded a sufficient basis for the inference that compensa-



tion in money for any services rendered was not contemplated. The relation existing, although meretricious, may be considered as illustrating the purpose and expectation with which work was done by each.

[4] 2. The court did not err in permitting the defendant, on cross-examination of the plaintiff, to inquire concerning his cohabitation with the defendant. The plaintiff, on direct examination, had testified that he had worked for defendant under circumstances from which an obligation to pay for his services would be implied. The relations between the parties had a tendency to rebut this implication, and formed, therefore, a proper subject for cross-examination. The questions, then, did not relate to collateral matters, and the defendant was not, as is claimed, bound by plaintiff's answers, and thus precluded from asking further questions for the purpose of impeachment.

[5] The same reasoning on which the cross-examination of plaintiff is held to be proper justifies the rulings of the court permitting the defendant to testify concerning her relations with plaintiff.

[6] 3. In 1907 the defendant conveyed the premises to plaintiff. Thereafter she brought an action to set aside the conveyance, alleging that she had been induced to execute it by means of fraud practiced by the plaintiff. The value of the property was estimated to be \$2,000. The plaintiff, in order to account for his failure to credit the defendant with this transfer as a payment of \$2,000 on his claim, offered in evidence the judgment rendered in the action brought by defendant against him, and setting aside the said conveyance. The judgment was not then final, although it has since been affirmed in this court. *Fieg v. Gjurich*, 127 Pac. 49. It is now argued that the judgment was not admissible because the cause in which it was rendered was still pending on appeal. But of course the appellant, having offered the evidence himself, cannot complain of its admission.

It is also claimed that the court erred in admitting the findings upon which the judgment in *Fieg v. Gjurich* was based. But this evidence, too, was offered by the plaintiff. He first offered the judgment alone. The defendant insisted that the entire judgment roll should go in. The court expressed the view that all should be offered. Thereupon the plaintiff, acting, as his counsel said, "under the advice of the court," offered the findings and the decree. If the findings were not admissible, the plaintiff waived his right to object by offering them himself. He might have preserved his point by insisting upon his offer of the judgment alone and taking an exception to a ruling excluding it. But, instead of so doing, he offered the findings himself.

[7] In the course of a prior colloquy, in which counsel were seeking to agree on a

stipulation concerning the former judgment, the court stated its recollection to be that the findings had been that the deed was obtained by fraud. Inasmuch as the findings themselves, showing the court's recollection to be accurate, were subsequently admitted, the plaintiff could have suffered no prejudice from this remark.

[8] It was not misconduct for defendant's counsel, in arguing to the jury, to refer to the matters covered by the findings which were before the jury.

[9] 4. We see no error in the instructions. As we have already intimated, they covered with fullness and accuracy the propositions of law governing the principal issue in the case. It was not improper for the court to refer to the case of a son working for a father, or a woman for a supposed husband. These were mere illustrations of some of the circumstances which would justify an inference that services had been rendered gratuitously, and were appropriate as aids to the jury in determining whether compensation was expected in the case at bar, which was in some degree parallel to those suggested.

[10] It is argued that instructions referring to the alleged cohabitation of the parties were erroneous because they dealt with matters that had not been pleaded. But the mere denial of indebtedness and employment raised an issue on which, in the absence of an express agreement, the relations of the parties became material.

[11] The court refused to charge, as requested by plaintiff, that sexual intercourse would not constitute payment of plaintiff's claim for wages. This instruction had no application to any issue in the case. The defendant did not rely upon the cohabitation as payment. Her contention was merely that her relations with plaintiff were to be considered in determining whether a claim for wages had ever existed. The offered instruction could only have served to confuse the jury.

[12] Certain instructions relative to the statute of limitations are criticised by plaintiff. Their effect was to limit any recovery to the amount earned in the statutory period next preceding the commencement of the action. We think the instructions were correct, but the verdict found makes it unnecessary to discuss the particular objections urged. The jury found, in effect, that there never had been any liability on defendant's part to pay wages to plaintiff. It is therefore immaterial whether the court was right or wrong in directing them that, if they found a liability, they could award wages for only a given time. There are no other points of sufficient consequence to require notice.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

20 Cal. App. 457

**RUSSELL v. RUSSELL. (Civ. 1,009.)**

(District Court of Appeal, Third District, California. Nov. 27, 1912. Rehearing Denied by Supreme Court Jan. 24, 1913.)

**1. DIVORCE (§ 303\*)—CUSTODY OF CHILDREN—MODIFICATION OF DECREE—ABUSE OF DISCRETION.**

Where the wife obtained a divorce for extreme cruelty, and the parties agreed that each should have the custody of their son for six months in each year, which interfered with his school attendance, there was no abuse of discretion in a modification of the decree so as to award the custody of the child, then 10 years old, to the father, the child to visit and be visited by his mother at reasonable times, to be set by the court, and to be with her during all vacations.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 793-795; Dec. Dig. § 303.\*]

**2. DIVORCE (§ 303\*)—CUSTODY OF CHILD—MODIFICATION OF DECREE—CONTRACTS BETWEEN PARTIES.**

Where a divorce decree is entered, and the custody of a child is given to each parent for six months out of the year, in accordance with an agreement between such parents, such decree does not render such agreement final and binding, but the decree is still subject to modification, since the power of the court to look after the interest of the child cannot be abridged.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 793-795; Dec. Dig. § 303.\*]

**3. PARENT AND CHILD (§ 2\*)—CUSTODY OF CHILD—"TENDER YEARS."**

It does not follow from Civ. Code, § 246, subd. 2, providing as between parents that, if a child is of tender years, the mother should have its custody, and, if of the age to require education and preparation for labor, the father should have it, and Code Civ. Proc. § 1750, providing that a child could not choose its guardian until it was 14 years of age, that a child is of "tender years" within Civ. Code, § 246, until it is 14 years of age, but sex and physical development are to be considered, and it cannot be said that as a matter of law a child 10 years old is a child of tender years.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 4-32; Dec. Dig. § 2.\*]

For other definitions, see Words and Phrases, vol. 8, p. 6911.]

**4. DIVORCE (§ 289\*) — CUSTODY OF MINOR CHILD—POWER OF COURT—STATUTORY PROVISIONS.**

Provisions of the Civil Code relating to guardians and wards do not control the power given the court under Civ. Code, § 138, in actions for divorce, to make such order for the custody, etc., of minor children as may seem proper.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 773; Dec. Dig. § 289.\*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Divorce action by Zelia B. Russell against Philip N. Russell. From an order modifying the final decree, affecting the custody of a child, the plaintiff appeals. Affirmed.

Raleigh E. Rhodes, of Madera, for appellant. M. K. Harris, of Fresno, for respondent.

CHIPMAN, P. J. This is an appeal from an order made after final judgment in a

divorce proceeding modifying the final decree affecting the custody of a minor child.

An interlocutory decree of divorce was duly made and entered July 1, 1909, in favor of plaintiff on the ground of extreme cruelty, which was made final on July 2, 1910. Pending the trial of the cause the parties entered into an agreement concerning their property rights, in which they also agreed that each should have the "care, custody, and maintenance of" their minor child, Dewitt Russell, six months of each year, during his minority. The agreement did not designate the months during which each was to care for the child. In the final decree the court adjudged as follows: "That the plaintiff is to have, and she is hereby awarded, the care, custody, and maintenance of said minor child (then eight years old) six months in each year of his minority; and that the defendant is to have the care, custody, and maintenance of said minor child for a like period of six months in each year." It appears that thereafter, to wit, about July 5, 1910, plaintiff married Charles Rogers, and now resides with him in the city and county of San Francisco; that since said interlocutory decree said minor child has resided with plaintiff during the months of July, August, September, October, November, and December, and the balance of the year with defendant in the city of Fresno.

Defendant gave notice to plaintiff that on June 5, 1911, he would move the court to modify the decree in said action "so that the custody, maintenance, and education of the minor child of said parties \* \* \* be awarded to defendant, with the right of said minor child to visit and be visited by plaintiff at such reasonable times as the court may determine, upon the ground that it is to the best interests of said minor child that he be placed in the care and custody of said defendant." The motion was heard on affidavits submitted by the parties, and the court made the following order: "It is hereby ordered and adjudged that said motion of defendant be granted; and it is ordered that the said decree in said action heretofore filed herein be and the same is so modified that the custody, maintenance, and education of said minor child be awarded to defendant, with the right of said minor to visit and be visited by plaintiff at such reasonable times as the court may determine, and the court does further order and adjudge that said minor child shall visit with and be with said plaintiff during all vacations, from the end of all school terms to the beginning of the succeeding school term of the school where said minor shall attend, and during such other time or times as may be reasonable, provided, however, that the actual attendance of said minor at school shall not be unnecessarily interfered with by such visits."

[1] There was no evidence that either



party was an unfit person to have the care and custody of the child, and, as to the question whether it would be to the best interest of the child to be chiefly cared for by the defendant, the evidence was such as to leave it to the sound discretion of the court which we cannot say was abused. It appeared that, under the existing arrangement, the child was shifted from San Francisco to Fresno during the school term which caused a change of teachers and course of study, to the disadvantage of the pupil. There was some evidence submitted by plaintiff that while in the care of the defendant the child had been neglected in some respects, and had not received the personal attention or discipline which his health and mental and moral welfare demanded. But this was successfully met by a countershowing made by the depositions of persons familiar with the treatment the child had received from defendant while in his custody. It was urged by plaintiff that the ground of divorce was such as to have called for a refusal to make the order. We do not know what facts were adduced at the trial which justified the court in finding the defendant guilty of extreme cruelty; nor can it be assumed that they were of such a character as to show defendant to be an improper guardian of the child. The parties agreed that each should share equally, during the minority of the child, in his care, custody and maintenance. It is not likely that plaintiff would have voluntarily agreed to the arrangement if she had thought the defendant's treatment of her in any way disqualified him to have the care and custody of their child. Nor is the child of such tender age (he is now past ten years of age) as to imperatively require the attention of a mother, or that his father, as the evidence shows his household to be constituted, may not give the child needed attention. In short, there was evidence such as justified the decision of the court that it is for the best interests of the child that he should remain with his father and under his direction during the school year.

[2] But plaintiff makes certain contentions independent of the questions of fact above described. It is claimed that the decree as to the custody of the child, having confirmed the agreement of the parties in respect of the custody of the child, is final and cannot be modified or changed, and also that the agreement is a binding contract irrespective of the decree. The precise question here involved arose, under somewhat similar conditions, in the case of *Black v. Black*, 149 Cal. 224, 86 Pac. 505. In that case the child was seven years old, and its custody was awarded to the mother. But this does not change the principle enunciated in the decision. The court said: "A decree based upon such an agreement as to custody is simply provisional. The court is not required to award the custody of the children in conformity to it. It does so only because the parents, in view

of a judicial separation and solicitous for the welfare of their offspring, have the greatest interest in determining which of them can best care and provide for them in the future, and an agreement prompted by these considerations is generally approved by the court and made part of the decree. The decree, however, made in pursuance of the agreement, is subject to the power of modification authorized by the statute. The children are not parties to the action for divorce and the jurisdiction which the statute confers on the court to be exercised from time to time as changed conditions or circumstances may require, in protecting their interests, cannot be limited or abridged by the contract of the parties made pending the divorce litigation which the decree follows, or by the action of the court in originally approving and adopting it."

[3] Upon the question of the power of the court under section 138, Civil Code, see *Crater v. Crater*, 135 Cal. 633, 67 Pac. 1049; *Miller v. Higgins*, 14 Cal. App. 156, 111 Pac. 403. Appellant insists that subdivision 2 of section 246 of the Civil Code should govern the action of the court. It provides as follows: "(2) As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as matter of right; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father." The next step in the argument is that a child under the age of 14 is a child of tender years because section 1750 of the Code of Civil Procedure provides that, if the child is under that age, the court may appoint his guardian, and, if of the age of 14 years, "he may nominate his own guardian, who, if approved by the court, must be appointed accordingly." The conclusion contended for by no means follows from the sections referred to. The Legislature has not declared that a child under the age of 14 years is to be treated by the courts as a child of tender years within the meaning of those terms as used in section 246 of the Civil Code. The sex is to be considered as is also the physical development. There cannot be any fixed and certain age of minority which, in all cases and for all purposes, can be said to constitute a child of "tender years."

It is not claimed that the child here requires "preparation for labor and business," and hence appellant's picture of the horrors of child labor, too often seen, is inapt. The claim here of both parents is that the child "is of an age to require education" and to better promote this object seems to be their chief concern.

[4] We do not think the sections found in the provisions of the Civil Code relating to guardians and wards in any wise control the power given the court under section 138, Civil Code, in actions for divorce, to "make

such order for the custody, care, education, maintenance and support of such minor children as may seem necessary and proper."

The order is affirmed.

We concur: HART, J.; BURNETT, J.

20 Cal. App. 418

MYERS v. CHITTINA EXPLORATION  
CO. et al. (Civ. 1,068.)

(District Court of Appeal, First District, California. Nov. 27, 1912.)

TROVER AND CONVERSION (§ 49\*)—CORPORATE  
STOCK—DAMAGES—ESTOPPEL.

In an action for conversion of corporate stock, the measure of damages is the market value of the stock, with interest and incidental damages incurred in the pursuit of the property, and the defendant is not estopped to deny that the shares were not worth their par value.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 264; Dec. Dig. § 49.\*]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by C. B. Myers against the Chittyna Exploration Company and others. Judgment for plaintiff, and part of the defendants appeal. Reversed.

W. C. Graves and J. S. Spilman, both of San Francisco, for appellants. Booth & Bartnett and W. J. Bartnett, all of San Francisco, for respondent.

KERRIGAN, J. This is an action brought by the plaintiff against the defendants to recover the value of 10 shares of the capital stock of the Chittyna Exploration Company, a corporation, sold to the defendant Jennie G. MacKinley under an assessment alleged in the complaint to be invalid.

The plaintiff recovered judgment for \$1,000, found by the court to be the value of said shares, and the appeal is by the defendant corporation and defendant MacKinley (the two of the defendants against whom the judgment was rendered), and is from the judgment and order denying their motion for a new trial.

Appellants have filed a brief in support of their appeal, but no answer thereto has been made by the respondent. From the record it appears that in the month of May, 1899, one Allis was the owner and holder of 10 shares of the capital stock of the corporation defendant, represented by a certificate; that while he was thus the owner he pledged the same to plaintiff to secure an indebtedness of \$4,500; that thereafter this stock was sold to pay an assessment which had been levied thereon by a resolution of the board of directors of the corporation.

The complaint is in two counts, the first of which proceeds upon the theory that the levying of the assessment and sale of the stock were void, and the second merely al-

leged that the defendants converted the shares to their own use.

The case was tried upon the theory that there had been a conversion of the stock by the defendants, for which the plaintiff was entitled to recover its reasonable value, which he alleged to be \$3,000. Testimony was admitted on behalf of the plaintiff tending to show that the 10 shares of stock in controversy were worth between \$2,000 and \$3,000. But when the defendants attempted to rebut this testimony, and show that the stock was worth in fact not more than the amount of the assessment, to wit, \$10 per share, the court refused to permit them to do so, holding that they were estopped to denying that the shares were worth their par value, and on this theory the court found the stock to be worth \$1,000, and rendered judgment for that sum against the appellants.

The refusal of the court to receive the proffered testimony was error. There is no principle of estoppel applicable to any phase of this case, and the law we think is plain that, in an action for conversion, the measure of damages is the value of the property at the time of the conversion, with interest, or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, and a fair compensation for the time and money properly expended in the pursuit of the property. Civ. Code, § 3336.

The judgment and order are reversed.

We concur: LENNON, P. J.; HALL, J.

20 Cal. App. 406

PEOPLE v. MEASOR. (Cr. 262.)

(District Court of Appeal, Second District, California. Nov. 23, 1912.)

CRIMINAL LAW (§ 1087\*)—APPEAL—RECORD.

The record on appeal must show that notice of appeal has been given as provided by Pen. Code, § 1247.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2770-2781, 2794; Dec. Dig. § 1087.\*]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Kate Measor was convicted of crime, and she appeals. Affirmed.

Henry W. Nisbet, of San Bernardino, and Dick Foye Harding, of Santa Ana, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. At the calling of the calendar for the October term, upon which calendar this cause appeared, attention of counsel for appellant was called to the fact that the record failed to disclose that notice had been given as required by section 1247 of the Penal Code, without which notice, by



the provisions of said section, an appeal was ineffectual. It was then stated by counsel that such notice had been given, and a diminution of the record was suggested and permission given to the defendant to supplement her record with a copy of such notice. No oral argument was made, but counsel for defendant obtained 10 days' time within which to file points and authorities in support of the appeal. No points and authorities have been filed; the defect in the record has not been cured; and in addition, in order that injustice might not be done the defendant by reason of the neglect of her counsel, we have taken the trouble to examine the record and we find no prejudicial error therein.

The judgment is therefore ordered affirmed.

We concur: JAMES, J.; SHAW, J.

(20 Cal. App. 388)

MENTRY et al. v. BROADWAY BANK & TRUST CO. et al. (Civ. 1,166.)

(District Court of Appeal, Second District, California. Nov. 22, 1912. Rehearing Denied by Supreme Court Jan. 20, 1913.)

**1. QUIETING TITLE (§ 21\*)—"ADVERSE CLAIM"—WHAT CONSTITUTES.**

Under Code Civ. Proc. § 738, authorizing an action by any person against another claiming an estate or interest in real property adverse to him for the purpose of determining such adverse claim, a mortgage is a claim adverse to the interest of the owner, and the owner may bring an action to determine the amount and extent of the mortgage lien.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 51-53; Dec. Dig. § 21.\*]

For other definitions, see Words and Phrases, vol. 1, p. 223; vol. 8, p. 7567.]

**2. QUIETING TITLE (§ 19\*)—CONDITIONS PRECEDENT.**

A tender of the amount due on the mortgage is not a condition precedent to an action by the mortgagor against the mortgagee to determine the amount and extent of the lien under Code Civ. Proc. § 738, authorizing actions to determine adverse claims.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 48; Dec. Dig. § 19.\*]

**3. MORTGAGES (§ 256\*)—ASSIGNMENT—EQUITIES—AVAILABILITY.**

Where a mortgagee, who had not advanced to the mortgagor the full face value of the mortgage, assigned it for its face value to a person, who made no inquiry of the mortgagor, the assignee had a lien on the premises only for the amount actually advanced by the original mortgagee, since an assignee failing to inquire of the mortgagor as to the validity of the mortgage, the amount due, and defenses thereto takes subject to all infirmities or objections which could have been set up against the original mortgagee.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 678-681, 688; Dec. Dig. § 256.\*]

**4. ESTOPPEL (§ 110\*)—PLEADING AS DEFENSE—NECESSITY.**

An assignee of a mortgage, who, when sued by the mortgagor for a determination of the amount and extent of the mortgage lien, knew the facts which she claimed estopped the mortgagor from denying that the original mortgagee advanced the full face value of the mort-

gage, but failed to plead such facts in her answer, could not rely on estoppel as a defense or introduce evidence tending to establish an estoppel.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 300; Dec. Dig. § 110.\*]

**5. ESTOPPEL (§ 55\*)—RELIANCE ON ACTS—NECESSITY.**

Where a mortgagee at the time of an assignment of the mortgage had not advanced the face value of the mortgage, but thereafter promised to do so, and the mortgagor then promised to notify the assignee if the mortgagee failed to advance the balance, the mortgagor's promise did not create an estoppel in favor of the assignee, unless she not only changed her position, but was injured by reliance on such promise.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 136-141; Dec. Dig. § 55.\*]

**6. APPEAL AND ERROR (§ 1050\*)—REVIEW—HARMLESS ERROR.**

Where a mortgagee, who had not advanced to the mortgagor the face value of the mortgage, assigned it, and the mortgagor subsequently brought an action against the assignee to determine the amount of the lien, the admission of the mortgagor's testimony that, because of the mortgagee's failure to advance the agreed amount, he was compelled to borrow money elsewhere, if erroneous, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.\*]

**7. TRIAL (§ 397\*)—FINDINGS—CONFORMITY TO ISSUES.**

Where there was no issue relative to estoppel raised by the pleadings, a finding relative thereto was unnecessary.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940-945; Dec. Dig. § 397.\*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by May Mentry and others against the Broadway Bank & Trust Company and others. From the judgment and an order denying a new trial, defendants appeal. Affirmed.

Williams, Goudge & Chandler, of Los Angeles, for appellants. Hutton & Williams, of Los Angeles, for respondents.

ALLEN, P. J. The action was one instituted by plaintiffs to determine adverse claims to real property described in the complaint the ownership and seisin of which was alleged to be in plaintiffs. Defendants and appellants answered, each alleging that on October 16, 1908, plaintiffs executed to one L. E. Jones their promissory note for the sum of \$5,500, copy of which is set out and made a part of the answer, and as a part of the same transaction, to secure the payment of such note, executed a mortgage in writing upon the property described; that thereafter, on October 24, 1908, said Jones assigned and transferred said note and mortgage to the Broadway Bank & Trust Company, after which date, to wit, on November 19, 1908, defendant Fiske, through defendant Forrester, her agent, purchased said note, paying the face value thereof, and the same was assigned and transferred to said Fiske. It is further averred that said Fiske

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

is the owner and holder of the note and mortgage, and that no portion of the mortgage indebtedness has been paid, except the sum of \$220 interest paid thereon April 16, 1909, and defendants asked that the mortgage be declared a first lien upon the property, and that plaintiffs be decreed to hold the title subject thereto. The defense is thus seen to have been founded upon a written instrument, copy whereof is contained in the answer, and, plaintiffs not denying its genuineness and due execution under oath, such genuineness and due execution of the instrument set out is thereby admitted. Under this admission of plaintiffs, and under the issues presented, the trial court proceeded to a hearing of the cause and found the ownership and seisin in plaintiffs, the execution of the note and mortgage as in the answers alleged, and the ownership thereof in said Fiske. The court further found that the only adverse interest held by defendants and appellants was that of an incumbrance upon the property created and established by the said note and mortgage, the amount of which incumbrance the court found to be the sum of \$2,500, with interest thereon, and by its judgment decreed plaintiffs to be the owners and seised of the premises subject to the lien of defendants for \$2,500, with interest from October 16, 1908, less a credit of \$220 paid on account of interest, which interest was to be computed according to the terms and provisions of the note and mortgage. Defendants and appellants moved for a new trial, which was denied, and they appeal from the judgment and order upon a statement of the case.

[1, 2] It is appellants' first contention that the action authorized by section 738 of the Code of Civil Procedure, being one in the nature of an action to quiet title, cannot be maintained by an owner as against a mortgagee without first, and as a condition precedent, tendering a return of the amount received and due upon the mortgage. We are of opinion that the conditions precedent necessary in order to entitle a party to rescind a contract in toto are not required in an action of the character here sought to be maintained. One owning or being possessed of real property may have a court determine the amount and extent of a lien actually existing under the provisions of section 738 without any tender or offer to pay the amount admitted to be due. Section 738 authorizes an action to be brought by any person against another who claims an interest in real property adverse to him for the purpose of determining such adverse claim. "It is settled by the decisions that the owner of any estate or interest in land of which the law takes cognizance is entitled under this statute to have any claim adverse to his interest, such as it is, determined." *German-American Sav. Bank v. Gollmer*, 155 Cal. 687, 102 Pac. 933, 24 L. R. A. (N. S.) 1066. An

incumbrance by way of mortgage is a claim adverse to the interest of the owner, and we think may be determined under the statute above cited. The facts of the case as presented by the record are as follows: Plaintiffs applied to Jones for a loan of \$5,500, which he agreed to make when good title was ascertained. The note and mortgage were signed and left with a notary. Jones obtained possession of the note and mortgage, and, procuring a certificate of title showing an incumbrance of the mortgage only, hypothecated the note and mortgage with the Broadway Bank & Trust Company as security for a loan of \$4,900. At that time Jones had only advanced to the mortgagors about \$1,250 of the amount of the mortgage. The bank within a few days thereafter sold the note and mortgage to defendant Fiske, and of the proceeds discharged the Jones note, for which said note and mortgage were held as collateral. Thereafter, from time to time, Jones advanced to the mortgagors an additional sum of \$1,250, and no more, and in February, 1909, Jones absconded, and has ever since been a fugitive from justice. Plaintiffs had no knowledge of the transfer of the note and mortgage until shortly after the 2d of December, 1908, and thereafter, on the 24th of December, one of the plaintiffs called upon Forrester, the agent of Fiske, and made known to him the fact of Jones' failure to advance the full amount of the mortgage. The agent and Mentry then visited Jones, and Jones promised to advance the balance called for by the mortgage before 2 o'clock that day. The agent told Mentry that, if Jones did not pay it, to let him know. Mentry gave the agent no further notice of Jones' default, and afterwards in April paid the interest due upon the entire amount of the mortgage. Subsequently, in June, 1909, the attorneys for all three of the plaintiffs notified the agent Forrester and defendant Fiske that the mortgage was obtained criminally and possession improperly secured, and they demanded the return of the note and mortgage, which was refused and this action was brought in October following. The record shows that after the 24th of December, the date of the interview between Jones, Mentry, and Forrester, Jones had on deposit with the bank in February, 1909, the sum of \$1,212.53, which he subsequently at various times drew out, and his account was balanced.

[3] It is appellants' further contention that, under the facts presented, the plaintiffs are estopped to claim that the note and mortgage are for less than the full amount. It is settled law in this state that "one about to take an assignment of a mortgage is bound in his own interest to inquire of the mortgagor as to the validity of the instrument and of the transaction on which it was founded and as to the amount due, and whether the mortgagor has any defenses or



set-offs to interpose against it. If he neglects to do this, he takes the mortgage subject to all infirmities or objections which could have been set up against it in the hands of the original mortgagee, being charged with knowledge of all facts which such an inquiry would have disclosed." *Briggs v. Crawford*, 162 Cal. 124, 121 Pac. 381. This rule insures to the plaintiffs in this case the right, notwithstanding the assignment of the note and mortgage, to every defense which they might have made had Jones retained the mortgage. It goes without saying that, if Jones had sought to foreclose the mortgage, they could have defended against it to the extent of his default in the advancements, and that the only lien which he could have had under a decree of foreclosure would have been as to the actual amount of money advanced by him, which was the sum the court in this case decreed to be a lien in favor of Mrs. Fiske, the purchaser.

[4] Mrs. Fiske had knowledge and notice long before this suit was instituted of the actual condition of affairs. She knew that Jones had not advanced the amount of money requisite, and that plaintiffs would claim a defense thereto because of such failure. Having such knowledge, she did not plead in her answer, nor did the bank, any facts by way of an estoppel. "That a party who has an opportunity to plead an estoppel, upon which his cause of action or defense depends, must do so, is the recognized rule in this state." *Fritz v. Mills et al.*, 12 Cal. App. 117, 106 Pac. 726, and authorities there cited. This rule suffers an exception only in instances where under our system of pleading no opportunity is afforded for a pleading wherein an estoppel may properly be pleaded. *Ahlers v. Smiley*, 11 Cal. App. 343, 104 Pac. 997. The defendants having cognizance, then, of the character of the defense which plaintiffs claimed to the mortgage, it was their duty, had they desired to avail themselves of any facts constituting an estoppel, to have pleaded the same. The opportunity so to do was afforded and their neglect precludes them from the introduction of evidence tending to establish an estoppel, or from the court's consideration of evidence in that direction. This we say is the rule were it even assumed that the facts of the case are such as would have estopped the plaintiffs from asserting their claim of a failure of consideration in part.

[5] It will be observed that Mrs. Fiske did no act or thing based upon any promise made by Mentry to her agent. That such a promise should operate as an estoppel, it must be made to appear, not only that she changed her position, but that relying upon such promise an injury resulted by reason thereof. There is no averment in the answer, nor in fact is there any evidence in the record tending to show a reliance upon Men-

try's promise, or that by reason of such reliance she was prevented from taking any steps necessary for her indemnification, or that any steps which she might have taken could have so resulted. There can be no inference from the facts that the appellants changed their position by reason of the neglect of Mentry to give the notice, or of any delay in instituting the action, unless it be assumed that such notice if given would have afforded them an opportunity to have recouped by an action against Jones, or the bank as a guarantor, the amount of the loss suffered. But, as we have said before, there was no plea of any estoppel, or of any facts supporting the same, and hence it was not proper for the court to consider them.

Appellants' citation of authorities to the effect that the acknowledgment of a deed is a public declaration of a fact upon which all persons may in good faith act and which the grantor is estopped from attacking can have no application in this state, where the question involved relates to a mortgage which is but a lien and incumbrance upon the property, and, were its force even conceded in that direction, our Supreme Court has by the decisions hereinbefore cited declined to observe the rule.

[6] We see no prejudicial error in the action of the court permitting the plaintiffs to show that they had been compelled to borrow money elsewhere by reason of Jones' failure to advance the amount agreed. Assuming the incompetency of such evidence, it could not in any view of the case have prejudiced the defendants.

[7] Appellants' final contention is that the court failed to find upon a material issue relative to an estoppel. As we have before attempted to show, there was no issue with relation to an estoppel and no finding was necessary.

We see no error in the record, and the judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

20 Cal. App. 394

NELLIS v. JUSTICES' COURT OF LOS ANGELES TP. et al. (Civ. 1,218.)

(District Court of Appeal, Second District, California. Nov. 22, 1912.)

1. JUSTICES OF THE PEACE (§ 80\*)—PROCESS—FORM AND REQUISITES—"ORDER."

Under Code Civ. Proc. § 102, as added by St. 1911, p. 442, providing that all legal processes in actions or proceedings in the justices' court of Los Angeles township shall be issued by the clerk on the order of the presiding justice, the clerk cannot issue the summons in an action unless, after the commencement of the action, the presiding justice makes an order in writing directing him to do so, and a general order to the clerk to sign all legal process that is necessary to be issued is insufficient, since an "order" in a legal sense means a decision given in an action pending during the progress thereof, and is defined by Code

Civ. Proc. § 1003, as every direction of a court or judge made or entered in writing, other than a judgment.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 251-257; Dec. Dig. § 80.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5017-5023; vol. 8, p. 7739.]

## 2. JUSTICES OF THE PEACE (§ 80\*)—PROCESS—FORM AND REQUISITES.

Under Code Civ. Proc. § 100, as added by St. 1911, p. 442, providing that the original process in all actions or proceedings begun in the justices' court of Los Angeles township shall be returnable and the party summoned required to appear before the presiding justice or one of the other justices to be designated by the presiding justice, the name of the justice in whose department the process is returnable, and before whom defendant is required to appear, should be designated in the summons, and a summons commanding defendant to appear and answer before the "justices' court" is insufficient to give jurisdiction.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 251-257; Dec. Dig. § 80.\*]

## 3. PROCESS (§ 1\*)—"SUMMONS"—NATURE.

A summons is the process whereby parties defendant are brought into court so as to give the court jurisdiction of their persons.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6787-6788; vol. 8, p. 7810.]

## 4. JUDGMENT (§ 17\*)—PROCESS TO SUSTAIN DEFAULT JUDGMENT.

A substantial compliance with statutory provisions as to the form of the summons is mandatory, and without such compliance the court does not acquire jurisdiction to render a default judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25-33, 157, 422; Dec. Dig. § 17.\*]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Petition by T. E. Nellis for a writ of review directed to the Justices' Court of Los Angeles Township and another. From a judgment in favor of respondents, the petitioner appeals. Reversed, with directions.

Edward Judson Brown, of Los Angeles, for appellant. Robert C. Fairall, of Los Angeles, for respondents.

SHAW, J. Petitioner obtained a writ of review from the superior court, the purpose of which was to annul the action of the justices' court of Los Angeles township (created by act of the Legislature in adding to the Code of Civil Procedure six new sections numbered 99 to 102b, inclusive, approved March 23, 1911, Stats. 1911, p. 442) in rendering judgment by default against him in a certain action brought in said justices' court, wherein the Pico Heights Lumber Company was plaintiff and petitioner defendant. Upon the return to the writ and after a hearing thereon, the court denied the relief prayed for and rendered judgment in favor of respondents herein. From this judgment, petitioner has appealed.

[1] Appellant contends that the summons

issued and served upon him as defendant in said action was insufficient to give the court jurisdiction. The summons is silent with reference to anything showing that the same was issued upon an order of the presiding justice, as required by section 102 of the Code of Civil Procedure, which provides that "all legal processes of every kind in actions or proceedings in said justices' court shall be issued by the said justices' clerk upon the order of the presiding justice." While the record of the justices' court contains nothing showing that the presiding justice at any time made an order directing the clerk to issue the process, an affidavit was presented at the hearing wherein it is stated that, some 10 months prior to the commencement of the action, the presiding justice ordered the clerk to sign all legal process that was necessary to be issued in and about the business of said justices' court. Respondents contend that this affidavit shows that such order was duly made. We cannot assent to this proposition. Section 1003 of the Code of Civil Procedure defines an order as being "every direction of a court or judge, made or entered in writing," other than a judgment. It is not shown that the alleged order was in writing, nor that any record thereof was made. Moreover, an order in a legal sense means a decision given in an action pending, and during the progress thereof. Had the Legislature intended that the clerk should of his own motion issue all process, it would have so stated. Since it has provided that he can only issue it upon the order of the presiding justice, the statute cannot be annulled by the making of a general order as a substitute therefor.

[2] Appellant further contends that the summons so issued was insufficient to give the court jurisdiction of defendant, for the reason that it wholly fails to comply with section 100 of the Code of Civil Procedure, which provides that "the original process in all actions or proceedings begun in said justices' court shall be returnable, and the parties summoned required to appear before the presiding justice, or before one of the other justices of the peace to be designated by the presiding justice." Reference to the summons shows that defendant was commanded to appear in the justices' court of Los Angeles township, "and to answer before the said justices' court in Los Angeles city in said township." It is clear from a reading of section 100 that the Legislature intended that the parties summoned in said justices' court should by the summons be required to appear either before the presiding justice or before one of the other justices of the peace designated and named therein. The summons issued to defendant should inform him of such fact. There is no statutory authority for requiring the defendant to appear in the justices' court of Los Angeles township.



[3, 4] The summons is the process whereby parties defendant are brought into court so as to give the court jurisdiction of their persons. Where the Legislature, as here, creates a justices' court with four justices, one of whom is presiding justice, and by express provisions of law provides that the summons in actions therein shall be issued by the clerk only upon order of the presiding justice, and that such process shall designate the justice before whom the defendant named therein shall be required to appear, a substantial compliance with such provisions must be deemed mandatory. *Lyman v. Milton*, 44 Cal. 630; *Ames v. Sankey*, 128 Ill. 526, 21 N. E. 579. In the absence of a compliance therewith, the court is without jurisdiction to render a judgment by default. In the case at bar no attempt was made to follow the statutory provisions. In *Helms v. Dunne*, 107 Cal. 117, 40 Pac. 100, involving a proceeding in the justices' court of the city and county of San Francisco, the summons issued purported to be pursuant to an order made by Charles A. Low as presiding justice, when in fact Low was not presiding justice. It being made to appear in the trial court, however, that a written order had been duly signed by J. E. Barry, who was presiding justice, directing the issuance of the summons, it was held sufficient; the recital therein of Low's official character being deemed surplusage. In our opinion, the clerk of the justices' court of Los Angeles township is without authority to issue summons in an action therein unless, after the commencement thereof, the presiding justice of such court makes an order in writing directing him so to do, and, furthermore, the name of the justice in whose department the process is returnable, and before whom the defendant is required to appear, should be designated in the summons.

For the reasons given, the judgment herein is reversed and the court directed to render judgment in favor of petitioner annulling the judgment of the justices' court.

We concur: ALLEN, P. J.; JAMES, J.

20 Cal. App. 415

LUNDEEN v. NOWLIN. (Civ. 1,185.)

(District Court of Appeal, Second District, California. Nov. 27, 1912. Rehearing Denied Dec. 27, 1912. Denied by Supreme Court Jan. 22, 1913.)

1. CONTRACTS (§ 187\*)—BENEFIT OF THIRD PERSON—RIGHT OF ACTION.

A contract for the exchange of land recited that a broker was the agent of both parties, and provided that each party agreed to pay a specified sum to such broker. The exchange was consummated, but one of the parties refused to pay the broker the stipulated price. Held that, the contract not having been rescinded, the broker was entitled to sue for the stipulated compensation under Civ. Code, § 1559, providing that a contract, made expressly for the benefit of a third person, may

be enforced by him at any time before the parties rescind it.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 798-807; Dec. Dig. § 187.\*]

2. APPEAL AND ERROR (§ 1010\*)—REVIEW—QUESTIONS OF FACT.

Where there was some evidence to sustain the trial court's findings, an appellate court cannot weigh the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.\*]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by K. Lundeen against George Nowlin. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

El. W. Freeman, of Los Angeles, for appellant. El. B. Drake, of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment entered in favor of plaintiff and from an order denying defendant's motion for a new trial.

[1] On the 17th day of May, 1911, one George Nowlin and K. B. Norswing entered into an agreement for the exchange of certain real property which they severally owned. Plaintiff herein was a real estate broker who, through his agents, performed some services in connection with the exchanges of properties, and, when the parties above mentioned reduced the terms upon which the exchange was to be made to writing, there was incorporated in it the following condition: "It is further understood, as part and parcel hereof, that K. Lundeen is agent for both the parties of the first part and second part, and for his services herein the party of the first part agrees to pay said K. Lundeen the sum of \$1,375, and the party of the second part likewise agrees to pay said K. Lundeen \$1,250. Both of said sums from the first party and second party are due the said K. Lundeen upon the signing of this contract by both parties hereto, and the said K. Lundeen is to perform no further services for either party hereto after this contract is signed." The exchange of properties was finally consummated, and, upon defendant's refusal to pay his portion of the amount agreed to be paid to Lundeen as agent, this action was brought. In the answer of defendant it was alleged that plaintiff had misrepresented the dimensions of the property which defendant received in exchange for that which he transferred to Norswing, and that, by reason of the alleged misrepresentations, defendant was damaged in a large sum of money. The trial court found on the issues in favor of plaintiff and against defendant.

On this appeal it is urged, first, that the contract imposed no liability on the part of Nowlin to pay plaintiff commissions, as plaintiff was not a party to the exchange and therefore not entitled to enforce any claim

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

against defendant. It appears from the face of the writing, as it is there expressly stated, that the parties agreed to pay to Lundeen, the plaintiff, the respective amounts mentioned, and an acceptance of this agreement, or offer of agreement, if we may choose so to term it, was indorsed upon the writing under date of the day following the execution thereof. It is provided by section 1559, Civil Code, that "a contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." This contract was not rescinded, and undoubtedly, upon default being made by either of the parties contracting in that regard, a cause of action arose in favor of plaintiff. *Washer v. Independent M. & D. Co.*, 142 Cal. 702, 76 Pac. 654; *Stanton v. Carnahan*, 15 Cal. App. 527, 115 Pac. 339. Page on Contracts, vol. 3, § 1308.

[2] We have examined the statement used on the motion for a new trial, and also the specifications in which error is assigned on the alleged ground that the findings made by the court are not supported by the evidence. On the question of misrepresentations alleged to have been made by plaintiff as to the dimensions of the ground which defendant received in the exchange of properties, it must be said that there was some evidence to sustain the findings of the court, and that, under the familiar rule that a state of conflict in the evidence presents a condition not subject to review by an appellate court, we have no function to perform in determining upon which side the weight of evidence rested. In our opinion, there is presented by the record no error entitling defendant to have the judgment or order denying his motion for a new trial reversed.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

20 Cal. App. 407

# PEOPLE v. HILL. (Cr. 259.)

(District Court of Appeal, Second District, California. Nov. 27, 1912. Rehearing Denied by Supreme Court Jan. 22, 1913.)

## 1. CRIMINAL LAW (§ 1159\*)—APPEAL AND ERROR—REVIEW—QUESTIONS OF FACT—VERDICT.

The weight of evidence is for the jury, and, where the record shows some affirmative evidence establishing all of the elements necessary to prove a criminal charge against defendant, this court cannot review the evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

## 2. CRIMINAL LAW (§ 1144\*)—REVIEW—PRESUMPTIONS—TIME WHEN CRIME CHARGED.

It cannot be presumed that an indictment filed May 25, 1912, for an offense against the local option law, effective November, 1911, alleging its commission "on or about the 19th day of May, 1912," was intended to charge the

commission of an offense at a time when the act described was no offense under the law.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2736-2781, 2901, 3016-3037; Dec. Dig. § 1144.\*]

## 3. INTOXICATING LIQUORS (§ 223\*)—REQUISITES—TIME OF OFFENSE—CODE PROVISIONS—"A MATERIAL INGREDIENT IN THE OFFENSE."

Under Penal Code, § 955, which provides that the precise time at which an offense was committed need not be stated in the indictment, but may be alleged to have been committed at any time before the finding or filing thereof, except where the time is a material ingredient in the offense, the time when an offense against the local option law, effective November, 1911, was committed was not "a material ingredient of the offense," and under an indictment filed May 25, 1912, alleging its commission "on or about May 19, 1912," the prosecution might show its commission at any time within the one-year period of limitations subsequent to the day when the law became effective.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 263-274; Dec. Dig. § 223.\*]

## 4. JURY (§ 131\*)—CHALLENGES—EXAMINATION.

Where defendant in the examination of jurors was permitted to ascertain their condition of mind as to their bias or prejudice, the court was not bound to permit an unduly protracted examination to enable defendant to decide whether he would peremptorily challenge any of the jurors.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 561-582; Dec. Dig. § 131.\*]

## 5. JURY (§ 103\*)—CHALLENGE FOR CAUSE—DISCRETION OF COURT.

Where the answers of jurors upon examination disclosed a state of mind closely bordering on prejudice against defendant, yet all asserted that they could try him fairly, the denial of his challenges for cause was within the discretion of the trial judge.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 461-479, 497; Dec. Dig. § 103.\*]

## 6. INTOXICATING LIQUORS (§ 239\*)—PROSECUTION—INSTRUCTIONS—APPLICATION TO ISSUES AND EVIDENCE—"FURNISHING" LIQUOR.

In a prosecution under an indictment for selling and furnishing liquor, an instruction that it was unlawful to sell, furnish, or "give away" any liquor was within the pleadings and issues, since, under the charge of "furnishing," a giving away might be proved.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 331-347; Dec. Dig. § 239.\*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3010-3013.]

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Harry Hill was convicted of an offense against the local option law, and he appeals. Affirmed.

Wm. J. Clark, of Independence, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted upon an indictment returned by the grand jury of Inyo county for the offense of selling and furnishing alcoholic liquor to another within the boundaries of certain "no license" ter-



ritory. This offense is a misdemeanor of which the superior court had jurisdiction. He appeals from the judgment and from an order denying a motion for a new trial.

[1] The first point made by appellant is that the evidence was insufficient to sustain the verdict of the jury. In view of the fact that there is shown by the record to have been some affirmative evidence establishing all of the elements necessary to prove the charge as made against defendant, this court is not permitted to enter upon a review of the testimony for the purpose of forming any conclusion as to which side the weight of evidence might lean. As to all questions of fact, it was the province of the jury to make conclusions upon them, and with the determination so made we cannot here interfere.

[2, 3] The indictment, in fixing the time of the commission of the offense, contained the allegation that the crime charged had been committed "on or about the 19th day of May, A. D. 1912." The law under which defendant was prosecuted became operative, as to that portion of Inyo county in which the offense was alleged to have been committed, on November 6, 1911. The indictment was filed on the 25th day of May, 1912. It is the contention of defendant that the prosecution under an allegation phrased in the words "on or about" might address the proof to any date prior to the filing of the indictment and within the one-year period of the statute of limitations, and that, as to a portion of this period there was no offense known to the law of the kind charged against defendant, the indictment should have contained a more definite statement as to the time of the commission of the alleged offense. In order to sustain this argument, we would be required to presume that, under the allegation contained in the indictment, the offense may have been committed prior to the time that the prohibitive measure affecting the sale and furnishing of liquors went into effect. Section 955 of the Penal Code, in treating of the statement to be contained in an indictment or information respecting the time of the commission of the alleged offense, provides as follows: "The precise time at which the offense was committed need not be stated in the indictment or information, but it may be alleged to have been committed at any time before the finding or filing thereof, except where the time is a material ingredient in the offense." We do not think that the matter of the time when the offense was committed was in this case a material ingredient of that offense, as that term is used in the statute. The prosecution might have introduced evidence showing the commission of the offense at any time within the period subsequent to the date when the law creating the offense became effective. We cannot presume that the pleader in drawing his indictment intended to charge the crime as having been committed at a time when the acts described constituted no offense under the law.

The case of *People v. Miller*, 137 Cal. 642, 70 Pac. 735, referred to by counsel for appellant, contains no intimation contrary to this view, but rather is an authority in point with the conclusion we have just expressed. The decisions of other states, where the statutes do not contain the provision which we have quoted from our Penal Code, are not valuable to establish the contention of appellant in this regard under our practice.

[4] It is next contended that the defendant was unduly restricted in his examination of certain jurors while interrogating them as to their state of mind. Many of the questions asked of these jurors, and which the trial judge declined to permit answers to be made to, might well have been allowed as proper questions, but sufficient appears by the record to show that the defendant was allowed ample latitude by other questions which he was permitted to ask of them, and to which answers were made to have illustrated the condition of mind of such jurors as to their bias and prejudice; and it was not incumbent upon the court to permit the examination to be unduly protracted for the sole purpose of enabling defendant to decide as to whether he might desire to challenge peremptorily any of the jurors offered.

[5] We find no error in the rulings of the court denying the challenges for cause interposed by the defendant to several of the proposed jurors. While the answers of these men in some instances disclosed a state of mind closely bordering upon prejudice, yet they each asserted that they could try the defendant fairly, and we think it was for the trial judge to determine that question, and that, under such a state of facts, his rulings ought not to be disturbed. *Graybill v. De Young*, 146 Cal. 421, 80 Pac. 618.

[6] Defendant complains of certain instructions given to the jury by the trial judge. One of these instructions was to the effect that, under the law then being considered, it was unlawful within the "no license" territory to "sell, furnish, distribute, or give away any alcoholic liquors." The point of the objection is directed to the use of the words "give away," and it is contended that, as the indictment charged only the selling and furnishing of liquor, it was improper to instruct the jury that a person who gave alcoholic liquors away would be guilty. In this contention we do not concur, as, under the charge made, a person described as "furnishing" liquor might be proved to be one who had given it away. All of the instructions complained of, with this exception, are admitted to correctly state propositions of law in an abstract way, and we believe further that the charge, as embodied therein, was correct and pertinent to the case then on trial. The instructions as given were numerous, and, as we read them, they covered sufficiently and fairly all of the matters pertinent to the issues being considered, and no prejudicial error appears in the giving of

any of them, or in the refusal to give certain additional charges offered by defendant.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

20 Cal. App. 420

PEOPLE v. ROSELLE. (Cr. 194.)

(District Court of Appeal, Third District, California. Nov. 27, 1912. Rehearing Denied by Supreme Court Jan. 22, 1913.)

1. CRIMINAL LAW (§ 554\*) — EVIDENCE — WEIGHT — TESTIMONY OF DEFENDANT — ACCEPTANCE AS A WHOLE.

Where there was circumstantial evidence that defendant killed the deceased, testimony by defendant that he killed deceased, but did so in self-defense, need not be accepted as a whole by the jury, but they could credit or disbelieve any of the narrated circumstances.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1255, 1256; Dec. Dig. § 554.\*]

2. HOMICIDE (§ 340\*) — APPEAL — HARMLESS ERROR—INSTRUCTIONS.

A defendant cannot complain that the court instructed on manslaughter when he was charged with murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 340.\*]

3. JURY (§ 31\*)—RIGHT TO TRIAL BY JURY—IMPAIRMENT—MISCONDUCT OF JUROR.

An affidavit by defendant's attorney that he saw a juror asleep during the taking of testimony, and before he could inform the court a recess was ordered, and that he did not know how long the juror was asleep, was not sufficient to show that the juror's condition was such that he failed to hear any question or answer, so as to deprive defendant of his right to trial by jury; the juror's name not being given, nor was he asked whether he heard the testimony, or given an opportunity to explain.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 204-219; Dec. Dig. § 31.\*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Phillip Roselle was convicted of manslaughter, and he appeals. Affirmed.

W. D. L. Held and T. J. Weldon, both of Yukia, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, of Sacramento, for the People.

CHIPMAN, P. J. Upon an information charging defendant with murder for the killing of one Erick Nilsen, the jury returned a verdict as follows: "We, the jury, find the defendant guilty of manslaughter, and we strongly recommend him to the mercy of the court." Before judgment, defendant made application for a new trial, which, being denied, judgment was pronounced and an appeal taken from both the order and judgment.

We quote from appellant's brief: "Three propositions are advanced by appellant, demanding a reversal herein: First, we contend that there is no evidence in the record

to sustain the verdict and judgment; second, the trial court erred in giving to the jury an instruction on the question of manslaughter; and, third, the defendant was deprived of his constitutional right to a trial by jury by reason of misconduct of one of the jurors in that, during a portion of defendant's cross-examination of one of the witnesses for the people, such juror was asleep."

[1] 1. There was evidence, in its nature circumstantial, that defendant killed the deceased. In addition to this evidence, defendant testified in his own behalf, admitting that he shot and killed deceased, claiming that it was in self-defense. The point made is that "the evidence for the defense was a connected whole, no portion of it could stand unless it all stood; to adopt a part demanded that credence be given to all, and to discredit one circumstance detailed forbade credit to any other," and hence the verdict cannot stand—that is to say, the jury having believed defendant's testimony that he killed the deceased, they were also bound to believe him that it was done in self-defense. The jury were under no such constraint. They had the right to judge from all the narrated circumstances what part of defendant's story should be credited and what part disbelieved. They had the right to say whether, on his own statement of the facts and under the instructions of the court on that subject, the defendant was justified, in self-defense, to go to the extremity of killing the deceased.

In *People v. Sherman*, 103 Cal. 409, 37 Pac. 388, it was held that the defendant, who was accused of murder and was convicted of manslaughter, was entitled to a new trial where the evidence, without conflict, showed that the killing was justifiable. Defendant relies on this case on the assumption that the justification in the case cited, shown by the witnesses who were present and saw the killing, also appeared in the present case. This is on the further erroneous assumption that the jury were bound to give credit to all of defendant's testimony. The jury, as we have seen, was not so required to do.

[2] 2. Upon the second point, it is stated in his brief: "Defendant has either justified the killing or he has not, for no mitigating circumstances were shown. This being so, defendant is either guilty of murder or he is not guilty, and the court was not warranted in instructing the jury that a verdict of manslaughter might be rendered." It has been held that, where the defendant requested such an instruction, it was not error to refuse it. *People v. Lee Gam*, 69 Cal. 553, 555, 11 Pac. 183; *People v. Chavez*, 103 Cal. 407, 37 Pac. 389; and other cases. But such ruling was based on the fact that the evidence was all one way and pointed to no other conclusion than of guilt as charged.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



The converse does not follow, as claimed, for the all-sufficient reason that, by giving the instruction, the defendant was not prejudiced. On the contrary, the jury were given latitude which resulted in defendant's advantage. There was evidence that defendant and deceased were not on friendly terms; that both of them had been drinking the early part of the night of the homicide, which occurred about half past nine o'clock, when both were on their way home; there was also evidence that the reputation of defendant for peace and quiet in the neighborhood was good. An examination of the entire record discloses some ground for the conclusion reached by the jury. There was no witness to the homicide except the defendant and the deceased. The jury were at full liberty to acquit the defendant if they believed that he was justified in taking the life of deceased. The instruction cannot be said to have been an invitation to render a compromise verdict. The jury may have decided that, while the deceased was, in some degree, the aggressor, the defendant was not justified in killing him.

[3] 3. The only support given to the claim of misconduct by a juror is found in the affidavit of W. D. L. Held, one of defendant's attorneys, which is as follows: "That on the 18th day of June, 1912, and while testimony was being taken in said case, affiant observed that one of the jurors was asleep in the jury box; that Clarence Ylitalo, a witness on behalf of the prosecution, was at said time under cross-examination; that affiant has no knowledge of the duration of the time during which said juror was asleep; that the judge of this court, presiding at said trial, before affiant had an opportunity to call his attention to the condition of said juror, admonished the jury that all of them should remain awake, and thereupon declared a recess of said court." Without doubt the defendant was entitled to the undivided attention of every juror while evidence was being taken in the trial. But we do not think the facts appearing in the affidavit of Mr. Held are sufficient to show that the juror's condition was other than momentary, or that he failed to hear any question and answer of material importance. The juror's name is not given, nor was he asked whether he heard the testimony. He was not given an opportunity to explain, what may have been the fact, that his eyes were closed but that he was not asleep. The affidavit shows that the duration of the juror's condition was not known, and we cannot presume that it was of such length of time as to have prevented his understanding the testimony being given.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

20 Cal. App. 424

**DOUDELL v. SHOO et al. (Civ. 1,001.)**

(District Court of Appeal, Third District, California. Nov. 27, 1912. On Petition for Rehearing, Dec. 27, 1912. Rehearing Denied by Supreme Court Jan. 24, 1913.)

**1. PARTNERSHIP (§ 20\*) — CREATION — CONSTRUCTION OF AGREEMENT.**

Where D. and S. enter into a parol contract of partnership to associate themselves together for certain purposes, including the obtaining of an option in the name of S. to purchase certain real property for the business in which they are to engage, and a certain sum is paid the vendor from money borrowed by S., and they agree that the unpaid principal and interest shall be paid from the proceeds of the business and property, and, when fully paid, D. shall pay S. one-half of the sum borrowed and advanced by him, with interest, and that such real property shall be and become part of the co-partnership assets, the relation between them is that of partners within Civ. Code, § 2395, defining a partnership, and is not a mere contract of employment of D. by S.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 6, 7; Dec. Dig. § 20.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5191-5202; vol. 8, pp. 7746, 7747.]

**2. PARTNERSHIP (§ 327\*)—ACTION FOR ACCOUNTING — COMPLAINT — CONSTRUCTION — "SHOULD BE AND BECOME."**

An averment of the complaint in an action for a partnership accounting that, under the partnership agreement, real estate purchased "should be and become partnership assets," meant that it should become such upon its acquisition, and not that it should become such only when fully paid for.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 769-778; Dec. Dig. § 327.\*]

**3. PARTNERSHIP (§ 11\*) — ESSENTIALS OF AGREEMENT—LIABILITY FOR DEBTS.**

In view of Civ. Code, § 2404, providing that an agreement to divide the profits of a business implies an agreement for a corresponding division of its losses unless otherwise stipulated, a contract may be a partnership agreement, though it makes express provision merely for a division of the profits, and not of the losses.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 26; Dec. Dig. § 11.\*]

**4. PLEADING (§ 8\*) — COMPLAINT — CONCLUSION.**

A statement in a complaint in an action for a partnership accounting that the parties "entered into a parol contract of copartnership" was not objectionable as a statement of a mere legal conclusion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.\*]

**5. PARTNERSHIP (§ 1\*)—NATURE.**

An agreement whereby persons associate themselves together for the purpose of conducting and maintaining a certain business is a contract of partnership within Civ. Code, § 2395, defining partnerships.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 1.\*]

**6. EVIDENCE (§ 471\*)—ADMISSIBILITY—CONCLUSIONS.**

Witnesses must state the very facts from which the facts pleaded are drawn, and not mere conclusions from such facts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\* Witnesses, Cent. Dig. §§ 833-836, 988.]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**7. PARTNERSHIP (§ 327\*)—ACTION FOR ACCOUNTING—COMPLAINT.**

A complaint in an action for a partnership accounting, which alleged that real property, stock in trade, fixtures, and paraphernalia used in the partnership business were to be paid for out of the profits of the business and rents from the real property, and that certain payments on the principal of the purchase price and interest had been so made, sufficiently alleged that plaintiff was to have an interest in the property.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 769-778; Dec. Dig. § 327.\*]

**8. PARTNERSHIP (§ 3\*)—NATURE.**

To constitute a partnership, it was not necessary that there be a joint ownership of the property used in carrying on the business.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 13, 14; Dec. Dig. § 3.\*]

**9. FRAUDS, STATUTE OF (§ 129\*)—CREATION OF PARTNERSHIP—DURATION.**

A partnership formed under a partly executed oral agreement that it shall continue for not less than three years exists until dissolved, notwithstanding the statute of frauds; Civ. Code, § 1624, subd. 1, making void an oral agreement not to be performed within a year.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287-292, 303, 306-308, 311, 314, 318-320, 322, 325, 326; Dec. Dig. § 129.\*]

**10. FRAUDS, STATUTE OF (§ 56\*)—PARTNERSHIP—PURCHASE OF REAL ESTATE.**

A partnership formed under an oral agreement to carry on a certain business was not invalid under Civ. Code, § 1624, making void an oral agreement for the sale of real property, though it provided for the purchase of certain real property to be used in the partnership business.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83-89, 136-138; Dec. Dig. § 56.\*]

**11. PARTNERSHIP (§ 322\*)—ACTION FOR ACCOUNTING — TRANSFER OF PARTNERSHIP PROPERTY.**

A person to whom it was alleged by supplemental complaint that certain real property belonging to a partnership had been conveyed by the defendant partner after the filing of the original complaint was properly joined as defendant in an action for a partnership accounting.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 746-752; Dec. Dig. § 322.\*]

**12. ACTION (§ 38\*) — MISJOINDER — PARTNERSHIP ACCOUNTING—RELIEF SOUGHT.**

Where the main relief sought was the establishment of a partnership and an accounting, a prayer for an injunction and the appointment of a receiver in aid of the main relief did not cause a misjoinder of causes of action.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549, 565; Dec. Dig. § 38.\*]

**13. WITNESSES (§ 275\*)—CROSS-EXAMINATION —ACTION FOR PARTNERSHIP ACCOUNTING.**

Where, in an action for a partnership accounting, the plaintiff testifies on the controverted issue whether certain real property belonged to the partnership that he paid the option money for same, the defendant should be permitted to cross-examine him on such matter.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 924, 926, 967-975; Dec. Dig. § 275.\*]

**14. WITNESSES (§ 388\*)—IMPEACHMENT—LAYING FOUNDATION.**

Under the express provisions of Code Civ. Proc. § 2052, it could not be shown on cross-examination of a witness for impeachment purposes that he made statements in his testimony at a former trial at variance with his present

testimony until the former statements had been related to him with the circumstances and he had been asked whether he made same, or, if such statements were in writing, until they had been shown to him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1223-1242, 1246; Dec. Dig. § 388.\*]

**15. APPEAL AND ERROR (§ 220\*)—OBJECTION BELOW—ADOPTION OF REFEREE'S REPORT.**

Defendants' objection to the adoption of a referee's report because they had no notice of the times and places at which testimony before the referee was to be taken could not be reviewed where they had ample notice of the filing of the referee's report, and did not make such objection before the report was approved and adopted by the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1325-1332; Dec. Dig. § 220.\*]

**16. REFERENCE (§ 55\*)—TAKING OF TESTIMONY—NOTICE.**

Where defendants were in court when a referee was appointed and directed, and thus had actual notice that he must take certain testimony, notice to them of the time and place at which such testimony would be taken was not essential, when, by the exercise of a little diligence, they could have ascertained such time and place.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 83; Dec. Dig. § 55.\*]

**17. APPEAL AND ERROR (§ 1011\*)—CONFLICTING EVIDENCE.**

The decision of the trial court upon the weight and preponderance of conflicting evidence will not be disturbed on review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

**On Petition for Rehearing.****18. WITNESSES (§ 245\*)—CROSS-EXAMINATION —REPETITION OF QUESTION.**

Where a question was asked and answered in a manner which indicated that no different answer could probably be given to the same question, it was not error to sustain an objection to a repetition of the question.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 827, 828; Dec. Dig. § 245.\*]

**19. APPEAL AND ERROR (§ 1058\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.**

In an action for a partnership accounting, the exclusion of defendant's testimony as to the total amount paid to plaintiff for his services, if error, was harmless, where such total could be easily determined by mathematical calculation from payments to which defendant was permitted to testify.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4204, 4206; Dec. Dig. § 1058.\*]

**20. WITNESSES (§ 236\*)—EXAMINATION—QUESTION.**

Where the defendant testified that some things testified to by plaintiff occurred and some did not, his counsel should not have asked him, "What part did and what part didn't?" but should have called defendant's attention separately to, and asked him as to the correctness of, each of the plaintiff's incorrect statements.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 817-826; Dec. Dig. § 236.\*]

**21. REFERENCE (§ 61\*)—HEARING—FAILURE OF PARTY TO ATTEND.**

Where the failure of defendant or his attorneys in an action for a partnership accounting to attend the hearing before the referee was



due to their own negligence, they could not complain that the hearing was held in their absence.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 93, 101; Dec. Dig. § 61.\*]

**22. PARTNERSHIP (§ 342\*)—ACTION FOR ACCOUNTING—MATERIAL ISSUES—DURATION OF PARTNERSHIP.**

Where, in an action for a partnership accounting, the principal issue was whether there was a copartnership agreement, and, if there was, whether the partners had entered upon the execution of its terms, the question of the duration of the partnership was immaterial; and hence it was immaterial whether a finding by the court thereon was within the issues.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 810, 812; Dec. Dig. § 342.\*]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by John Doudell against John J. Shoo and others. From a judgment for plaintiff and denial of new trial, defendants appeal. Affirmed and petition for rehearing denied.

Royle A. Carter, of Fresno, Carl F. Wood, of Oakland, and Frank Kauke, of Fresno, for appellants. C. K. Bonestell, of Fresno, for respondent.

HART, J. This action was brought for an accounting of the partnership property and business of the plaintiff and the defendant John J. Shoo.

The complaint alleges that in the month of July, 1909, the plaintiff and the defendant John J. Shoo entered into a parol contract of copartnership, "whereby they agreed to associate themselves together for the purpose of conducting and maintaining a billiard and pool hall and saloon and cigar business in the city of Coalinga, county of Fresno, state of California, and dividing the profits thereof equally between them"; that by the terms of said contract the plaintiff was to have the sole and entire management of said business; that, at the time that said contract was entered into, it was further agreed by and between said parties that they would obtain an option to purchase, in the name of the defendant John J. Shoo, four certain lots, with the improvements thereon, situated in said city of Coalinga; that the improvements on said lots consisted of buildings suitable to the purposes of the business which, as before indicated, they had agreed to engage in; that in pursuance of said agreement the plaintiff and defendant John J. Shoo on the 21st day of July, 1909, obtained an option in writing and in the name of said John J. Shoo from the owners of said real property to purchase the same for the total sum of \$65,000, on the following terms: Twenty thousand dollars to be paid on the 1st day of August, 1909, and \$15,000 on the 1st day of every succeeding August until the full purchase price was paid, together with interest at the rate of 6 per cent. per annum on the deferred payments; that neither plain-

tiff nor John J. Shoo had ready money with which to make the first payment as aforesaid, and it was, therefore, agreed between them that said Shoo should borrow the sum requisite to make such payment; that the balance remaining unpaid on the purchase price should be paid as the installments thereof and interest became due out of the profits of the copartnership business and the rents to be derived from said property; that, when the entire purchase price should have been so paid, the plaintiff should pay to said Shoo one-half of the said sum of \$20,000 borrowed by him for the purpose of making the first payment on the purchase price and one-half of the interest which said Shoo might have paid on said sum of \$20,000; that said real property "should be and become part of the copartnership assets."

The complaint then proceeds to allege that all the terms of the said agreement were carried out as above averred, and that on the 1st day of August, 1909, the "plaintiff and said defendant, as partners, entered into and took possession of said premises and proceeded to conduct, and ever since have conducted therein as partners, a saloon and cigar business in conjunction with pool and billiard tables, and have ever since let out other portions of said premises and received rent therefor; that plaintiff has from said 1st day of August continuously up to the time he was expelled from participation in the affairs of said copartnership, as herein-after set forth, had the sole and entire charge of said business; that on the 8th day of February, 1910, said defendant Shoo against the will of plaintiff forcibly excluded him from said premises and from any participation in any of the affairs of said copartnership, and has ever since kept him excluded from all thereof, and has ever since refused, and still refuses, to permit plaintiff to participate in any thereof, or to account to him for anything belonging to said copartnership; that said defendant has ever since claimed, and now claims, to be the sole owner of everything belonging to said copartnership, whether real or personal property." The complaint (supplemental) further avers that Shoo, after the commencement of this action, caused to be executed and delivered to him by the vendors thereof a deed to all the real property purchased as aforesaid as copartnership property, and that on the same day such deed was so executed and delivered (February 28, 1910) said Shoo and the defendant, Josephine J. Shoo, his wife, executed and delivered a deed to said property to the defendant Herrick; that said copartnership has made large profits and rents out of the business conducted and the property owned by it, amounting to the sum of \$25,000, which has been expended in the extinguishment of the debts of the copartnership; that the defendant has received and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

retained for his own use from the profits of said business the sum of \$4,000, while the plaintiff has likewise received and retained for his own use the sum of \$900 only; that at the time of the commencement of this action there was on deposit in two banks in Coalinga in the name of the defendant Shoo a sum exceeding \$3,000, which belongs to said partnership.

It is then alleged that prior to the commencement of this action the defendant John J. Shoo conveyed and assigned to the defendant Josephine J. Shoo all of his property "for the purpose of evading pecuniary responsibility for any of the acts hereinabove set forth." Ancillary to the principal relief sought for as above stated, the prayer is for a decree enjoining the defendants, their agents, etc., from interfering with the plaintiff in participating in the management of said business and the partnership property, etc., and for the appointment of a receiver, pendente lite, to take possession of all the partnership property and business, etc. Each of the defendants filed demurrers, both general and special, to the complaint. Among the grounds specially urged against the complaint are those of misjoinder of parties defendant and misjoinder of causes of action and that it is ambiguous and uncertain. The demurrers having been overruled, each of the defendants answered the complaint, specifically denying the averments thereof, and charging, as do the special demurrers, a misjoinder of parties defendant, misjoinder of causes of action and that the averments of the complaint are ambiguous and uncertain.

The court found that a copartnership agreement was entered into by and between the plaintiff and the defendant John J. Shoo at the time and for the purposes set out in the complaint; that, in pursuance of said agreement, they, as equal partners, entered into and took possession of the premises described in the complaint, and proceeded to conduct and maintain thereon as equal partners the saloon and cigar business and billiard hall, and have ever since conducted and maintained thereon such business and billiard hall; that in the name of the said defendant Shoo they acquired, as equal partners, and for partnership uses, the real and personal property described in the complaint; that at the time mentioned in the complaint the defendant John J. Shoo, "against the will of plaintiff, wholly excluded him from said partnership property and business and from any participation in any of the affairs of said partnership, and has ever since kept him wholly excluded therefrom, and has ever since refused to account to him for or concerning anything relative to said partnership"; that profits from said business and rents from portions of the real property purchased by them as described have been derived and received, and that a portion of the profits and rents so derived and received

have been expended in remodeling and repairing buildings standing on said real property and in making payments on the interest on the unpaid purchase price and on the principal thereof; that the plaintiff and said Shoo have each received and retained a share of the profits of said business, "but unequal in amount"; that there are debts outstanding against said partnership, and "that since the exclusion of plaintiff from said business the defendant John J. Shoo has had the management and control of the partnership business and property, and has received and paid out sums of money in connection therewith."

As to the interest of the defendant Herrick in this controversy, the court finds that money had been loaned by him and applied on account of the purchase price of the partnership real property "and the legal title to said property has been transferred to said Herrick as security for the payment of said loan."

The court as a conclusion of law from said findings determines "that an accounting is necessary between plaintiff and the defendant John J. Shoo covering all of the property and business found to exist between them from the commencement thereof."

The decree, which is characterized in the transcript as an "Interlocutory Decree," followed the findings and the conclusion of law, but required and provided for the appointment of and named a referee, to whom was committed the power and the duty of taking a full accounting of all of the copartnership dealings and transactions between the plaintiff and the said defendant John J. Shoo, as described in the complaint, and postponed the making of further findings and of a final decree "until the coming in and settlement of the referee's report." After the filing of the report of the referee, the court adopted the same, and made it a part of the findings theretofore made, and upon the findings so made, and the conclusions of law deduced therefrom, made and entered its final decree adjudging the plaintiff and the defendant John J. Shoo to be partners, as set forth in the complaint, and adjusting the matter of the accounting of their partnership business and property in conformity with the findings and report of the referee.

The defendant appealed from the "interlocutory decree" and from an order denying a motion for a new trial after the entry of said decree. After the rendition and entry of the final decree, the defendants moved for a new trial, which motion was denied, and they then noticed and took an appeal from the order denying said motion.

The defendants contend that the complaint does not state facts sufficient to constitute a cause of action for the following reasons, viz.: (1) That it is not therein or thereby



shown that the plaintiff and the defendant John J. Shoo entered into or formed a partnership, and in this connection it is contended that the mere allegation that they "entered into a parol contract" involves nothing more than the statement of a legal conclusion, and that the facts pleaded disclose a contract of employment only whereby the plaintiff was to render the services alleged in consideration of one-half of the profits of the business referred to in the complaint. (2) That the contract pleaded in the complaint is void under the statute of frauds, in that it involves "an agreement that by its terms is not to be performed within a year from the making thereof." Section 1624, Civ. Code; section 1973, Code Civ. Proc. (3) That as to the real property which it is alleged the parties agreed to purchase as partnership property the contract is void under the terms of section 1624 of the Civil Code, *supra*.

In addition to the general objections thus urged against the complaint, the points, arising under the special demurrer, that there is a misjoinder of parties defendant, a misjoinder of causes of action, and that the complaint is ambiguous and uncertain are also pressed by the defendant John J. Shoo, and discussed in the briefs.

The further complaint is made of certain rulings of the court in the allowance and rejection of certain testimony.

[1] 1. A partnership is defined by section 2395 of our Civil Code as follows: "The association of two or more persons for the purpose of carrying on business together, and dividing the profits between them." The complaint in our opinion clearly discloses a contract by which the plaintiff and John J. Shoo associated themselves together for the purpose of carrying on and conducting the business therein mentioned as partners. The complaint, as has already been shown, reads: "That the plaintiff and said John J. Shoo entered into a parol contract of copartnership whereby they agreed to *associate themselves together* for the purpose," etc. Again, in the second paragraph, it is alleged that said contract also involved a covenant whereby they agreed to obtain an option, in the name of the defendant Shoo to purchase in the city of Coalinga certain real property, on which were located buildings appropriate "for the business which plaintiff and defendant had agreed, as hereinabove stated, to carry on." In the same paragraph it is averred that, the sum of \$20,000 having been paid to the vendor upon the acceptance of the option from money borrowed by the said defendant, it was agreed that the unpaid principal and interest should be paid from the profits and the rents derived from said business and said property, and that, when the same was fully paid, then the plaintiff should pay to the defendant one-half of the said \$20,000 used in making the first payment

as aforesaid and one-half of any interest which said defendant might have paid thereon, and that said real property "should be and become part of the copartnership assets." These averments obviously go much further than the statement of the mere conclusion that the parties formed themselves into a copartnership. They show, as we have declared, that they agreed to and did associate themselves together as partners; that they jointly purchased certain real and personal property for carrying on the business which they had associated themselves together as partners to carry on; that, as partners, they jointly entered into and took possession of said property; that they agreed to share equally the profits of said business.

[2] But counsel appear to assume that the averment that the real property "should be and become partnership assets" means that such property should not become such until it was fully paid for. We cannot agree with that construction. Interpreted by the light of the complaint as a whole, that averment clearly and unmistakably means that the real property upon its acquisition by the plaintiff and Shoo under the circumstances indicated by the complaint should then "be and become partnership assets." In this view of the complaint, and particularly of the averment just referred to, there can be no difficulty in distinguishing from the present case the cases cited by appellants, and in which it was held that the complaints disclosed by their averments not a contract of copartnership (the theory upon which they were drafted), but a mere contract of employment, whereby the plaintiff was employed by the defendant to perform services in consideration of an equal share with his employer in the profits of the business upon which such services were to be bestowed. We will examine some of the cases referred to. In *Stone v. Bancroft*, 112 Cal. 652, 44 Pac. 1069, the plaintiff was employed at a monthly salary to manage the business of the defendant, and, in addition thereto, the defendant agreed to give the plaintiff a one-tenth interest in said business upon the condition that the plaintiff would devote his whole time and best energies, for a period of not less than 10 years from the date of the agreement, to the carrying on of said business. The plaintiff quit his connection with and management of the business before the expiration of the time during which he was to manage the same as a condition precedent to the vesting in him of the one-tenth interest therein. The Supreme Court very properly held that the plaintiff never acquired a vested interest in the business because of the failure of the contingency upon which his title was to vest.

In *Coward v. Clanton*, 122 Cal. 451, 55 Pac. 147, the complaint alleged that the defendant agreed with the plaintiff to purchase with his own funds real estate, and that the plain-

tiff, for selling the same in subdivided tracts, should receive one-half the profits of all sales so made. It was held, as very clearly the complaint revealed, that the agreement pleaded was one whereby the defendant employed the plaintiff to perform the stipulated services for certain specified compensation. *Lyden v. Spohn-Patrick Co.*, 155 Cal. 177, 100 Pac. 236, was where the plaintiff and the defendant entered into a contract whereby the former hired his services to the latter in carrying on and conducting for the defendant the canned salmon business, and for which services it was agreed that the plaintiff should receive a salary of \$200 per month, and, additionally, one-half the net profits of said business. The company had the right to reject sales and to determine the matter of the credit of parties to whom sales were made. The agreement was to continue for six months from its date, "and was to continue thereafter, in consecutive periods of six months each, for three years from its date, if at the end of the first six months and each successive six months, respectively, there should be no net loss to the company." It was further agreed that, if either party failed to carry out any portion of the agreement, the same should for that reason become null and void at the option of either party. The Supreme Court held, as it could not justly otherwise be held under the facts as stated, that the contract did not make the plaintiff a partner in the business, and said: "He was to have no title to any of the property, and was not liable for any of the debts. His entire interest in the business consisted in his right to receive one-half of the profits as his compensation." In the case at bar, as will be noted, there is no language in the agreement as pleaded, as we construe and understand it, which provides, as do the agreements involved in two of the cases above referred to, any condition or contingency upon the performance or happening of which only the interest of the plaintiff as a partner in the business and property mentioned in the complaint was to vest. The allegation is not, as before declared, that the plaintiff's title was not to vest until some future time or only in the event that the purchase price was in fact fully paid and the defendant Shoo repaid by the plaintiff one-half of the \$20,000 advanced by said Shoo as the first payment. The only reasonable interpretation of the language of the complaint is, as we have shown, that the parties agreed to jointly purchase the property for partnership purposes; that they did so and jointly entered into and took possession of said property; that they were to jointly carry on the business, to carry on which they had associated themselves together, and to jointly enjoy in equal shares the profits thereof.

[3] But it is insisted that the complaint fails to disclose a partnership because it is

not therein made to appear that the plaintiff agreed to be liable for the debts contracted in carrying on the business. This contention is not sound. Manifestly, as counsel for the plaintiff suggests, liability for debts can mean nothing else but liability for losses, and, where a contract of copartnership contains a stipulation or agreement for the division of profits and none as to the division of losses, the law will imply a joint responsibility for the latter by the partners. Section 2404 of the Civil Code provides that "an agreement to divide the profits of a business implies an agreement for a corresponding division of its losses, unless it is otherwise expressly stipulated." In *Coward v. Clanton*, supra, it is said that it is "not true that our Code makes profit-sharing a test of partnership," and in the same case it is said: "It would not lack much of a good definition of a partnership if the clause (in section 2395, Civ. Code, supra) in regard to the division of profits were omitted. It would read that 'a partnership is the association of two or more persons for the purpose of carrying on business together.'" Thus it will be observed that the effect of an agreement whereby two or more parties associate themselves together for the purpose of carrying on business, without any reference or covenant therein as to the division of profits, would be to establish them as partners, unless there was some other express stipulation therein that such was not intended to be their legal relation. But where, as here, the agreement goes further, and stipulates that there shall be a division of profits without a stipulation of any character as to the division of losses, the latter liability is implied from the provision for the division of profits. See *Quinn v. Quinn*, 81 Cal. 15, 22 Pac. 264; *Whitley v. Bradley*, 13 Cal. App. 721, 110 Pac. 596; *Brooke v. Tucker*, 149 Ala. 96, 43 South. 141.

[4] Nor is the statement in the complaint that the parties "entered into a parol contract of copartnership" to be regarded, as is the contention, as a mere legal conclusion. Of course, it is true, as may likewise be said of many averments of ultimate facts, that the mere statement alone that two or more persons have formed themselves into a copartnership may be said to involve the statement of a conclusion of law. An averment in an action to recover real or personal property that the plaintiff is the owner thereof is no less the statement of a legal conclusion than the one criticised here, yet such averment of ownership has always been held to involve the statement of an issuable fact.

[5] However, it will be observed that the averment as to the contract of partnership in this case is followed by the allegation, "whereby they agreed to associate themselves together for the purpose of conducting and maintaining" the business therein named, and this language itself is a sufficient statement of a partnership under our Code def-



inition thereof, as construed in *Coward v. Clanton*, supra.

There is nothing said in the case of *Hammond v. Borgwardt*, 126 Cal. 613, 59 Pac. 121, in conflict with the construction of the complaint in the respect here considered. In that case a witness at the trial upon an issue of partnership made the statement in his testimony that a certain party was his "partner." This statement, the Supreme Court correctly held, constituted, "at best, a mere legal conclusion." Of course, there can be no proposition less subject to dispute than that it is not for the witnesses but for the court or jury to say from the facts whether a partnership between two or more persons exists, and the former are not permitted to give their opinions upon that proposition, but must simply state facts from which the final arbiter thereof must determine the ultimate truth of such controversy. In pleading, where ultimate and not probative facts are dealt with, much more liberality must of necessity be indulged as to the statement of the facts of the transaction on which the action is founded than can be accorded to the witnesses who must give evidentiary facts only. As before suggested, in many cases it would be impossible to state a cause of action in a pleading without embracing a statement which, in a strict view, would involve a legal conclusion. For instance, in the case at bar, strictly speaking, the statement that the parties "associated themselves together" for the purpose of jointly carrying on a business might be regarded as the statement of a conclusion from certain acts and facts that had constituted them partners. But it would be difficult, indeed, to perceive how any other statement of the fact of partnership could be made in the complaint without averring probative facts, contrary to the recognized rules of good pleading.

[6] The witnesses are required to state to the court or jury the very facts from which the facts pleaded are drawn, and obviously, as stated, it is beyond their province as such merely to state their conclusion from the facts, which would, of course, throw no more light on the transaction on which the action is founded than do the pleadings themselves.

[7] It is further objected that the complaint is not good for want of facts because it does not appear therefrom that the plaintiff was to have title to any of the property with which the business was to be conducted. There is no merit in this objection. The complaint, as has been shown, alleges that the improvements put upon the real property and the stock in trade and all fixtures and paraphernalia used in connection with the business they embarked in as partners were paid out of the profits of said business; that the real property they purchased, in pursuance of an option they previously secured, was to be paid out of the

profits of said business and the rents derived from certain portions of said real property; that out of such profits and rents payments had been made on the principal of the purchase price and the interest accruing thereon. We are unable to perceive how the plaintiff's title to the property referred to could be made plainer.

[8] But while the question whether the title to the real property was to vest in both the plaintiff and the defendant, and not in the latter alone, is important here because of the prayer for an accounting of the partnership assets, the fact of the joint ownership of the property employed in carrying on the business of a copartnership need not necessarily be shown in order to establish the fact that a partnership exists. "To constitute a partnership, it is not necessary that there should be property forming its capital, jointly owned by the partners. The property employed in the partnership business may be separate property of the partners; but, if they share in the profits and losses arising from its use, a partnership exists." *Brooke v. Tucker*, 147 Ala. 96, 43 South. 141; *Whitley v. Bradley*, 13 Cal. App. 721, 110 Pac. 596.

[9] 2. We see no force in the point that the complaint discloses that the contract pleaded, as to the time within which it is to be performed, is void under the statute of frauds. Subdivision 1, § 1624, Civ. Code, supra. This contention is inspired by the following averment in the complaint as it was originally filed: "That said copartnership shall continue for a period of not less than three (3) years," etc. But this allegation and certain other portions of the complaint were stricken out by the court on motion, and, therefore, so far as the complaint is concerned, the point that the contract is void under our statute of frauds is not well taken. But it has been doubted whether the statute has any application whatever to oral partnership agreements. "Certainly not," says the Court of Appeals of New York, in *Sanger v. French*, 157 N. Y. 213, 51 N. E. 979, "when the agreement has been wholly or partially executed. But, if it has, the only effect it could have upon the agreement found by the referee was to convert it into a partnership at will. Such a partnership exists until something is done to dissolve it"—citing *Lindl. Partn.* 571. See, also, *Shropshire v. Adams*, 40 Tex. Civ. App. 339, 89 S. W. 448; *Railway Co. v. Wood*, 88 Tex. 191, 30 S. W. 859, 53 Am. St. Rep. 766. The agreement here was partially executed—that is, the parties after the formation of the partnership entered into the active prosecution of the partnership business immediately upon securing the property necessary to do so, and continued the partnership until the plaintiff was forcibly excluded from any participation therein by the defendant John J. Shoo, and, even if the allegation as to the time during which the alleged partnership was to

exist had not been stricken out, the objection here made to the agreement as thus pleaded would still have been unavailable, since the partnership would necessarily exist until dissolved. This brings us to the consideration of a cognate question involved in the third ground upon which it is argued that the complaint, in so far as it attempts to disclose that the real property therein described was to be and become a part of the partnership assets, is deficient in the statement of facts.

[10] 3. The contention upon said proposition is that that part of the agreement which relates to said real property is void under our statute of frauds—that is, as before stated, under the terms of section 1624 of the Civil Code. But this precise point has been decided by the Supreme Court adversely to the contention of appellants. In *Bates v. Babcock*, 95 Cal. 479, 484, 30 Pac. 605, 606 (16 L. R. A. 745, 29 Am. St. Rep. 133), it is said that while the question whether such a partnership (that is, to deal in real property) can be formed, except by an agreement in writing, has been the subject of conflicting decisions, yet “the great weight of authority is in support of the rule that such a partnership may be formed in the same mode as any other, and that its existence may be established by the same character of evidence.” In support of this view, the court cited and quoted from a number of English and American cases, among the latter that of *Coward v. Clanton*, 79 Cal. 23, 21 Pac. 359, where it was held “that an agreement for the purchase of a tract of land, and its subdivision and sale in parcels, and for a division of the profits resulting therefrom, in which one party was to furnish the capital and take a conveyance of the land, and the other to furnish the skill and labor in making the sales, could not be avoided after the transaction had been completed, merely because it was not in writing.” See *Pico v. Cuyas*, 47 Cal. 174; *Koyer v. Willmon*, 150 Cal. 785, 787, 90 Pac. 135.

Similar views are to be found in cases from other jurisdictions. In *Dale v. Hamilton*, 5 Hare, 369, it is held that “a partnership agreement between A. and B. that they shall be jointly interested in a speculation for buying, improving for sale and selling lands may be proved without being evidenced by any writing, signed by or by the authority of the party to be charged therewith within the statute of frauds; and such an agreement being proved, A. or B. may establish his interest in land, the subject of the partnership, without such interest being evidenced by such writing.” Approving the doctrine as thus laid down, the court, in *Chester v. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550, clinches the proposition in the following fashion: “\* \* \* But suppose two persons, by parol agreement, enter into a

partnership to speculate in lands, how do they come in conflict with the statute of frauds? No estate or interest in land has been granted, assigned or declared. *When the agreement is made no lands are owned by the firm, and neither party attempts to convey or assign any to the other.* The contract is a valid one, and in pursuance of this agreement they go on and buy, improve, and sell lands. While they are doing this, do they not act as partners and bear a partnership relation to each other? Within the meaning of the statute in such case neither conveys or assigns any land to the other, and hence there is no conflict with the statute. The statute is not so broad as to prevent proof by parol of an interest in the lands. It is simply aimed at the creation or conveyance of an estate in lands without a writing. \* \* \* This is not a controversy about the title to any of the lands taken or owned by the partners, but it simply relates to the conduct of the defendants while they were acting as partners; and in such a case the statute of frauds certainly can present no obstacle to relief.” In the present case, the object of the agreement of copartnership was not only to carry on the business referred to in the complaint, but also to purchase the real property therein described to be used for the purposes of the partnership. As in the cases above cited neither of the parties conveyed or assigned to the other any of the real estate, but they merely carried out, after becoming partners, one of the objects of the partnership agreement by purchasing the goods and property referred to in the complaint. We can discern no distinction between the transaction by the partners as to the real property and the transaction by said partners involving the purchase of the goods and wares which they agreed to engage in selling.

[11] 4. The next point, arising under the special demurrer, is that there is a misjoinder of parties defendant in the complaint. The complaint, as to the defendant Josephine J. Shoo, was dismissed by the court. As to the defendant Herrick, the complaint alleges that during the pendency of this action, and prior to the filing of the amended and supplemental complaint, the defendant John J. Shoo conveyed to said Herrick by deed the real property involved in this controversy. Manifestly, under such circumstances, there could be no final adjudication with respect to said real property without making Herrick, the grantee thereof, a party to the action. *Cuyamaca Granite Co. v. Pac. Pav. Co.*, 95 Cal. 252, 30 Pac. 525; 30 Cyc. p. 573. Moreover, as this is a proceeding in equity, it was proper “to join as defendants all who have an interest in the subject-matter of the litigation.” *County of Tehama v. Sisson*, 152 Cal. 167, 179, 92 Pac. 64; *Robinson v. Gleason*, 53 Cal. 38; *Stewart v. Smith*, 6 Cal. App. 157, 91 Pac. 667.



[12] 5. There is no misjoinder of causes of action. The principal relief asked for here is the establishment of the existence of a partnership between the plaintiff and the defendant John J. Shoo, and for an accounting of the partnership assets and business. The prayer for an injunction and the appointment of a receiver is only in aid of the main relief sought. The subject-matter of the action relates to but one transaction, and it is a well-settled practice in courts of equity, in order to avoid a multiplicity of suits, to sue in one and the same action for every species of relief which may be necessary to conserve all the rights of the plaintiff in the subject-matter of the action. *Whitehead v. Street*, 126 Cal. 70, 58 Pac. 376; *Story's Eq. Pleading*, §§ 271, 272a; *Wilson v. Castro*, 31 Cal. 429; *Stewart v. Smith*, 6 Cal. App. 152, 157, 91 Pac. 667; *Lanigan v. Neely*, 4 Cal. App. 760, 89 Pac. 441.

6. The objection that the complaint is ambiguous and uncertain is untenable. This criticism proceeds principally from the fact that in filing an amended and a supplemental complaint counsel for the plaintiff incorporated the two pleadings into one, and counsel for the defendants declare that the allegations of the amended complaint and those of the supplemental complaint are so "jumbled together" that it cannot be told therefrom "how much is intended as supplemental and how much as the amended complaint." There are other objections to the complaint under this head. But it is deemed sufficient to say generally, in reply to the objection of ambiguity and uncertainty, that the complaint is very clear with respect to the precise purposes of the action or the relief thereby sought, and that, if it be important for any reason that such distinction should be marked or kept in view, it is not at all difficult to apprehend and distinguish from those of the amended complaint those allegations of fact which, by reason of their having obviously arisen after the commencement of the action, must have necessarily been brought in or made issues by way of a supplemental complaint. The amendment of the original complaint appears to have consisted in striking therefrom certain of its averments, and these are designated in the order striking them out by reference to the words at which the elimination was to begin and end, together with the numbers of the lines and pages of the complaint in and on which those words appeared. No difficulty could, therefore, have been experienced by counsel in apprehending what portions of the complaint were so eliminated and thus the particulars in which the pleading was amended. By the aid of the amended complaint as reproduced in respondent's brief, the verity of which is not controverted by the defendants, we have had no trouble in finding the precise averments which were stricken out, and therefore no difficulty in considering that pleading as amended.

[13, 14] 7. The plaintiff testified that upon securing the option to purchase the real property he paid the owner of said property the sum of \$100 as a consideration for the option, said sum, however, to be credited on the purchase price in case of a sale. Counsel for the defendant attempted to show on his cross-examination that the plaintiff loaned said \$100 to Shoo, and asked him this question: "Well, if you testified at the former trial that you loaned him the money, were you correct at that time, or were you not?" The witness, evidently misapprehending the purport of the question, replied: "I don't remember whether I was corrected." A question of like import was again put to the witness, when the court interrupted, saying: "I think that is a matter of inference. I don't think it is worth while to spend any time on it. Proceed with your question." Counsel then asked: "Can you say whether you did make that statement or not?" The court again interrupted counsel as follows: "Mr. Carter, I have ruled on that. Take an exception, if you want to; but go on."

We think the proposed cross-examination involved a legitimate subject of inquiry. The witness had given testimony upon that subject which warranted no other inference than that he, as a partner, had paid the owner of the property the \$100 as a consideration for the option awarded to him and Shoo to purchase the real property, and it would have been strictly proper for the defendant to have shown, if he could, as tending in some measure to negative the claim of partnership in the transaction by the plaintiff, that it was not a payment by the latter on the option or the purchase price of the land, but merely a loan of that sum to Shoo. Therefore the defendant was entitled by the cross-examination of the plaintiff either to secure from the latter an admission that he had previously declared that he had merely loaned the defendant the \$100, or, in case the plaintiff denied having made such statement, to lay the foundation for his impeachment upon that matter. But it cannot be held that the action of the court in disallowing the cross-examination was, under the circumstances, prejudicial, since the questions called for impeaching testimony and for that purpose were not, as is plainly manifest, in the proper form. Where it is sought to impeach a witness by showing that he had previously made statements at variance in material respects with his "present testimony," such "statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements," or, "if the statements be in writing, they must be shown to the witness before any question is put to him concerning them." Section 2052, Code Civ. Proc. If in this case the testimony of the witness at the former trial, where, it was claimed, he stated that he had simply loaned the \$100 to Shoo, was taken down

and transcribed by a stenographer, he was entitled to have that portion of such testimony which related to that subject shown to him before he could be required to answer the questions relative thereto, or, if the testimony was not so taken and transcribed, then counsel was not entitled to replies to his questions until he related to the witness the circumstances under which the alleged inconsistent statement was made. Counsel pursued neither course, and therefore, as stated, his exceptions to the rulings of the court disallowing answers to the questions referred to can be of no avail to the defendant here.

There are some other rulings on the evidence of which complaint is made. As to these rulings, the objection is that the court thus improperly curtailed the cross-examination of the plaintiff. We perceive no necessity for a special review of the rulings here referred to. It will be sufficient to say concerning them that the testimony sought to be elicited by some of the questions so propounded had been previously brought out, while others called for the opinions or conclusions of the witness and for testimony as to matters not within the issues.

[15] 8. There is no merit in the claim that the court committed prejudicial error in adopting the report of the referee, appointed by it to take testimony in the matter of the accounting of the partnership assets, &c. The ground of the complaint on this score is that the referee omitted to notify the defendants or their counsel of the times and places at which such testimony was to be taken. One of the attorneys for the defendants filed an affidavit in which he deposed that no such notice was given, but this was rebutted by the statement of the referee in his report that he did so notify the parties on both sides. It, moreover, appears that notwithstanding that counsel for the defendants were notified on the 6th of September, 1910, that on the 3d day of the same month the referee had filed his report in the office of the county clerk, and that the court did not render its final decision, embracing the report of the referee, until the 15th day of said month, no objection was interposed or filed by the defendants to said report. It is very clear that the time for the defendants to have raised any objection to the report of the referee was before the court approved and adopted the findings of that officer into its own findings. We doubt not that, if it had been shown to the court that neither the defendants nor their counsel were served with notice of the time and place of the hearings before the referee, and no deliberate or unreasonable negligence on their part had been made to appear concerning such hearings, they would have been allowed an opportunity to have corrected such errors, if any, as might have found their way into the findings of the referee. But, as stated, counsel made no objection to said report, and we

must therefore assume that no ground existed for objection thereto.

[16] But whether it be true or not, in point of fact, that counsel received no notice of the times and places at which testimony was to be taken by the referee, it cannot be contended that they did not know of the appointment of the referee for the purpose of investigating the accounts and assets of the partnership. Indeed, they were in court when the order appointing the referee was made and the directions as to his duties given, and thus they received actual notice that certain testimony essential to the final decision of the case would be taken at some time by such referee. We do not hold that in such case the parties should not be given notice by the referee of the time and place fixed for his hearings, although there is no special provision in our Code requiring such notice to be given, yet, under the circumstances shown here, it is clear that, if it be true that they were given no notice, counsel for the defendants had sufficient warning from their actual knowledge of the appointment of a referee for the purpose stated to put them on their guard, so that, by the exercise of a little diligence, they could have ascertained the time and place at which testimony was to be taken by the referee.

[17] 9. Counsel asseverate that the great weight or preponderance of the evidence is in favor of the defendants. We cannot examine the evidence here in detail, nor is it considered necessary to do so. It is conceived to be enough to say that the plaintiff's own testimony, which is corroborated by a number of strong circumstances to which other witnesses testified, amply supports the findings of the trial court. It is true that the testimony adduced on behalf of the defendants squarely contradicts in all material particulars the plaintiff's proofs, and would undoubtedly have sustained a decision in their favor; but the result of the wide variance between the testimony produced in support of the respective positions of the parties is only to create a substantial conflict in the evidence, and therefore, upon the question of the weight or preponderance of the evidence, we must submit to the decision of the trial court.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Petition for Rehearing.

HART, J. Counsel for defendants in their petition for a rehearing of this cause make these points: (1) That this court erroneously upheld the ruling of the trial court in refusing to allow the defendants on the cross-examination of the plaintiff to go into the question whether the latter on a previous occasion had stated that he loaned the \$100 to Shoo at the time the contract of option was made. (2) That the ruling by the trial



court sustaining the plaintiff's objection to the question asked of defendant Shoo: "Mr. Shoo, you were asked about the arrangement with Mr. Doudell, and you testified that he was to have \$100 a month. How much has been paid?"—to which ruling we did not specially refer in our original opinion, was erroneous and prejudicial. (3) That the trial court erred in its ruling (to which we did not particularly refer in the former opinion) disallowing the defendant Shoo upon being recalled and interrogated with respect to what occurred and what was said in the conversations between him and Doudell at the time of the exclusion of the latter from further participation in the partnership business to answer the question: "What part did, and what didn't?" (4) That this court erred in sustaining the action of the court below in adopting the report or the findings of the referee, it having been made to appear, so it is claimed, that neither the defendant nor their counsel received notice of the times and places of the hearings conducted by that officer of the court. (5) That "the part of the judgment of the trial court which adjudges that said partnership should exist, at least until said real property should have been paid for, should be reversed, or at least directed to be modified, for the reason that there is no allegation in the amended and supplemental complaint upon which such a finding could be predicated, and the same is wholly outside, and beyond, and not responsive to, any issue made by the pleadings."

1. It may be conceded that the cases cited by counsel appear to sustain the defendants' contention that a witness may properly be required to answer questions tending to show that he had made other statements inconsistent with "his present testimony" without first calling his attention to the "circumstances of times, places, and persons present" under which such alleged statements were made. Section 2052 of the Code of Civil Procedure, it is true, merely provides that, before such witness can be impeached by showing that he had previously made inconsistent statements, such circumstances must first be related to him, and, while the opinion has prevailed to some extent that that rule was intended as well for the benefit of the witness as for the purpose of laying the ground for impeachment—that is to say, that it required that the witness be put in possession of all the circumstances under which he made the alleged inconsistent statement, so that, his memory being thus refreshed as fully as it could be, he could answer the question honestly and, if necessary, explain such statement—still, as counsel contend, the later expressions of the Supreme Court upon that proposition appear to coincide with their views as expressed in the petition.

[18] But we find, upon further examina-

tion of the record, that there is another answer to the criticism of counsel of the ruling under consideration, viz.: That the witness previously to the ruling complained of had answered the question as satisfactorily as he appeared to be able to. At folio 378 of the transcript, the following question was propounded to Doudell by the attorney for the defendants and the following answer returned: "Q. You testified other times that you were on the stand that you loaned him (Shoo) a hundred dollars? A. I do not remember. *I might have said I loaned it to him. I gave it to him, however.*" Thus the witness answered that it was possible that he said at the former time referred to that he loaned the money to Shoo, and we can see no reason why he should have been required to repeat an answer to the very same question subsequently propounded to him. Nothing more was done or said to refresh his memory concerning the matter about which he was interrogated when the question was asked the second time than was done or said when it was asked the first time, and it is to be assumed that he would have returned an answer similar to that given the first time the question was asked if he had been asked the same question a dozen or more times under the same circumstances. In any event, where a question is asked and answered in a manner which, as here, indicates that no different answer could probably be given to the same question, the trial court is not bound to have its time consumed by having such question uselessly repeated. In view of the uncertainty of the witness as to whether he had previously said that he had loaned the money to Shoo, we can see no reason why counsel, had they wished to pursue that course, could not have shown, by way of impeachment or rebuttal, precisely what the witness did say respecting that matter (*People v. Mar Gin Suie*, 11 Cal. App. 42, 55, 103 Pac. 951; *Ehat v. Scheidt*, 17 Cal. App. 430, 436, 120 Pac. 49; *Greenleaf on Evidence* [16th Ed.] § 462), but counsel did not appear to be disposed to thus clear up the matter. In no view of the proposition are we able to perceive anything in the action of the trial court in the matter of the ruling here complained of to justify a reversal.

[19] 2. The question: "Mr. Shoo, you were asked about the arrangements with Mr. Doudell, and you testified that he was to have \$100 a month. How much has he been paid?"—called for testimony which had previously been brought out through the defendant Shoo. At folio 838 of the transcript it will be seen that Shoo was permitted to go into a full explanation of his understanding of the arrangement between himself and the plaintiff, and among other things declared that the latter was merely an employé of Shoo, and was to receive as compensation the sum of \$100 per month and expenses. "He had at least taken a hun-

dred dollars a month out of that," continued Shoo. "We were both satisfied to leave it in that vague way, and it was left that way." Thus it clearly appears that Shoo testified, in effect, that Doudell received \$100 per month for every month he was actively connected with the business, and the aggregate amount so paid to him, which was all that the interdicted question could have revealed, was easily and readily ascertainable by arithmetical calculation. The ruling was not prejudicial, even if erroneous.

[20] 3. The third ground upon which a rehearing is asked involves the ruling of the court refusing to allow the defendant Shoo to answer the question, propounded by his attorney, "What part did, and what part didn't?" Shoo had just testified that "some of the matters that Doudell has testified to concerning himself and me occurred and some didn't," whereupon the above stated question was asked. No answer was made to the question, the court having immediately interrupted before an answer was essayed with, "No further questions," to which counsel for the defendants replied, "Well, if the court please, I don't like to leave things in that indefinite way." The court responded: "Well, I have left it that way now. I have given this case all the time I will give it. I have given it a great deal of time." While it is, of course, the duty of the trial courts, as it is that of all courts, to give to all the cases tried or heard before them all the time they require or that may be necessary to a just and proper decision of all the important questions involved therein, and that the mere fact that a court might in its judgment have given sufficient of its time to a particular case is no excuse or justification for an erroneous ruling, or for refusing to hear further testimony where it is proper in a legal aspect and is designed to illuminate one or all the disputed questions of fact, still we know of no rule of evidence which requires a trial court to allow a large amount of testimony involving, perhaps, various specific topics, to be given in response to an omnibus question such as the one above quoted and as put to the witness Shoo. Doudell had minutely related all the conversations and acts which had occurred between him and Shoo from the time of the commencement of their difficulties or from the time the differences leading to this litigation arose between them. Some of those occurrences Shoo said had occurred and others had not, and, if counsel desired to have their client specify or point out in Doudell's testimony those which had occurred and those which did not occur, then they should have questioned him particularly about the several matters to which Doudell had testified, and not have left it entirely to the witness to recall all of the latter's testimony and himself thus point out and separate the correct and the incorrect statements. In other words, counsel should

have taken up the alleged incorrect statements of Doudell separately if they related to different acts or matters, and have called the attention of Shoo thereto, and have asked him whether they were or were not correct. Besides, it will be seen, by reference to folios 1115 et seq. of the transcript, that Shoo went fully into all the matters pertaining to the differences between the parties, and at folios 1118-1120, it will be observed that he stated several times that "that is all that occurred." Under these circumstances, we cannot see how the defendants could have been damaged in the least by the court's ruling, even if we felt required to hold it to have been erroneous.

4. As to the objection that the trial court committed error by adopting the report of the referee because neither the defendants nor their counsel were notified of the times and places for conducting the hearings of that officer, it is to be said: (1) That we did not say nor intend to say in the former opinion that the failure of the defendants to object to the report of the referee before the decision was filed had the effect of depriving the defendants of the right to interpose objections to said report after the findings were filed. Of course, they had the right to object to said report as part of the findings of the court, just as they had and have the right to object to any of the other findings. But what we intended to say was that, if neither counsel nor the defendants were given notice of the hearings, they should have called the court's attention to that fact before the findings were made and filed, they having been given ample notice of the filing of the report to have done so, and that the court (although no procedure of this sort is expressly authorized), in the exercise of its discretion, and in the interest of justice, would have doubtless caused the referee to proceed de novo in the matter of his investigations so that the parties could have all been present thereat, if they so desired. As stated in the former opinion, the defendants did not elect to take that course. 2. Upon this point the record discloses this situation: That, after the findings were filed, the attorneys for the defendants made a motion to vacate the findings and the report of the referee upon the ground upon which they here urge error in the adoption by the trial court of said report. This motion was supported by affidavits. The bill of exceptions not only shows that the report of the referee was made up almost entirely from the books and papers of the firm, most of which had already been introduced in evidence, and which had been turned over to the referee by the clerk of the court, but also contains an affidavit by the attorney for the plaintiff in which it is alleged that affiant on the 8th day of June, 1910, informed Messrs. Carter & Carter, the attorneys for the defendants, that the referee was proceeding with the



taking of an account as required by the court; that frequently thereafter affiant requested Stanton L. Carter, the senior member of the firm of Carter & Carter, attorneys for the defendants, to join with affiant in assisting the referee to make up his account as speedily as possible, "and, in particular, on the 9th day of July, 1910, in open court and in the presence of the Hon. Geo. El. Church, before which this action was pending, stated to said Stanton L. Carter that said referee was engaged in making up said report, and then and there requested said Stanton L. Carter to join affiant in helping said referee to complete his report as speedily as possible, to which said Stanton L. Carter replied that he would see about it or words to that effect." It is further alleged in said affidavit that, after the exclusion of plaintiff from the business carried on by him and Shoo, one L. C. Shingle was placed in charge and possession of said business to represent Shoo, and thereafter conducted said business; "that the defendant Shoo has not been in the city of Coalinga since the 15th day of April, 1910, and has left the entire charge of said business to said L. C. Shingle, and that said Shoo has known nothing with reference to any of the matters which the referee was required by said order of June 6, 1910, to report to this court; that said Shingle alone was familiar with all the details of said business and premises from and after the 8th day of February, 1910." This affidavit further alleges that it was not necessary to take any testimony or examine any witnesses other than the plaintiff and said Shingle to enable said referee to make a report as required by the court; that, in addition to the books and papers which were delivered to the referee by the clerk of the court, said Shingle "turned over all the remaining books of account, vouchers and papers and whatever else was necessary to or proper to enable said referee to make a report in accordance with the aforesaid order of June 6, 1910"; that said books of account, vouchers, bills, papers, etc., turned over to said referee were sufficient to enable him, with the assistance of said Shingle and the plaintiff, to make a complete report required by the order of the court, and that from time to time, whenever required by the referee, both the plaintiff and said Shingle appeared before him for the purpose of making such explanations as were required by him with respect to the matters which he was to report to the court; "that the character of the report did not necessitate such a trial as required the testimony of other witnesses."

The statements contained in the foregoing affidavit are not controverted by counsel for the defendants or the defendants themselves. And upon that showing alone the court below was justified in refusing to set aside the findings upon the ground here urged against the report of the referee.

Counsel, however, declare in their petition that the court below found as a fact that "none of the attorneys for said defendants had any notice or knowledge of the taking of any testimony by said referee, or of any hearing before said referee, or of any action taken by the court thereon, and the records of said court do not show that any such notice of any said proceedings was given." Counsel are obviously in error in said statement. The language just quoted and which is also quoted in the petition as purporting to be an excerpt from the court's findings constitutes a part of the language of the bill of exceptions on the motion to set aside the findings, and said language in said bill is immediately preceded by the language, "Said motion was supported by affidavits showing that;" thus clearly indicating it to be merely the statement by the attorneys preparing the said bill of exceptions, and not a finding of the court. This is so plainly the fact that we are at a loss to understand how counsel came to treat said language as a finding or as emanating from the court in any form or for any purpose. As a matter of fact, by adopting the report of the referee into its findings, the court found that "both plaintiff and defendant *were advised as to the accounting*, but very little information could be obtained from either party and the referee was obliged to rely on the books, papers, and records as aforesaid."

[21] Our conclusion upon the point under consideration is that, if the defendant Shoo or his attorneys were not present when the referee was conducting his investigations, it was entirely due to their own negligence. They therefore now have no ground upon which to found a just complaint against the judgment of the court because of their alleged absence from said hearings or investigations, and this would still be true even if it could well be maintained that their rights would have been more circumspectly conserved by the presence of Shoo himself or his attorneys than they were by his representative Shingle, who at the time the referee was investigating the accounts, and for some time prior to the appointment of said referee, had charge of the business, books of account, and papers concerning which the referee was required to report to the court, and who had actual knowledge of the investigations of the referee as they were being prosecuted.

[22] 5. The fifth and last point urged in the petition is that the court erred in finding "that said partnership should exist at least until said real property should have been paid for," the argument being that said finding is not within the issues made by the pleadings. It is true that the allegation in the complaint as to the time during which the alleged partnership was to exist was stricken out and that no language of like import is contained in the complaint upon which the trial was had. But in our opinion the finding is immaterial. As shown in the

original opinion, where a contract of co-partnership has been executed—that is to say, when the parties thereto have actually entered upon the execution of such contract—the partnership will exist and remain such until “something is done to dissolve it.” *Sanger v. French*, 157 N. Y. 213, 51 N. E. 979. The principal point in issue in this case was whether there was a copartnership agreement at all, and, if there was, and the partners had entered upon the execution of the terms of said agreement, it seems to us to be of no material importance in this case whether such partnership was to continue for a specified or limited time or indefinitely. Moreover, we are not altogether satisfied with the position which the appellants necessarily assume that, upon an issue whether two or more parties are copartners, engaged in carrying on a partnership business, it is absolutely necessary to allege the period of time during which such copartnership is by the agreement to subsist in order to justify the court in making a finding as to such time, if there is evidence justifying it. However, as stated, we do not think the finding referred to is of any special importance in this case one way or the other.

We have now, as counsel in their petition requested us to do, specially noticed all the points made on this application, and, while the record is amenable to some criticism (and what record made up in the trial of a case is not?), it is evident that we have not thus been convinced that the judgment or order should be disturbed.

The petition for a rehearing is denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

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(164 Cal. 464)

**SCHULTE v. BOULEVARD GARDENS  
LAND CO. (S. F. 5,833.)**

(Supreme Court of California. Jan. 9, 1913.)

**1. CORPORATIONS (§ 67\*)—STOCK—"CAPITAL STOCK."**

Civ. Code, § 309, prohibiting directors of corporations from dividing, withdrawing, or paying to stockholders any part of the capital stock, which means not the shares of which the nominal capital is composed, but the actual assets of the corporation, while applying in terms only to the directors, deprives the stockholders as well of the power to do the forbidden acts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 181-183, 449; Dec. Dig. § 67.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 959-967; vol. 8, p. 7595.]

**2. CORPORATIONS (§ 82\*)—STOCK—SALES OF CAPITAL STOCK.**

Despite Civ. Code, § 309, prohibiting directors of corporations from dividing, withdrawing, or paying to stockholders any part of the capital stock, an agreement by a corporation upon the sale of stock to redeem it at a fixed price at a future time is valid, when not injuriously affecting the rights of the corporation creditors; the agreement to redeem being part of the contract of sale and coming into existence at the same time the purchase price passed to the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 285-295; Dec. Dig. § 82.\*]

**3. CORPORATIONS (§ 82\*)—STOCK—SUBSCRIPTIONS.**

While stipulations limiting the apparent liability of subscribers to corporate stock are invalid as a fraud upon other subscribers, an agreement by the corporation, at the time of selling its stock, it being abundantly solvent, to repurchase its stock at a future time is not in itself such a fraud.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 285-295; Dec. Dig. § 82.\*]

In Bank. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Henry B. Schulte against the Boulevard Gardens Land Company. From a judgment for defendant, entered upon an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed, with directions to overrule demurrer.

J. A. Elston, of Berkeley, and Geo. Clark, of San Francisco, for appellant. Keyes & Martin, of Berkeley, and Leon E. Martin, of San Francisco, for respondent.

SLOSS, J. The plaintiff appeals from a judgment in favor of defendant, entered upon an order sustaining, without leave to amend, a demurrer to the plaintiff's first amended complaint. The complaint contains 18 counts, but, by stipulation of the parties, only the first, the second, the third, the tenth, the eleventh, and the twelfth counts are included in the transcript; the omitted counts being, so far as concerns the legal questions here involved, precisely similar to one or another of those before us.

The first count, with amendments subsequently made thereto, alleges that on April 3, 1908, the defendant, a corporation organized under the laws of California, executed and delivered to plaintiff a written agreement, reading as follows: "Berkeley, Cal., April 2, 1908. This agreement to accompany Boulevard Gardens Certificate of Stock No. 165, issued to Henry B. Schulte under date of April 3, 1908. First. We, the undersigned, individually and severally, promise and agree that should there be at any time any assessment levied against above-described certificate of stock, we will pay the same. Second. We further promise and agree, on behalf of the Boulevard Gardens Land Company, that should the purchaser of said stock certificate at any time prior to the payment of dividends equaling the face value of said stock wish to sell the same, we will repurchase it at par value providing that we receive ninety (90) days' notice of such desire to sell; and should the stock above described be so repurchased by us under this agreement, we will pay to the holder thereof a sum equal to eight (8 pct.) per cent. net upon the face value thereof from the date of its purchase to the date of its sale to us. [Signed] George Schmidt, President. G. W. Skilling, Vice Pres. Edward Bonsall, Director. For the Boulevard Gardens Land Co. [Corporate Seal]."

The certificate referred to in the agreement was a certificate, issued to plaintiff as owner, for 20 shares of the capital stock of the defendant corporation, of the par value of \$100 per share. It was issued and the agreement executed for the single and entire consideration of \$2,000, paid by plaintiff to defendant, and the certificate, with the written agreement, formed parts of a single transaction and an entire contract. No dividends were ever declared or paid. On December 3, 1909, plaintiff gave to defendant notice that he desired defendant, at or before the expiration of 90 days, to repurchase the shares as agreed, and offered to indorse and return the certificate. After the lapse of 90 days, to wit, on March 8, 1910, plaintiff repeated his demand and tender, and is still able and willing to comply with the terms of his tender. The defendant refused to pay, and has not paid, any part of the sum of \$2,000 agreed to be paid to plaintiff.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

It is further alleged that, at the time the contract was made and ever since, the defendant owned and owns surplus profits exceeding, by over \$50,000, the sum of the corporate debts, together with the value of everything received by the defendant in exchange for its issued shares of stock. The defendant could comply with its contract without injury to any creditor or stockholder.

The second count relies upon the same contract. It omits the allegation of tender, but seeks to show that a tender would have been useless. Otherwise the count does not differ from the first. The third count contains substantially the same averments of fact as the first, but is framed with a view to demanding a return of the money paid, on the theory that the contract is illegal. The tenth count is based on a contract between the defendant and one D. N. Mitchell, in the following form: "Berkeley, Cal., Sept. 9, 1907. The Boulevard Gardens Land Company, Incorporated, hereby agrees to pay to D. N. Mitchell of Calistoga, Cal., at any time after one year (and not exceeding eighteen months) from the date hereof the sum of twelve hundred and fifty (\$1,250.00) dollars, together with interest at 6 per cent. from this date on \$1,000.00 for the return and surrender of ten (10) shares of Boulevard Gardens Stock today issued to him and recorded on the books of the company. The Boulevard Gardens Land Company, Inc. By George Schmidt, Pres. By G. W. Skillings, Vice Pres."

It will be observed that while Schulte's contract calls for the return only of the purchase price of the shares, with interest, the Mitchell agreement assumes to bind the defendant to pay a bonus of \$25 per share, if it be assumed—there is no direct allegation on this point—that the shares were brought from the company at par. The plaintiff claims as assignee of Mitchell's rights. In other respects, the averments of the tenth count are like those of the first. With like exceptions, the eleventh count corresponds to the second, and the twelfth to the third.

The demurrer went to each count. It was based on the ground of want of facts, and contained, as well, various specifications of uncertainty, ambiguity, and unintelligibility. We think none of the special assignments would have justified a sustaining of the demurrer without leave to amend, and we shall therefore confine our discussion, as counsel have done, to the consideration of the general ground of want of facts to constitute a cause of action.

[1] The position of the respondent is that the contracts for the retaking by the corporation of its own shares are illegal and void as in violation of the provisions of section 309 of the Civil Code, prohibiting directors of corporations from dividing, withdrawing, or paying to the stockholders, or any of them, any part of the capital stock, or from

reducing or increasing the capital stock, except as provided in the section. The phrase "capital stock," as used in this section and in the section of the practice act from which the Code provision was drawn, has been construed in various decisions of this court. Its meaning has been definitely settled to be, not the shares of which the nominal capital is composed, but the actual capital—i. e., assets—with which the corporation carries on its corporate business. *Martin v. Zellerbach*, 38 Cal. 309, 99 Am. Dec. 365; *S. F. & N. P. R. R. Co. v. Bee*, 48 Cal. 398; *Kohl v. Lillenthal*, 81 Cal. 385, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520; *Tapscott v. Mex. Col., etc., Co.*, 153 Cal. 667, 96 Pac. 271; *Burne v. Lee*, 156 Cal. 222, 104 Pac. 438. Although the prohibition runs, in terms, only against the directors, the effect of the section is to deprive the stockholders as well of power to do the forbidden acts. *Kohl v. Lillenthal*, supra; *Burne v. Lee*, supra.

[2] In other jurisdictions, the authorities show a sharp conflict over the question whether, in the absence of any statutory or charter restrictions, a corporation may employ its assets for the purchase of shares of its own stock. *Cook on Corp.* (6th Ed.) § 311. But, in view of the Code provisions to which we have referred, it cannot be doubted that, in this state, a corporation is not authorized to make such purchase, since the result would be to illegally withdraw and pay to a stockholder a part of the "capital stock." *Bank v. Wickersham*, 99 Cal. 655, 661, 34 Pac. 444. The want of power to buy its own stock does not prohibit a corporation from taking the stock in satisfaction of a loan, or when otherwise necessary to save itself from loss (*Ralston v. Bank of California*, 112 Cal. 208, 213, 44 Pac. 476), but the general rule is, as above stated, that the purchase is unauthorized. Thus, this court has condemned, as in violation of section 309, a by-law assuming to give to any stockholder the right, upon 60 days' notice, to withdraw from the corporation and to receive, upon surrender of his stock, the amount paid therefor. *Vercoutere v. Golden State L. Co.*, 116 Cal. 410, 48 Pac. 375.

In the case at bar, however, we have something more than a mere attempt by a stockholder to sell, and by the corporation to buy, shares of stock. The plaintiff is seeking to enforce a part of an entire contract under which the stock was originally issued to him. The right to return the stock and to receive the sum agreed to be paid upon such return was a material and indivisible part of the consideration upon which the plaintiff agreed to become a stockholder. As between the parties, it would be manifestly unjust to permit the corporation to retain the money paid by plaintiff, and at the same time to repudiate the promise which it gave in exchange for the money. The obligation to pay, upon a return of the shares, the sum agreed to



be paid is not to be viewed as a new undertaking, arising after the plaintiff has assumed the relation of stockholder. It came into being coincidentally with the contract by which plaintiff became a stockholder. The sale to plaintiff was conditional. He never became a stockholder except subject to the qualification that he might return his shares upon the stipulated terms. In *Ophir Cons. Mines Co. v. Brynteson*, 143 Fed. 829, 74 C. C. A. 625, the Circuit Court of Appeals for the Seventh Circuit, in upholding the right of recovery under a contract similar to those in the case at bar, used this language: "It is contended that the contract violates section 485, Mills' Ann. St. Colo., which prohibits the use by corporations of any of their funds 'for the purchase of stock in their own company or corporation, except such as may be forfeited for the nonpayment of assessments thereon.' This agreement is in no sense within the meaning or object of the provision referred to. The stock was held in the treasury of the company to raise funds for improvements, upon such terms of sale as were adopted by the president. The right to so hold and own the stock remains in the corporation until an absolute sale is made. No such sale arose under the agreement in suit. It was of the well-recognized class, known as a contract of 'sale or return,' as defined in *Sturm v. Boker*, 150 U. S. 312, 328, 14 Sup. Ct. 99, 37 L. Ed. 1093, where the title passes for the time being, but subject to the option of the purchaser to rescind and return the property within the time stipulated. With the exercise of the option, the contract of sale terminates, and the right and title of the corporation is restored to its original status. No sale has been accomplished, and no purchase or repurchase arises upon the part of the corporation through the return of its unsold stock."

The great weight of authority is in accord with this view. Contracts of the kind under discussion have generally been sustained, and this, too, in jurisdictions in which corporations are not permitted to purchase their own stock. *Browne v. St. Paul Plow Works*, 62 Minn. 90, 64 N. W. 66; *Vent v. Duluth C. & S. Co.*, 64 Minn. 307, 67 N. W. 70; *Porter v. Plymouth G. M. Co.*, 29 Mont. 347, 74 Pac. 938, 101 Am. St. Rep. 569; *Sweeney v. United Underwriters Co. (S. D.)*, 137 N. W. 379; *Jones v. Johnson*, 86 Ky. 530, 6 S. W. 582. See, also, 10 Cyc. 416; 2 Cl. & M. Pr. Corp. § 475; 1 Cook on Corp. (6th Ed.) §§ 83, 170. A similar ruling has been made in this state in *Dickinson v. Zubiate Mining Co.*, 11 Cal. App. 656, 106 Pac. 123. The case of *Vercoutere v. Golden State L. Co.*, supra, is strongly relied on by respondent as establishing the contrary doctrine in California. But the case is readily distinguishable from the one at bar. There the plaintiff relied solely upon a by-law which assumed to authorize every subscriber and stockholder to withdraw from the corporation and, upon returning his stock, receive

what had been paid in. Obviously this, if upheld, would have made possible a complete destruction and dissolution of the corporation without compliance with the statutory requirements. As a by-law, the provision was clearly bad. But a very different case is presented where an individual sets up a contract whereby the corporation selling him stock agrees, as part of the consideration, to give him the option of returning the stock and receiving a payment therefor.

All that has been said is subject to the qualification that the rights of creditors are not to be affected by any arrangement between the purchaser of stock and the corporation. Undoubtedly a creditor of the corporation would be entitled to hold the conditional purchaser as a stockholder and to insist that the amount of his subscription be made applicable to the satisfaction of the corporate debts. In most of the cases cited by appellant, the courts were dealing with states of fact in which the rights of creditors were involved. But no such question arises here; the complaint alleging that the assets of the corporation are greatly in excess of its indebtedness.

[3] Nor does this case present the question of invalidity of secret stipulations limiting the apparent liability of certain subscribers. Such stipulations have been frequently denounced as a fraud upon other subscribers, as well as creditors of the corporation. 2 Cl. & M. Priv. Corp. § 467c. But the allegations of the complaint do not bring the case within the rule. No fact is alleged which would justify the inference that any fraudulent invasion of the rights of other stockholders (or, as already stated, creditors) had been attempted or would result.

Under the views stated, the complaint clearly states a cause of action on the agreement between Schulte and the defendant. This contract calls for the return of the purchase price, with interest. We cannot see that any different considerations apply to the Mitchell agreement. That instrument requires the corporation to pay \$1,250 on the return of shares of the par value of \$1,000. But if the parties had the right to agree, upon the original sale of the stock, that the purchaser should have the option to return the stock and receive a money payment, it can make no difference whether the amount to be so paid was equal to, or more or less than, the original price. In either case, the right to have the payment upon tender of the stock was reserved by the purchaser as a condition upon which he took his stock. The validity of the condition cannot depend upon the amount of the payment.

The judgment is reversed, with directions to the court below to overrule the demurrer, granting leave to the defendants to answer within a stated time.

We concur: MELVIN, J.; HENSHAW, J.; SHAW, J.

164 Cal. 775

**NICHOLS v. BOULEVARD GARDENS  
LAND CO. (S. F. 5,834.)**

(Supreme Court of California. Jan. 9, 1913.)

In Bank. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by E. E. Nichols against the Boulevard Gardens Land Company. From a judgment for defendant, plaintiff appeals. Reversed.

J. A. Elston, of Berkeley, and Geo. Clark, of San Francisco, for appellant. Keyes &amp; Martin, of Berkeley, and Leon E. Martin, of San Francisco, for respondent.

**PER CURIAM.** This cause presents precisely the same questions as those considered in the opinion in *Schulte v. Boulevard Gardens Land Co.* (S. F. No. 5,833) 129 Pac. 582, filed this day. Upon the authority of that decision, the judgment herein is reversed.

(164 Cal. 446)

**PRENTICE v. ERSKINE. (S. F. 5,877.)**

(Supreme Court of California. Jan. 6, 1913.)

**1. VENDOR AND PURCHASER (§ 119\*) — CONTRACTS OF PURCHASE—DEFECTS IN TITLE—RESCISSION.**

Though as a rule a defaulting vendee of land cannot complain that at a time prior to the date fixed by the contract for the delivery of a deed, the vendor was not in a position to convey full title to the land, where the defects in vendor's title arise from the existence of a public servitude, as a dedicated highway, the vendee can rescind at any time, because the vendor never could give a perfect title.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 212-214; Dec. Dig. § 119.\*]

**2. VENDOR AND PURCHASER (§ 102\*) — DEFAULT OF BOTH PARTIES—POSSESSION—RESCISSION.**

Where a vendee is in default as to payment, and the vendor is in default because he cannot give a perfect title on account of the existence of a highway over the land, the demanding by the vendor and the surrendering of possession by the vendee amount to a rescission of the contract.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 175-177; Dec. Dig. § 102.\*]

**3. VENDOR AND PURCHASER (§ 187\*)—TAKING POSSESSION BY VENDOR—WAIVER OF PAYMENT.**

Where a vendor of land under a time contract takes back possession, he waives his right to further payments.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 121, 374, 375; Dec. Dig. § 187.\*]

Department 2. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Hosea Prentice against Charles Erskine. Judgment for defendant, and plaintiff appeals. Affirmed.

M. K. Harris and L. B. Hayhurst, both of Fresno, for appellant. L. L. Cory, of Fresno, and F. W. Von Schrader and W. F. Christ, both of San Francisco, for respondent.

**MELVIN, J.** The plaintiff appeals from a judgment in favor of defendant, and from an

order denying said plaintiff's motion for a new trial. The parties to the action entered into a written agreement, whereby plaintiff covenanted to sell and defendant to buy certain real property for \$6,500. Of this the sum of \$500 was paid on the execution of the contract, and subsequently a mortgage on the property of \$1,000 was paid by defendant, and that amount was duly credited. Subsequent payments were to be made annually, and defendant also agreed to pay taxes and interest and to cultivate the land properly. Defendant entered into possession of the premises under the terms of the agreement immediately upon the execution thereof. According to the contract of sale, defendant's failure to comply with any of the terms thereof would relieve plaintiff from all obligations in law and equity to convey the property, and all payments made prior to such default were to be forfeited as liquidated damages. Defendant failed to pay the taxes and the first annual installment of \$1,000, with interest, and, upon written demand of the vendor, surrendered the premises to him. Plaintiff then sued to quiet his title. By his answer defendant asserted that the contract had been mutually abandoned and rescinded by the parties, and that plaintiff was himself in default under the agreement, because he was unable to convey clear title to the land in question owing to the existence of a perpetual right of way for a public road over said land, to an easement for an irrigating ditch across the property, and to the lien arising from a contract for the payment annually for water to be used on the premises. He asked for judgment for the \$1,500 which he had paid to plaintiff on account of the contract of sale with interest thereon, and for \$400, the value of the necessary improvements on the place made by him during his occupancy thereof. The court, although finding that defendant had failed to pay taxes, interest, and installments according to the terms of the contract, found also that plaintiff was in default, because, owing to the incumbrances on the land, he could not, either at the time of the making of the agreement or sale, or at the date of the commencement of this action, give a perfect title to the land. Judgment was given in favor of defendant for the \$1,500 which he had paid, with interest thereon. It was found by the court that defendant had expended \$400 for necessary improvements as alleged in his pleading, but that this amount was offset by the reasonable rental value of the land during his occupancy thereof. The judgment also provided for the cancellation of five promissory notes by defendant given in favor of plaintiff, each for \$1,000, payable in five equal annual sums, respectively, and evidencing the deferred payments set forth and described in the contract of sale. Appellant contends that in the matter of the as-



serted rescission there is no essential difference between this case and *Oursler v. Thatcher*, 152 Cal. 740, 93 Pac. 1007. In that case, as in this, there was a default on the part of the vendees in the performance of the conditions of the contract. There, as here, upon demand the vendees surrendered possession of the premises. It was held that these facts, together with the commencement of an action to quiet the title of the vendors, did not constitute a rescission of the contract by the mutual consent of the parties, and the vendees were properly denied judgment on their cross-complaint for the money paid as a part of the purchase price prior to their default. Respondent denies the authority of that case because there was no question in it with reference to the sufficiency of the title of the vendors. He asserts that it has long been settled law in California that one may contract to sell real property and to deliver title at a future time who has no present interest in it; and, a fortiori, one who owns real property subject to certain incumbrances may enter into such an agreement. In this case, admittedly, Prentice did not own the land free from all incumbrances at the date of the agreement of sale, because that instrument by its very terms provided for the future payment of an existing mortgage, and Erskine obligated himself "to pay all water assessments on the water right covering said premises."

[1] In California it is the general rule that a defaulting vendee under an agreement of sale cannot complain because at a time prior to the maturity of the contract and the date fixed thereby for the delivery of a good and sufficient deed the vendor was not in a position to convey full title to the land. *Joyce v. Shafer*, 97 Cal. 336, 32 Pac. 320. See, also, *Backman v. Park*, 157 Cal. 607, 108 Pac. 686, 137 Am. St. Rep. 153, and authorities there cited. It is a harsh rule, and should not be unduly extended. If the only incumbrances upon the property were the easement for the irrigating ditch and the lien for the water tax, we might be constrained to hold, under the authorities, that the case would fall within the rule discussed above, but, as one of the defects in the vendor's title arose from the existence of a public servitude, we must conclude that plaintiff was himself in default, because that is the sort of cloud which in the nature of things he could not remove by any ordinary method of business negotiation. It would not be like a mortgage, for example, which might be extinguished by payment of the debt thereby secured, or like a lien for unpaid water rent which might be destroyed by settlement of the account. He could not either by adverse possession or by purchase take from the public the right to pass over the land on a dedicated highway. He was as completely helpless and hopeless of conveying a perfect title at any time as if the whole tract had been taken for use as a

public park. The vendee might have rescinded the contract at any time, even though the time for final payment had not arrived because the vendor, in the nature of things, never could offer a perfect title to him. While this case differs from *Burks v. Davies*, 85 Cal. 110, 24 Pac. 613, 20 Am. St. Rep. 213, because in that case the vendee had the right to exercise his option at any time, and therefore the vendor was bound to be ready at all times during the life of the contract to convey an unclouded title, nevertheless the rule there announced is applicable, and the vendee was at all times entitled to rescind because there was no more chance to make vendor's title complete and flawless at the maturity of the contract than at any other time. In *Koshland v. Spring*, 116 Cal. 700, 48 Pac. 62, it was said: "Since defendants were in express terms obligated to make good title as a condition of the sale, we do not concede that actual knowledge by the purchasers of dedication to public use of the extensive street surface exhibited on the map—the tract being mainly or largely agricultural and to be sold as acreage—could be deemed, while the contract remained executory, to imply a waiver of substantial fulfillment of the condition for title. *Sugden on Vendors*, \*390; *Speakman v. Forepaugh*, 44 Pa. 363, 374. Compare *Devlin on Deeds*, §§ 911, 913 and cases cited. \* \* \* So here the reasonable construction of the contract is that defendants, the map before them, agree to make title to plaintiffs of unconveyed streets as well as lots, but it is found that there are at least grave doubts whether they have right to convey many of the streets; and the result is that they cannot enforce specific performance of the contract, and plaintiffs are entitled to return of their deposit." Vendee's right to rescission under such circumstances is upheld by such authorities as *Turner v. McDonald*, 76 Cal. 177, 18 Pac. 262, 9 Am. St. Rep. 189; *Sheehy v. Miles*, 93 Cal. 288, 28 Pac. 1046; *Wilcox v. Lattin*, 93 Cal. 588, 29 Pac. 226; *Easton v. Montgomery*, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123; *Boas v. Farrington*, 85 Cal. 535, 24 Pac. 787; *Peckham v. Stewart*, 97 Cal. 147, 31 Pac. 928.

[2] The conduct of the parties, both being in default, the one demanding and the other surrendering the possession of the premises, amounted to a rescission of the contract.

[3] By taking back the possession of the property, plaintiff, of course, waived his right to insist upon further payments under the agreement of sale. Consequently the notes evidencing payments to be made in the future execution of that agreement were properly shorn by the court of their apparent efficacy.

No other specifications of alleged error require comment.

The judgment and order are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

104 Cal. 472

**VAN BUSKIRK v. KUHN.** (L. A. 2,975.)  
(Supreme Court of California. Jan. 9, 1913.)

**1. LIMITATION OF ACTIONS (§ 2\*)—DEBT ARISING IN ANOTHER STATE.**

Where a Nebraska statute of limitations would bar an action on a debt contracted in that state, a suit to foreclose a mortgage given to secure the debt is barred in this state, under Code Civ. Proc. § 361, providing, with certain immaterial exceptions, that an action on a cause arising in another state cannot be maintained here after the lapse of such time as would bar it in the other state.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 4-8; Dec. Dig. § 2.\*]

**2. EVIDENCE (§ 80\*)—DEBT ARISING IN ANOTHER STATE — PRESUMPTION OF FOREIGN STATUTE.**

Where, in an action to foreclose a mortgage given to secure a debt contracted in Nebraska, there was no evidence of the Nebraska law of limitations, it was presumed to be the same as Code Civ. Proc. § 339, subd. 1, which provides that an action on an oral agreement to repay money loaned must be brought within two years.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.\*]

**3. LIMITATION OF ACTIONS (§ 46\*)—ACCRUAL OF ACTION—PROMISE TO PAY WHEN ABLE.**

Limitations will not commence to run against a promise to pay "when able" until the debtor is able to pay, especially where he is in no way derelict in his efforts to acquire the means to pay.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 240-253; Dec. Dig. § 46.\*]

**4. LIMITATION OF ACTIONS (§ 195\*)—ACCRUAL OF COSTS—PROMISE TO PAY WHEN ABLE—BURDEN OF PROOF.**

In an action on a promise to pay "when able," the burden was on defendant, in order to establish his plea of limitations, to prove an ability to pay the debt; limitations being an affirmative defense.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 711-716; Dec. Dig. § 195.\*]

**5. CONTRACTS (§ 213\*) — PROMISE TO PAY WHEN ABLE—BURDEN OF PROOF.**

In an action on an oral promise to repay borrowed money "when able," the plaintiff must allege and prove the debtor's ability to pay.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 957-979; Dec. Dig. § 213.\*]

**6. APPEAL AND ERROR (§ 864\*)—MATTERS REVIEWABLE.**

Failure of the complaint and findings to support judgment is a defect reviewable on appeal from the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1765-1767, 3456-3461; Dec. Dig. § 864.\*]

Department 1. Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by H. C. Van Buskirk against J. T. Kuhns, administrator. From judgment for plaintiff and denial of new trial, defendant appeals. Reversed.

Collier, Carnahan & Craig, of Riverside, for appellant. Purington & Adair, of Riverside, for respondent.

**SLOSS, J.** The defendant appeals from a judgment against him, and from an order denying his motion for a new trial.

The action was brought to foreclose a mortgage on land in Riverside county. It is alleged in the complaint that in November, 1894, the defendant's intestate, E. P. Reynolds, Jr., who was then indebted to plaintiff in the sum of \$3,000 for money loaned, borrowed of plaintiff the further sum of \$1,500, and promised to pay plaintiff the entire sum of \$4,500 "whenever he, the said E. P. Reynolds, Jr., should be able to do so." This transaction took place at Wymore, Gage county, Neb. At the same time and place, Reynolds executed and delivered to plaintiff an instrument, in form a bargain and sale deed of the property above mentioned, the instrument being given and accepted as a mortgage to secure the payment of said sum of \$4,500. With the exception of \$350, the debt is unpaid. Reynolds died in December, 1907, and the defendant was, by the superior court of Riverside county, appointed administrator of his estate. Recourse against any property, other than that mortgaged, is waived. The answer denies the making of the loan, and the execution of the mortgage. It also pleads the bar of the statute of limitations, specifying sections 361, 339 (subd. 1), and 337 (subds. 1 and 2) of the Code of Civil Procedure. The findings were in favor of the plaintiff, and judgment of foreclosure followed.

[1] The appellant's principal contention is that the evidence establishes that the action was barred by the statute of limitations, and particularly by section 361. Under that section, an action based upon a cause of action arising in another state cannot be maintained in this state after the lapse of time within which an action might have been maintained in the state in which the cause of action arose. There is an exception in favor of citizens of this state, but the plaintiff is not within the excepted class. If, then, at the date of the filing of the complaint herein, an action on the debt could not have been maintained in Nebraska, the state in which the cause of action arose, the suit to foreclose the mortgage must be held to be barred here. *Allen v. Allen*, 95 Cal. 184, 30 Pac. 213, 16 L. R. A. 646; *Lilly-Brackets Co. v. Sonnemann*, 157 Cal. 192, 106 Pac. 715, 21 Ann. Cas. 1279.

[2] There was no evidence of the Nebraska law with reference to limitation of actions, but, since, in the absence of proof, the law of a foreign jurisdiction is presumed to be the same as our own (*Hickman v. Alpaugh*, 21 Cal. 225; *Flood v. Dunphy*, 147 Cal. 95, 81 Pac. 315; *Lilly-Brackets Co. v. Sonnemann*, supra), the period within which an action might have been brought in Nebraska on the oral agreement to repay the money loaned must be taken to be two years. Code Civ.



Proc. § 339, subd. 1. On the propositions just stated there is no dispute between the parties. They advance opposing views, however, regarding the time when a cause of action on the debt accrued. The loan was made in November, 1894. Reynolds died in December, 1907, and this action was commenced in May, 1910. There was, accordingly, a lapse of 13 years after the making of the loan, until Reynolds' death, and over 15 years until the filing of the complaint. The appellant contends that, where a promisor agrees to make a payment "when able," his obligation is to pay within a reasonable time, and that the right to sue is barred at the expiration of such reasonable time. If the rule be as claimed, it will not be doubted that a delay of 15 years is *prima facie* long enough to permit a reasonable time within which to sue, together with two years thereafter, to elapse several times.

[3] But the authorities in this state seem to establish a different rule for construing a promise to pay "when able." They support the respondent's contention that such a promise is conditional, and that no cause of action accrues until the condition is performed; that is to say, until the debtor is able to pay. In *Curtis v. City of Sacramento*, 70 Cal. 412, 11 Pac. 748, the court said that: "If the debtor promises to pay the debt when he is able, or by installments, etc., the creditor can claim nothing more than the promise gives him." In *Rodgers v. Byers*, 127 Cal. 528, 60 Pac. 42, the defendant, being indebted to plaintiff, wrote to plaintiff before action was barred, saying: "I will liquidate that note as soon as I can get the money. \* \* \* Will pay as soon as I can." It was held that plaintiff could not rely upon the statements as extending his time to sue upon the original obligation. His claim, said the court, was based upon a "substituted, conditional promise," and the proper action would have been one for the breach of such promise, "in which it would have been necessary for the plaintiff to allege the promise and show the condition broken after defendant's ability to perform." See, also, *Morehouse v. Morehouse*, 140 Cal. 88, 73 Pac. 738. It follows that, until the debtor becomes able to pay, the statute of limitations does not begin to run. The general current of authority is to this effect. 25 Cyc. 1350; 19 Am. & Eng. Enc. L. (2d Ed.) 193; *Tebo v. Robinson*, 100 N. Y. 27, 2 N. E. 383; *Richardson v. Bricker*, 7 Colo. 58, 1 Pac. 433, 49 Am. Rep. 344; *Mattocks v. Chadwick*, 71 Me. 313; *Scott v. Thornton*, 104 Tenn. 547, 58 S. W. 236; *Barker v. Heath*, 74 N. H. 270, 67 Atl. 222. Nothing contrary to this view is decided in cases like *Williston v. Perkins*, 51 Cal. 554, or *Earle v. Sunnyside Land Co.*, 150 Cal. 214, 88 Pac. 920, where the promise was to pay out of a fund to be realized in a certain way. It was held in these and similar cases

that there is an implied obligation to use reasonable diligence in performing the act upon which payment was contingent. In default of such diligence, payment becomes due without performance of the condition. But there is nothing in the facts before us to bring this case within the rule stated. It is not suggested that Reynolds was in any way derelict in his efforts to acquire the means to pay his debt.

[4] Since the statute of limitations is an affirmative defense, it became incumbent upon the defendant, in order to establish this plea, to show that Reynolds had the ability to pay his debt, and that, accordingly, a cause of action against him accrued more than the statutory time before the filing of the complaint. The evidence on the subject is rather meager, and we think the court below was justified in making a finding, implied in the finding that the action was not barred, that Reynolds had not had such ability.

[5] But, if the views above expressed are sound, the very fact that prevents the statute from running (i. e., the lack of ability, on Reynolds' part, to pay his debt) operates also to prevent the plaintiff from maintaining his action. The reason that the statute does not run is that the promise is conditional upon the debtor's ability to pay, and that a cause of action does not accrue until such ability exists. If the promise is conditional upon such ability, it is, as is said in *Rodgers v. Byers*, *supra*, incumbent upon the plaintiff to allege and prove that the condition has been complied with. This is not, like the plea of the statute of limitations, matter of defense. It is a substantive part of the cause of action, and the burden of proof with respect to it is upon the plaintiff. *Bidwell v. Rogers*, 10 Allen (Mass.) 438; *Boynnton v. Moulton*, 159 Mass. 248, 34 N. E. 361; *Veasey v. Reeves*, 6 Ind. 406; *Halladay v. Weeks*, 127 Mich. 363, 86 N. W. 799, 89 Am. St. Rep. 478; *Parker v. Butterworth*, 46 N. J. Law, 244, 50 Am. Rep. 407. The complaint contains no allegation of such ability, and the court does not find it. There is therefore a want of averment and finding of facts establishing the existence of a cause of action. The plaintiff alleges a promise to pay in a certain event. He does not allege, and the court does not find, that the event upon which the obligation depends has occurred.

[6] Neither the complaint, therefore, nor the findings, support the judgment. This defect is one that may be reviewed on an appeal from the judgment.

The result of these views being that the judgment must be reversed, it is unnecessary to consider the further points made by the appellant.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; ANGELLOTTI, J.

164 Cal. 435

**STANDARD OIL CO. v. SLYE et al.**

(S. F. 5,792.)

(Supreme Court of California. Jan. 4, 1913.)

**1. VENDOR AND PURCHASER (§ 231\*)—CONSTRUCTIVE NOTICE—RECORD.**

Record of a lease is not constructive notice, where title of the lessor is not recorded.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 513-539; Dec. Dig. § 231.\*]

**2. LANDLORD AND TENANT (§ 79\*)—NOTICE—POSSESSION.**

A purchaser of a lease authorizing subleasing and the acquisition of an additional term for the subtenants is put on inquiry by notorious possession of persons holding under the lessee as to the terms on which the lessee had surrendered the land to them.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 235, 244-253; Dec. Dig. § 79.\*]

**3. LANDLORD AND TENANT (§ 83\*)—"COVENANTS RUNNING WITH LAND"—RENEWAL OF LEASE.**

A covenant of a lease to renew it is one running with the land.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 263, 264, 266-278, 295; Dec. Dig. § 83.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1698-1703.]

**4. LANDLORD AND TENANT (§ 85½\*)—COVENANTS RUNNING WITH LAND—PRIVITY OF ESTATE.**

One by purchasing the interest of a lessee, and accepting rent from claimants under a lease made by such vendor, placed itself in privity of estate with them, so as to be bound by a covenant in their lease for renewal running with the land, though it also purchased the land.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 85½.\*]

**5. CORPORATIONS (§ 425\*)—ACCEPTANCE OF BENEFITS.**

A purchaser of a lease of a corporation, having collected rents of the corporation's sublessee, may not thereafter assert invalidity of the sublease, which the corporation treated as valid, because it was not ratified by the stockholders, as required by statute.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1697-1701, 1705; Dec. Dig. § 425.\*]

In bank. Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by the Standard Oil Company against Joseph Slys and others. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

Pillsbury, Madison & Sutro, of San Francisco, and L. L. Cory, of Fresno, for appellant. Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, and Frank H. Short, of Fresno, for respondents.

MELVIN, J. Appeal from a judgment against plaintiff, and from an order denying its motion for a new trial. The action was for the possession of 10 acres of land situated in the N. E. ¼ of section 28, township 19 S., range 15 E., M. D. B. M., in Fresno county, Cal. Plaintiff's title as owner in fee is undis-

puted. Defendant, however, claims the right to extract oil from the land until the 30th day of September, 1919, paying to plaintiff one-third of the gross product obtained. Defendant claims under a contract from a prior sublessee, the latter, in turn, holding under a lessee of plaintiff's grantor of the fee. All parties to the controversy deraigned title from the Hanford Oil Company, a corporation, which had owned all of section 28 above mentioned. On September 30, 1899, Hanford Oil Company leased to S. N. Griffith the N. E. ¼ of section 28 for a term commencing October 1, 1899, and ending September 30, 1909, the contract providing that Griffith was to form a corporation to assume his obligations under the lease. In accordance with the terms of said lease, Griffith organized the "28 Oil Company," and transferred his lease to that corporation. By the said lease the corporation was authorized and empowered to sublet the whole or any part of the land in subdivisions of not less than five acres. The lease also contained this paragraph: "Said corporation may and shall have the right, privilege, and option to demand and receive from the party of the first part at any time after the first day of October, 1907, and before the first day of October, A. D. 1908, a second lease and demise of all the land above described for an additional term of ten years, to commence at the expiration of the term hereby created, upon the same terms, conditions, stipulations and limitations, and for the uses and purposes herein made, agreed upon and set out." By paragraph 15 of the lease it was provided that under certain conditions the rights of the corporation should cease, but this paragraph also contained the following language: "Provided that if any part of the said land shall be in the actual possession and occupation of any person under and by virtue of any sublease executed in accordance to the provisions hereof, the term of such person under such sublease and his possession of said part of said land, and his right of possession thereof, shall not terminate, nor be at an end, or be in any manner affected by the foregoing provisions of this clause, numbered fifteen, and the term of such person under such sublease and his possession and right of possession of such part of said land shall immediately cease and determine, and such person shall lose all right to the possession of such part of said land, so held by him, upon failure or refusal by such person to keep any of the stipulations, agreements and covenants of the sublease by which he holds such part of said land, and the party of the first part shall thereupon be immediately entitled to the possession of all of said land so held by such person." On October 31, 1899, 28 Oil Company leased to Independence Oil Company the S. W. ¼ of the N. E. ¼ of section 28. This lease required, among other things, the



boring of a well by the Independence Oil Company each year of its term. The duration of the term and the option for a further term of 10 years were expressed in the leasing contract in substantially the same words as those employed in the original lease from Hanford Oil Company. This lease also contained language substantially identical with that of paragraph 15 of the original lease from Hanford Oil Company. It was evidently contemplated by both of these leases that the land should be developed at a certain rate per year, that the work of the sublessees should be counted as a part of the necessary development, and that the term of a sublessee was not to cease or determine by reason of any forfeiture by his immediate lessor. A lease was made by Independence Oil Company on July 18, 1902, to W. L. Harper. This is designated by those on both sides of this controversy as the "Harper lease." Defendant Slye appears as the last sublessee under the rights conveyed by the Harper lease. The first paragraph of this lease gave to Harper the exclusive right to drill for oil and to extract and remove the same and any other merchantable minerals existing on the 10 acres of land in question. By the second paragraph it was provided that two-thirds of the product from the land should be retained by Harper (the party of the second part). The fourth paragraph was in part as follows: "The term of this agreement shall be the unexpired term of the lease between the 28 Oil Company and the Independence Oil Company and the renewal thereof as therein provided. And said party of the second part hereby agrees that he and his assigns, in consideration of the foregoing covenants, of the party of the first part, will drill upon said land, and complete within the terms and conditions of the said lease of the 28 Oil Company to the Independence Oil Company one well at his own expense, on or before the first day of October, 1902, and at least one well each year thereafter as provided in said lease." It also contained this language: "This agreement is based upon and intended as a substitute for that certain application and resolution of June 23rd, 1902, between the Independence Oil Company of Coalinga and W. G. Griffith, said Griffith having assigned his right to drill on said ten acres of land of said company to the said W. L. Harper." W. G. Griffith's original application for a sublease (mentioned in the last quotation) recited as a condition of such sublease: "That one well was to be drilled by him on or before the first day of October, 1902, and a well each year thereafter for the period of the term of the Independence, to-wit, the unexpired term, and the renewal thereof." Standard Oil Company obtained a deed from Hanford Oil Company to the whole of section 28 on May 7, 1908. Previously Standard Oil Company had received assignments from successors of 28 Oil Company, including

one from Independence Oil Company, dated March 26, 1907, of its interest in the lease.

The court found that at the time plaintiff acquired title to the real property here involved said plaintiff knew that Slye's predecessors were in possession of the land extracting oil therefrom, "and had and claimed to have the exclusive right to drill upon said real property, hereinabove lastly described, and to extract oil, petroleum, and other merchantable minerals therefrom, under and pursuant to the terms of said agreement aforesaid, executed by said Independence Oil Company of Coalinga, said corporation, to said W. L. Harper, for and during the whole of said term, ending with the 30th day of September, 1919." It was also found that the Independence Oil Company bound itself to renew and continue the Harper lease for the additional period of 10 years, and that plaintiff took its assignment of the lease from the said Independence Oil Company subject to the contract with W. L. Harper, and bound by the obligation to renew the term of Harper or his assigns and to extend the same for 10 years, namely, to the 30th day of September 1919. The court found that Roberts and others who had acquired the Harper interest had spent large sums of money in developing the property which they would not have expended except under the assurance that they should hold the land for the long term.

Appellant's contentions are (1) that, when it purchased the interest of Independence Oil Company, it had no notice, actual or constructive, of the claim by respondent or his predecessors of a right to remain in possession of the land beyond September 30, 1909; (2) that any covenant by Independence Oil Company to demand a new lease for Harper's benefit could not bind Standard Oil Company as purchaser of the fee or of the leasehold interest of Independence Oil Company; (3) that Independence Oil Company could not grant a term beyond that acquired under its own actual lease, nor did it covenant to demand a new lease for Harper; and (4) that the Harper lease was void because not ratified by the stockholders of the grantor according to the law in force at the date of its execution.

[1, 2] It is conceded by respondent that the Harper lease was not of record, although one of the intermediate assignments thereof was recorded. This was the assignment of the lease from Mt. Pelee Oil Company to George D. Roberts; but, the parties to this assignment being strangers to the record title, the recording thereof gave no notice of the contents of the lease. *Garber v. Gianella*, 98 Cal. 529, 33 Pac. 458; *Bothin v. California Title Ins. Co.*, 153 Cal. 724, 96 Pac. 500. There was therefore no such constructive notice as would have been presumed from a recorded lease from the Independence Oil Company to Harper. Plaintiff, however,

was charged with actual notice of the occupancy of the 10-acre tract by Harper and his assigns, and it was also constructively apprised of the contents of the lease from Hanford Oil Company to S. N. Griffith and the recorded assignments thereof carrying with them the right to sublease the property wholly or in parts for the residue of the term and the renewal thereof. The sublessees under the Harper lease were notoriously in possession of the property. "The first well was brought in Christmas morning, 1902," said witness Condon, secretary of the Stockholders' Oil Company. George D. Roberts, president of that corporation, testified that he promptly served upon Hanford Oil Company and 28 Oil Company notices of the completion of this well as per contract, and demanded the unexpired term of their lease to the Independence Oil Company, plus the renewal. Shannon, upon whom Roberts says he served these notices, was the general manager of the 28 Oil Company when Roberts went upon the 10-acre strip. He knew all about the activity of Roberts, and knew long before the transfer was made to Standard Oil Company from 28 Oil Company that Roberts and his assigns asserted right to possession of the property until 1919. But appellant insists that while there may have been evidence of the fact that Standard Oil Company had notice of the right to the long term claimed under the Harper lease, before the purchase of the interests of Hanford and 28 Companies, no notice was given to it prior to its purchase of the lease of Independence Oil Company, and that it could not therefore be charged with notice of what that company had done. We think, however, that the notorious occupancy of the 10-acre tract by those holding under the Harper lease was in itself sufficient to put Standard Oil Company upon its inquiry. Knowing the power of the Independence Oil Company to sublease for the residue of 10 years and to acquire an additional 10 years for its subtenants by a mere demand, it was bound to inquire the terms under which Independence Oil Company had surrendered this land. The subsequent conduct of the plaintiff shows that it recognized the claims of those asserting rights under the Harper lease. Its authorized agents endeavored several times, within a few months subsequent to the purchase of the leasehold of Independence Oil Company, to acquire the rights of the claimants of the Harper interest, but failed to agree upon terms, not because of the asserted privilege of the latter to occupy the premises until 1919, but because of difference of opinion regarding the amount which would fairly compensate the owner of the sublease. Of course, such conduct does not operate as an estoppel against Standard Oil Company, but it does show that almost contemporaneously with the assignment from Independence Oil Company Standard Oil Company acted as a corporation having actual knowledge of the

terms of the Harper lease. The court's finding that the plaintiff bought the lease of Independence Oil Company with notice of the Harper lease was supported by the evidence.

[3, 4] Plaintiff insists that the covenant to renew the lease is a personal one not running with the land. In this behalf sections 1461 and 1462 of the Civil Code are cited. The former provides: "The only covenants which run with the land are those specified in this title, and those which are incidental thereto." And the latter is as follows: "Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property, or some part of it then in existence, runs with the land." Plaintiff's position is that such a covenant as the one here considered is not made for the benefit of the property, but, on the contrary, is an injurious limitation upon the lessor's power of repossession. Even if this position were correct, the plaintiff would be bound in conscience to fulfill the covenant. *Bryan v. Grosse*, 155 Cal. 135, 99 Pac. 499. But it was a covenant running with the land, and by purchasing the interest of the Independence Oil Company and accepting rent from the claimants under the Harper lease plaintiff placed itself in privity of estate with them. This covenant, running as it did with the land, was binding upon one holding in privity of estate with the assignee of the lessor. *Salisbury v. Shirley*, 66 Cal. 225, 5 Pac. 104. In the early case of *Laffan v. Naglee*, 9 Cal. 675, 70 Am. Dec. 678, this court held that a covenant to give the lessee a preference, in case the lessor should decide to sell the property, was a covenant running with the land. In the case of *Lyford v. North Pac. Coast R. R. Co.*, 92 Cal. 95, 28 Pac. 103, referring to the covenant there considered, the court used this language: "It is obvious that the agreement to continue to operate the railway is not a covenant which, under the Code, would run with the land. It is not a covenant for the direct benefit of the property—i. e., the estate granted—as required by section 1462 of the Civil Code." This interpretation of the section brings the covenant here under review directly within the meaning of the statute, because obviously a covenant for a renewal of a lease is for the direct benefit of the estate granted.

In *Taylor on Landlord and Tenant*, the rule is thus stated, at section 262: "The right of renewal constitutes a part of the tenant's interest in the land, and so a covenant to renew is binding upon the assignee of the reversion. So the grant of an additional term or of a right to purchase is, for many purposes, to be considered a continuation of the former lease; and, if there is nothing in the lease to show that such right or renewal was intended to be confined personally to the lessee, it will inure to his assignees or executors without these being particularly named. Covenants running with



the land are divisible, and will bind the assignee of a part of the estate demised, in respect to the parcel assigned to him, as to repair, or to pay rent of the part occupied by him. (Where a covenant running with the land is divisible, if the entire estate in different parcels of the land passes by assignment to different individuals, the covenant will attach upon each parcel pro tanto; and the assignee of each parcel will be answerable for a proportionate part of the common burden, and will be exclusively liable for the breach of any covenant which related to his part alone.)" One of the cases cited in this behalf by Taylor is *Piggott v. Mason*, 1 Paige 413, decided by Chancellor Walworth. This decision is frequently mentioned and followed in the opinions bearing on this subject. In it the original lessor covenanted with the lessee and his assigns to renew the lease at the expiration of the term upon a fair valuation by appraisers. Subleases were made by assignees of the original lessee's interest (which had been sold upon execution). In these subleases the sublessors covenanted that sublessees should have the renewal upon the same terms as those upon which they themselves should receive the new lease. The defendant in the action had become by purchase the owner of the reversion and all of the original lessor's interest, subject to the rights arising under the lease. It was held that a covenant of the lessor to renew the lease was one running with the land; the chancellor saying: "It is well settled, even at law, that the assignee may recover in his own name for a breach of such a covenant, if the breach was committed after the assignment. *Lemetti v. Anderson*, 6 Cow. (N. Y.) 302; *Withy v. Mumford*, 5 Cow. (N. Y.) 137; *Kane v. Sanger*, 14 Johns. (N. Y.) 89; *Grescot v. Green*, 1 Salk. 199. And it lies either for or against an assignee, although he is not named in the covenant. *Hyde v. The Dean and Canons of Windsor, Cro. Eliz.* 552. The assignee of a part of the premises may also recover pro tanto, if the covenant be in its nature divisible. *Touchstone*, 199; *Co. Litt.* 385a." Other cases holding that such covenants run with the land are *Leppla v. Mackey*, 31 Minn. 75, 16 N. W. 470; *Callan v. McDaniel*, 72 Ala. 105; *McDaniel v. Callan*, 75 Ala. 330; *Wilkinson v. Pettit*, 47 Barb. (N. Y.) 234; *Cook v. Jones*, 96 Ky. 286, 28 S. W. 960 (a case holding that even where the original lessee after the sale of his leasehold interest agreed not to demand a renewal, that fact did not deprive the sublessee of his right to a renewal as to that part of the land included within his sublease); *Alford v. Jones* (Ky.) 30 S. W. 1013; *McClintock v. Joyner*, 77 Miss. 680, 27 South. 837, 78 Am. St. Rep. 541; *Robinson v. Perry*, 21 Ga. 186, 68 Am. Dec. 455; *Blount v. Connolly*, 110 Mo. App. 607, 85 S. W. 605; *Phelps v. Erhardt*, 5 N. Y. Supp. 540;<sup>1</sup> *Mitchell v.*

*Young*, 80 Ark. 443, 97 S. W. 454, 7 L. R. A. (N. S.) 221, 117 Am. St. Rep. 89, 10 Ann. Cas. 423 (citing with approval *Bailey v. Richardson*, 66 Cal. 416, 5 Pac. 910); *Leominster Gaslight Co. v. Hillery*, 197 Mass. 268, 83 N. E. 870 (holding that the reversioner is bound, even without notice, by the contract to renew although the sublease is unrecorded). Other authorities in support of the rule that a transference of the lessor's interest is bound by a stipulation contained in a sublease are *Connor v. Withers* (Ky.) 49 S. W. 310; *Kolasky v. Michels*, 120 N. Y. 635, 24 N. E. 278; *Robinson v. Beard*, 140 N. Y. 111, 35 N. E. 441; *Buttner v. Kasser* (App.) 127 Pac. 811, petition for rehearing denied by this court November 19, 1912. Respondent cites *Bailey v. Richardson*, 66 Cal. 416, 5 Pac. 910, supra (a case discussed and approved in the very late case of *Buttner v. Kasser*, supra) as determinative of the questions here presented. In that case, as here, the plaintiff appeared as the owner of the fee and assignee of the lease. The court held that where a lessee, after subletting, assigns to the lessor, who collects from the sublessee the rent reserved in the sublease, the lessor comes in as assignee of the reversion and not as the owner of the fee; there being no merger of the term of the original lessee in the estate of his lessor. The court said of defendant: "Claiming the benefit of Dore's contract, he is estopped from denying that he has succeeded to his responsibilities." Dore was the assignee of the original lessee and the rights of plaintiff arose under a covenant in the sublease running with the land. The case is in point, and supports respondents' contention.

It is argued that a formal demand of a renewal of the lease was necessary, and that failing to make it defendant forfeited all right to a continuance of his term to 1919. It may be conceded that defendant might have exercised the right of Independence Oil Company to demand a renewal of the lease from its lessors after that corporation had parted with its interest in the lease; but by the terms of the sublease the owners of the Harper interest were not required to make any demand at all, and, as that duty devolved upon plaintiff as successor to the Independence Oil Company, it would have been idle to require Standard Oil Company as lessee to demand the extended term from itself as owner of the fee.

[5] Plaintiff insists that the original sublease from Independence Oil Company to Harper is not enforceable because not ratified by the stockholders of that company. At the time of the execution of that contract (July 18, 1902), a statute was in force which required such ratification. By this act it was provided as follows (Stats. 1897, p. 96): "It shall not be lawful for the directors of any mining corporation to sell, lease, mortgage, or otherwise dispose of the whole or any part of the mining ground owned or held

<sup>1</sup> Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 53 Hun, 630.

by such corporation, nor to purchase or obtain in any way (except by location) any additional mining ground, unless such act be ratified by the holders of at least two-thirds of the stock of such corporation then outstanding." This statute, and its predecessor (Stats. 1880, p. 131), as explained by Mr. Justice Sloss in the opinion of this court in *Royal Con. Min. Co. v. Royal Con. Mines*, 157 Cal. 752, 110 Pac. 123, 137 Am. St. Rep. 165, has been given a less rigid and strict interpretation in the later cases than in the earlier ones. In that case formal ratification of the transaction involved was not found to be necessary where one of the participating directors owned more than two-thirds of the stock. While we would doubtless hold that, in the absence of some proof of actual ratification, the lease would be of no effect if the act were still in force, we are confronted with the fact that it was repealed in 1905 (Stats. 1905, p. 74). The Harper contract was treated as valid by Independence Oil Company up to March 26, 1907, and Standard Oil Company collected the full amount of royalties from Harper's successors from that time until near the close of the year 1909. Under clear principles of estoppel that corporation may not now assert the invalidity of a corporate act regular upon its face. The courts have almost uniformly sustained contracts which litigants who have profited thereby have later sought to avoid on the ground that such agreements were executed without proper authority. Such has been the ruling in the following cases: *Main v. Casserly*, 67 Cal. 128, 7 Pac. 426; *Gribble v. Columbus Brewing Co.*, 100 Cal. 71, 34 Pac. 527; *Lawrence v. Johnson*, 131 Cal. 176, 63 Pac. 176; *Jones v. Evans*, 6 Cal. App. 90, 91 Pac. 532.

No other alleged errors require discussion.

The judgment and order from which plaintiff appeals are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.

164 Cal. 412

JERSEY FARM CO. v. ATLANTA REALTY CO. (S. F. 5,872.)

(Supreme Court of California. Dec. 30, 1912.  
On Rehearing, Jan. 29, 1913.)

# 1. WATERS AND WATER COURSES (§ 154\*)—NATURE OF PARTICULAR EASEMENT.

Civ. Code, § 801, provides that "the following burdens or servitudes on land may be attached to other lands as incidents or appurtenances, and are then called easements," naming 17 forms of easements, such as a right of pasture, etc., and section 1104 provides that a transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to the use of other realty of grantor in the same manner as such property was obviously and permanently used by grantor for the benefit of such property at the time of the transfer. *Held*, that section 1104 was not limited in its application to the list of easements

enumerated in section 801, so that the purchaser of land takes it with all of the easements appertaining thereto at the time of the sale, whether enumerated in section 801 or not, and hence would take the right of going upon grantor's remaining lands for the purpose of maintaining a levee, and using the pumping plant thereon to pump out a drainage canal which drained all of the land before the conveyance; the drainage system being a complete scheme of which the levee and pumps were an essential part.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 167–173; Dec. Dig. § 154.\*]

## 2. EASEMENTS (§ 16\*)—CONVEYANCE OF LAND.

Deeds by a trustee of land conveyed to secure the payment of money under a trust deed authorizing trustor to demand reconveyance would convey any easements attached to the land conveyed if the trustor be treated as owner; the trustee's conveyance being as trustor's agent.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 43; Dec. Dig. § 16.\*]

## 3. EASEMENTS (§ 28\*)—EXTINGUISHMENT—"RELEASE."

"Release" is the appropriate word used for the extinguishment of an easement.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 76; Dec. Dig. § 28.\*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6058–6060; vol. 8, p. 7783.]

## 4. EASEMENTS (§ 27\*)—EXTINGUISHMENT—CONVEYANCE.

A deed by the owner of a dominant easement to the owner of the servient tenement extinguishes all easements held by the owner of the dominant easement in the land conveyed.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 75; Dec. Dig. § 27.\*]

### On Rehearing.

## 5. EVIDENCE (§§ 433, 434\*)—VALIDITY OF INSTRUMENT—PAROL EVIDENCE.

When an instrument is sought to be avoided for fraud or mistake in law or fact, evidence is admissible as to what grantor intended to do or convey.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1990–2004, 2005–2020; Dec. Dig. §§ 433, 434.\*]

Department 2. Appeal from Superior Court, Contra Costa County; R. D. Latimer, Judge.

Action by the Jersey Farm Company against the Atlanta Realty Company. From an order granting a preliminary injunction, defendant appeals. Affirmed.

J. C. Meyerstein and H. U. Brandenstein, both of San Francisco, and A. B. McKenzie, of Martinez, for appellant. A. L. Shinn, of San Francisco, and M. R. Jones, of Martinez, for respondent.

HENSHAW, J. This appeal is from an order granting a preliminary injunction restraining defendant and appellant from interfering with the repair and maintenance by plaintiff of a levee, and from interfering with the use and repair of a drainage canal and pumping plant, all situated upon the land of the appellant.

The controversy arises under the following facts: There is in the county of Contra Costa



a tract of land comprising over 3,900 acres which in the state of nature is overflowed by the waters of the San Joaquin river. This land unreclaimed, is valueless, reclaimed, is very valuable. Years ago it was reclaimed by its then owner, the reclamation consisting of the construction of a levee around the exterior boundaries of the tract and the excavation of drainage canals conducting the water to the lowest part of the tract where a pumping plant was erected, and the excess water pumped out of the canal and off the land. The levees, canals, ditches, and pumping plant were constructed, installed, and operated as a single indivisible system for reclaiming all of the land, and they are still indispensable for its use and cultivation. In 1907 Nathan Fisher was the owner of the land. He made a deed of trust to Archibald Kains, trustee for the benefit of Myra E. Wright, beneficiary, to secure the payment of a sum of money owing by Fisher to Wright. The deed of trust contained a provision empowering Nathan Fisher or his grantee to demand reconveyance of any portion of the tract in lots of not less than 50 acres on the payment of a certain specified sum of money per acre. Herman Bendel by mesne conveyances succeeded to the title and rights of Fisher and tendering the requisite amount of money demanded from the trustee a reconveyance of 50 acres. The 50 acres whose reconveyance was thus demanded was the lowest land of the tract. Upon it was established the pumping plant to which pumping plant by a main canal were conducted the surplus waters of the whole tract. The exterior protecting levee extended along the river frontage of this tract. The trustee refused to make the conveyance and Bendel brought suit to compel him to do so. A decree was given commanding the execution of the deed which the trustee thereupon executed. Subsequently Bendel conveyed this 50 acres to the defendant and appellant herein. Previous to the execution of the trustee's deed to Bendel the trustee had executed under the terms of his trust a deed of all of the rest of the tract to Myra E. Wright. To all the interest of Myra E. Wright in this land plaintiff has succeeded. Defendant refused plaintiff admission to its lands for the purpose of maintaining the outer levee upon the lands, of maintaining and using the drainage canal, and of maintaining and using the pumping plant to expel waters from the drainage canal. Plaintiff insisted upon its right to enter the land of appellant for these purposes. The injunction forbade defendant from interfering with plaintiff in the exercise of its asserted rights.

[1] Appellant's first proposition is that section 801 of the Civil Code enumerates all the burdens by way of servitudes which may be attached to land for the benefit of the dominant tenement and that the burdens imposed by the decree upon its land do not come under any of the classifications enumerated

in that section; that the only other section which can have reference to the matter is 1104 of the same Code which declares: "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed." This section, it is said, affords no ground for the relief awarded to respondent, for, it is argued, the easements contemplated by section 1104 are such, and such only as are classified and enumerated in section 801. This, however, we think to be an incorrect construction of the two sections. The ingenuity and foresight of the Legislature would be taxed in vain to name and classify all the burdens which might be imposed upon land. By section 801 it enumerated some of them. By section 1104 it declared generally that, in the case of a transfer of real property other easements may spring into existence, easements which could not be enumerated for the very reason that they embrace every burden which by virtue of the manner of use has been imposed upon the portion of the estate not granted in favor of the portion granted. It is a direct recognition of the principle long established and fully recognized by this court (*Cave v. Crafts*, 53 Cal. 135; *Quinlan v. Noble*, 75 Cal. 250, 17 Pac. 69), that principle being that where the owner of two tenements sells one of them, or the owner of the entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and with all the burdens that appear at the time of the sale to belong to it as between it and the property which the vendor retains. It is this general principle which is given full recognition by section 1104, and its application is by no means limited to the list of servitudes and corresponding easements enumerated in section 801 of the Civil Code. It follows, therefore, that the character of the burden imposed upon the servient tenement is not controlling, that it is of no consequence whether that particular burden will fall into or can be forced into any of the seventeen subdivisions of section 801. If it be a burden obviously cast upon the land at the time of the segregation of the title, it remains a burden upon that land in favor of the other parcel, and it is an "easement" within the meaning of section 1104, even if it does not come within the limitations of section 801 because section 1104 itself designates it an easement. We have before us, then, one complete scheme of reclamation to which the surrounding levee was an essential part, the main drainage canal upon the 50 acres to which all the other drainage canals led another essential part, and finally, and

quite as indispensable, the pumping plant to eject the surplus waters. It would work the destruction of the whole plan to recognize the easement of any of these essentials and not of all. Nor, it may be added, is the right to use a pump under such circumstances a unique burden upon land in the history of the law. Similar cases may be found in *Seymour v. Lewis*, 13 N. J. Eq. 439, 78 Am. Dec. 108; *Larsen v. Peterson*, 53 N. J. Eq. 88, 30 Atl. 1094. It is a matter of indifference to the conclusion thus reached whether the trustee of the whole tract be considered as the absolute owner at the time of the transfers, or whether the successor in interest of Nathan Fisher, the trustor, be considered the owner. In the one case the trustee deeds all of the tract saving the 50 acres to Myra E. Wright and in favor of the land thus conveyed to her springs up the easement to use the remaining 50 acres for the indicated purposes. The later conveyance of the 50 acres would, of course, be subject to these easements.

[2] Precisely the same construction would obtain if Nathan Fisher or his grantee be treated as the owner of the whole tract at the time of the making of the deeds. The deeds by the trustee would then, in effect, be nothing more than deeds by an agent and the same legal result would follow.

Appellant further contends, however, that even if the easements claimed by plaintiff be found to have, or rather to have had, an existence, they were extinguished by the deed of Myra E. Wright, predecessor in interest of plaintiff. This contention rests upon the following facts: Myra E. Wright in July, 1909, through the trustee's deed, became the owner of all the tract excepting the 50 acres subsequently conveyed to Bendel. In that 50 acres after demand by Bendel of the trustee for a deed with tender of the money she had no interest other than what may be described for convenience as a mortgagee's interest. The decree awarding Bendel the 50 acres was made on the 24th day of November, 1909. It would appear that the court's decision had been indicated earlier than this date for the trustee's deed to Bendel was dated and acknowledged on November 22, 1909, and a quitclaim deed and release to Bendel from Myra E. Wright and her husband was given, which deed was dated and acknowledged on November 20, 1909.

[3,4] Upon these facts appellant argues that the release of Myra E. Wright to plaintiff is to be construed by its terms and by its terms alone; that "release" is the appropriate word to be used for the extinguishment of an easement; that a deed by the owner of the dominant tenement to the owner of the servient tenement extinguishes easements; and that the inevitable result is that whatever burdens and servitudes existed upon the Bendel 50 acres were by the deliberate act of Myra E. Wright released and extinguished.

Over these general principles there can be no controversy. *Durkee v. Jones*, 27 Colo. 159, 60 Pac. 618; 14 Cyc. 1191; *Jones on Easements*, § 845; *Devlin on Deeds* (2d Ed.) § 27. The court, however, received evidence of the circumstances under which the deed of quitclaim and release was executed, and from this evidence concluded, as it had the right to do (Code Civ. Proc. §§ 1860, 1861), that "release" was not employed in its technical sense for the extinguishment of the easements, but that the instrument of quitclaim and release was made only for the purpose of carrying into effect the provisions of the trustee's deed and of giving to Bendel simply the title which the trustee's deed justified him in demanding. The evidence upon this point is that the right to appeal from the court's decree existed in favor of Myra E. Wright, that her quitclaim deed preceded in date the deed of the trustee to Bendel, that there was no mention in the deed of easements or servitudes and no indication other than that contained in the use of the word "release" of any intent to extinguish the servitudes. There is positive testimony by the husband of Mrs. Wright who joined in the release that the sole purpose of it was to end the litigation to fortify the trustee's deed, and to give to Bendel just such title as he was entitled to take under the trustee's deed and no more, that a previous sale under the deed of trust had been made to Myra E. Wright, and the quitclaim was further designed to relieve the Bendel land from all question of the effect upon it of this previous sale.

For these reasons, the decree and the order appealed from are affirmed.

We concur: MELVIN, J.; LORIGAN, J.

On Rehearing.

PER CURIAM. The petition for rehearing is denied.

In answer to the proposition argued in the petition, that the effect of the court's decision is to permit declarations of the intent of the grantor in making the deed to control the language of that instrument, it is proper to point out that the hearing before the trial court was solely to determine whether or not a preliminary injunction should be granted. The language of this court was addressed solely to the case made in the trial court upon that hearing—a hearing which was had principally upon affidavits. The defendant having set up the quitclaim deed in its answer, it was open to plaintiff to meet and overcome its legal effect in any appropriate way. It did this by evidence tending to show that the quitclaim deed owed its existence to a mistake in law upon the part of the grantor, taken advantage of by the grantee.

[5] It is, of course, true that, where an instrument is sought to be avoided for fraud or for mistake in law or in fact, evidence is



admissible as to what the grantor intended to do or to convey (Civ. Code, § 1578, subd. 2). Therefore, what is decided upon this appeal is that enough was shown to have justified the court in granting the temporary injunction. Whether the reformation of the deed is required, whether, if required, it may be accomplished under the implied replication to defendant's answer, or whether a separate action seeking affirmative relief on this ground should be brought by plaintiff are one and all questions whose consideration pertain to the principal case when that case comes to be tried upon its merits and formal findings are made.

Therefore those questions are left until that time.

20 Cal. App. 462

**BENSEN v. BENSEN.** (Civ. 1,008.)

(District Court of Appeal, Third District, California. Nov. 29, 1912.)

**DIVORCE (§§ 231, 294\*)—AWARDING PERMANENT ALIMONY—CUSTODY OF CHILDREN.**

Under Civ. Code, §§ 136, 137, authorizing the court denying a divorce to provide for the maintenance by the husband of the wife and children of the marriage, and authorizing an action by the wife for permanent support of herself and children in case of the willful desertion by the husband, the court finding that neither husband nor wife was entitled to divorce could not award the custody of the children to the wife, nor award to her permanent alimony and counsel fees where it did not find facts justifying the inference that the best interests of the children demanded that their custody should be awarded to her, and where it did not find whether the parties were living together or separate, nor make any findings as to their financial condition.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 658-661, 664, 777; Dec. Dig. §§ 231, 294.\*]

Appeal from Superior Court, Contra Costa County; H. C. Gesford, Judge.

Action by Gerda Bensen against Carl Bensen. From a judgment denying divorce, and awarding permanent alimony and counsel fees to the plaintiff, defendant appeals. Modified and affirmed.

Austin Lewis and R. M. Royce, both of San Francisco, for appellant. Harry E. Styles, of Redwood, for respondent.

**BURNETT, J.** This was a suit for divorce, plaintiff claiming it on the ground of cruelty, and defendant, in his cross-complaint, asking for a decree of divorce on the ground of desertion.

The court found as follows: "That the allegations and averments of plaintiff's complaint have not been proved; that the allegations and averments of defendant's cross-complaint have not been proved; that there are three children, issue of this marriage named, respectively, Alice, Berger, and Chester, and that it is for the best interests of said children that plaintiff have their cus-

tody. As a conclusion of law from the foregoing facts, the court finds that neither plaintiff nor defendant is entitled to a divorce herein; that plaintiff is entitled to the care and custody and control of said children and all of them; that said plaintiff is entitled to permanent alimony in the sum of \$20 per month beginning on the 1st day of July, 1911, for the care of said children; that said plaintiff is entitled to the sum of \$75 as and for counsel fees herein which shall be due and payable on the 1st day of July, 1911; that the community property or homestead shall remain as it is, it being understood that plaintiff shall collect and receive the rents and profits thereof until its future disposition by mutual agreement of the parties hereto, or otherwise; and it is hereby ordered that judgment be entered accordingly."

We think it is quite apparent that the findings of fact are utterly insufficient to support the judgment, except that portion of it which denies a divorce to each of the parties. No fact is found that would justify the inference that it is for the best interests of the children that their custody be awarded to the mother. Indeed, considering the general findings of fact in connection with the specific allegations of the complaint and cross-complaint, we have the conclusion of the court that both plaintiff and defendant are "fit" and also "not fit" persons to have the custody of said children. Likewise, it may be said that there is no necessity or justification shown for the provision in reference to the alimony, court fees, or homestead. In fact, we are left completely in the dark as to whether the parties are living together or separate, what their financial condition is, whether there is any community or separate property, whether a homestead exists or what may be the capacity or needs of either party. There is no sufficient reason disclosed, therefore, for the application of section 136 or 137 of the Civil Code. The decisions of our Supreme Court make this plain.

In *Hagle v. Hagle*, 68 Cal. 588, 9 Pac. 842, it is held that: "In an action for a divorce the court has discretionary power, under section 136 of the Civil Code, although a divorce is denied, to require the husband to provide for the maintenance of the wife while she is living separate from him, when the circumstances of the case show that it would be impossible for them to live happily together." An examination of the opinion, however, shows that facts were found by the lower court upholding such conclusion. In *Hagle v. Hagle*, reported in 74 Cal. 608, 16 Pac. 518, it is held that: "The courts of California have no authority to grant a divorce a mensa et thoro, or to compel a husband to support his wife while she is living separate and apart from him against his

will and consent, without any statutory ground for an absolute divorce or any statutory excuse for her absence from his home." In *Peyre v. Peyre*, 79 Cal. 336, 21 Pac. 838, the law is declared to be that: "Where a divorce is denied, permanent alimony cannot be granted the wife, under section 136 of the Civil Code, where no facts are either proved or found showing that the wife has a cause for divorce, or that the parties are not living together, or that permanent alimony is needed for her support and maintenance." In *Volkmar v. Volkmar*, 147 Cal. 175, 81 Pac. 413, it was held that: "In an action for a divorce brought by the husband, where the application is denied, and the court finds that the parties have lived separate and apart since a certain date and that the wife did not desert her husband, but there was neither averment in the answer nor finding that the husband deserted the wife or was at fault for the separation, the court cannot award a permanent maintenance or permanent alimony to the wife." The judgment there was modified by striking out the provision in reference to permanent alimony and as thus modified affirmed.

Following that case as a precedent, it is ordered that the judgment herein be and the same is modified by striking therefrom the following provision, viz.: "That plaintiff is entitled to the custody and control of the three minor children, issue of this marriage, and they and each of them are hereby awarded to plaintiff; that defendant pay permanent alimony to plaintiff in the sum of \$20 per month, beginning on the 1st day of July, 1911; that defendant pay to plaintiff on or before July 1, 1911, the sum of \$75, as and for counsel fees herein; that the community property or homestead remain as it now is, plaintiff to receive rents and profits until its future disposition by agreement of parties hereto or otherwise." And, as so modified, the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

20 Cal. App. 504

ROYAL INS. CO. OF LIVERPOOL, ENG., v.  
CALEDONIAN INS. CO. OF EDIN-  
BURGH, SCOTLAND. (Civ. 1,031.)

(District Court of Appeal, First District, California. Dec. 4, 1912. Rehearing Denied by Supreme Court Feb. 1, 1913.)

**1. INSURANCE (§ 684\*)—REINSURANCE—LIABILITY OF REINSURER.**

Where policies of insurance and reinsurance each contained a provision that if a building, or any part, should fall except as the result of fire, the insurance on the building or its contents should immediately cease, a provision in the reinsurance policy that it should be subject to the same risks, valuations, conditions, and adjustments as were or might be taken by the reinsured, and that the loss was payable pro rata with the reinsured, did not authorize the original insurer by adjusting a loss for which it was not liable because of the fall of a build-

ing to subject the reinsurer to its pro rata share of such loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1817; Dec. Dig. § 684.\*]

**2. CONTRACTS (§ 162\*)—CONSTRUCTION—GIVING EFFECT TO WHOLE INSTRUMENT.**

Every part of a contract must be given some effect, if possible, and apparently conflicting provisions must be reconciled if this can be done without doing actual violence to the language of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 744; Dec. Dig. § 162.\*]

**3. INSURANCE (§ 686\*)—REINSURANCE—ACTIONS—DEFENSES.**

In an action on a policy of reinsurance, an answer alleging a violation by the original insurer of a promise not to adjust any loss without notice to defendant, but not alleging any injury to defendant from such failure, was insufficient.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1823; Dec. Dig. § 686.\*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Royal Insurance Company of Liverpool, England, against the Caledonian Insurance Company of Edinburgh, Scotland. Judgment for plaintiff, and defendant appeals. Reversed.

T. C. Van Ness, of San Francisco, for appellant. James Alva Watt, of San Francisco, for respondent.

HALL, J. This is an appeal from a judgment rendered for plaintiff against defendant upon a policy of reinsurance against loss by fire.

[1] The original policy of insurance and the policy of reinsurance are attached to the complaint and made a part thereof. The risk was upon machinery, fixtures, and goods contained in a designated building. The original policy of insurance contains the following clause: "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." The reinsurance policy contains precisely the same clause and also the following: "This policy is subject to the same risks, valuations, conditions and adjustments as are or may be taken by the reinsured, and the loss, if any thereunder is payable pro rata with the reinsured and at the same time and place." It is substantially alleged in the complaint, among other things, that after the fire plaintiff adjusted and ascertained the amount of the loss sustained by the original insured at a certain amount, and the portion thereof payable by the plaintiff to the original insured, and that it paid the same. Plaintiff sought and obtained a judgment against the defendant for its pro rata amount based upon such adjustment. Defendant, among other things, pleaded as and for a separate defense that, before the occurrence of the fire, a material and substantial portion of said building had fallen from



a cause other than fire, and that said building had fallen within the meaning of the policies. Plaintiff interposed a general demurrer to this defense, which the court sustained, and it is this ruling which presents the principal point to be determined upon this appeal.

It is the contention of plaintiff that because of the pro rata clause defendant is liable for its proportion of the amount found to be due the original insured from plaintiff by its adjustment of such loss with the owner of the property, unless indeed that such adjustment shall have been fraudulently or collusively made to the injury of defendant. In other words, that plaintiff may, by its adjustment with the original insured, establish as against the reinsuring company the fact of its liability for a loss as well as the amount thereof, and this in plain disregard of the conditions of both the original policy and the policy of reinsurance that, "if a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." We cannot accede to the soundness of this view of the law. We have been cited to no case that goes so far. As was said in *Firemen's Fund Ins. Co. v. Aachen & Munich Fire Ins. Co.*, 2 Cal. App. 690, 84 Pac. 253: "In any event, the liability of a reinsurer, like that of a party to any other contract, must depend upon the terms of his contract." By the terms of the contract in the case at bar, all insurance on the property covered by the policy of reinsurance was to immediately cease upon the falling of the building or any part thereof, except as the result of fire.

[2] It is a well-recognized rule that every part of a contract must be given some effect, if possible, and two apparently conflicting provisions of the same contract must be reconciled if such may be done without doing actual violence to the language of the contract. Just what is the precise meaning of the so-called pro rata clause may be in some doubt. We certainly do not think that under its somewhat vague and uncertain language there can justly be found any authority to the reinsured to charge the reinsuring company for a loss for which it in plain terms provided exemption. See *Firemen's Fund Ins. Co. v. Aachen & Munich Fire Ins. Co.*, 2 Cal. App. 690, 84 Pac. 253; *Manufacturers' Ins. Co. v. Western Assur. Co.*, 145 Mass. 419, 14 N. E. 632; *Commonwealth Ins. Co. v. Globe Mut. Ins. Co.*, 35 Pa. 475. In discussing a claim made by a reinsurer that he was entitled to notice of abandonment as and for a total loss the Court of Kings Bench said: "So long as liability exists the mere fact of some honest mistake having occurred in fixing the exact amount of it will afford no excuse for not paying. He has promised 'to pay as may be paid thereon.'" *Western Assur. Co. of Toronto v. Poole*

[1903] 1 Kings Bench Div. 376. The court seemed to be of the opinion that the right of the reinsured to bind the reinsurer by any adjustment of the loss depended upon the existence of a liability for any loss. It has been held that, under a reinsurance policy containing the clause "to pay as may be paid," no adjustment or payment by the reinsured will put a liability upon the reinsurer for a loss for which, under the other provisions of his policy, he was not liable, or for which the original insurer was not in fact liable though he paid it. *Marten v. Steamship Owners Underwriters' Ass'n, Ltd.*, 9 Aspinal's (N. S.) 339; *Chippendale v. Holt*, 73 L. T. Rep. 472. These two cases are precisely in point, but are not cases in appellate courts. We do not think that the reinsured, under the pro rata clause, may, by adjusting and paying a loss, impose a liability upon the reinsurer for a loss not covered by either the original policy or the reinsuring policy, but expressly excepted therefrom. The court erred in sustaining the demurrer to the defense founded upon the fallen building clause. See *Clayburgh v. Agricultural Ins. Co.*, 155 Cal. 708, 102 Pac. 812, 18 Ann. Cas. 579.

[3] Defendant also claims that the court erred in sustaining plaintiff's demurrer to that portion of the answer wherein defendant set up the alleged violation of a promise made by plaintiff not to adjust the loss without giving notice thereof to defendant. Without discussing this claim in detail, it is sufficient to say that we see no error in this ruling. No facts are pleaded which show that defendant was in any way injured by such failure to notify defendant of the adjustment. Especially must this be so if, as we have already held, defendant's liability for any loss is not concluded by such adjustment.

For the reasons above stated, the judgment must be reversed and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

20 Cal. App. 477  
McEWEN v. OCCIDENTAL LIFE INS. CO.  
(Civ. 1,170.)

(District Court of Appeal, Second District,  
California. Nov. 29, 1912.)

1. TRIAL (§ 139\*)—TAKING QUESTIONS FROM JURY—NONSUIT.

To justify a trial judge in taking the issues of fact from the jury, the evidence must be such that plaintiff's case finds no substantial support in it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.\*]

2. INSURANCE (§ 668\*)—ACTIONS ON POLICIES—QUESTION FOR JURY.

In an action on an accident policy, evidence held to present a question for the jury whether

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the death of the insured was occasioned through accident.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.\*]

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Rachel A. McEwen against the Occidental Life Insurance Company. From an order granting a new trial after judgment of nonsuit, defendant appeals. Affirmed.

Benjamin E. Page and L. T. Chamberlain, both of Los Angeles, for appellant. Murphy & Poplin, of Los Angeles, for respondent.

JAMES, J. Plaintiff brought this action as the beneficiary under a policy of insurance against accident and death issued to her husband, Charles R. McEwen. This contract of insurance contained a conditional clause providing that the injuries which might result in the death of the insured, and for which the indemnity was agreed to be paid, should not be "intentionally self-inflicted," and should be "sustained by the insured while sane, and effected directly and independently of all other causes through external, violent and accidental means (suicide, sane or insane, not included)." Evidence was introduced at the trial showing that the insured, McEwen, died on the 21st day of February, 1910, after having been ill for some time; that on the day prior to his death he was alone in his room, and was heard to fall to the floor. Members of his family immediately went to him, and had him placed on his bed. He complained of pain in the back of his head, and it was noted that his neck and shoulder had been bruised, that they were black and blue, and a mark or cut was discovered on his arm. He complained of suffering pain in his neck and head. His death resulted shortly after he experienced this fall. At the conclusion of the evidence introduced on behalf of plaintiff, the trial judge made an order granting the motion of defendant for judgment of nonsuit, and thereafter, on the motion of plaintiff, reopened the case and granted a new trial. This appeal is taken by defendant from the latter order.

The grounds assigned by the plaintiff in her notice of motion for a new trial were sufficient to raise the question as to the sufficiency of the evidence to sustain the judgment of nonsuit.

[1] The rule is elementary and thoroughly settled that, in order to justify a trial judge in taking the issues of fact in suit away from a jury, the condition of evidence must be such that it may be said that plaintiff's case finds no substantial support in it. If there is any evidence at all of a substantial nature supporting the essential features of the cause of action alleged in the complaint,

then and in that case the motion for judgment of nonsuit should not be granted.

[2] In our opinion there was such evidence in this case tending to show that the death of plaintiff's husband was occasioned through accident, and it was for the jury to consider what weight should be given the facts and circumstances in proof in determining that issue. Had the trial court made its order for judgment of nonsuit at the conclusion of the introduction of all of the testimony and at that time taken the case from the jury, a different rule of review would be applied. We are of the opinion that the trial court erred in granting the motion for judgment of nonsuit, and that the order subsequently made setting aside that judgment and granting a new trial was necessary and appropriate to secure to plaintiff an opportunity of having her case adjudged upon the whole evidence.

The order granting a new trial is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

20 Cal. App. 502

ROSE v. LELANDE, County Clerk.

(Civ. 1,260.)

(District Court of Appeal, Second District, California. Dec. 3, 1912.)

# 1. PLEADING (§ 129\*)—ADMISSIONS.

Facts alleged in a verified complaint, and not denied by the answer, are deemed admitted.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 269; Dec. Dig. § 129.\*]

# 2. CLERKS OF COURTS (§ 66\*)—POWERS—DETERMINATION OF SUFFICIENCY OF PLEADING.

The clerk of the superior court has no judicial power to pass on the sufficiency of an answer filed in due time, but the question of its sufficiency is for the court on motion for judgment on the pleadings or on motion to strike out the answer.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. §§ 98-100; Dec. Dig. § 66.\*]

# 3. JUDGMENT (§ 106\*)—DEFAULT—ENTRY BY CLERK.

Where an answer is stricken from the files by the court, and the time for answering has expired, and there is no answer on file, the clerk is warranted in entering a default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 160, 162, 180-197; Dec. Dig. § 106.\*]

# 4. JUDGMENT (§ 107\*)—DEFAULT—ENTRY BY CLERK.

The clerk of the superior court in entering a default acts ministerially, and he may not enter a default where his authority so to do depends on the determination of the sufficiency as to the substance or form of an answer filed in time.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 198-200; Dec. Dig. § 107.\*]

Application by Ruth M. Rose for an alternative writ of mandate directed to H. J. Lelande, as county clerk and ex officio clerk of the superior court of Los Angeles county. Denied.

E. M. Barnes, of Los Angeles, for petitioner.



**SHAW, J.** This is an ex parte application for an alternative writ of mandate directed to H. J. Lelande, county clerk and ex officio clerk of the superior court of Los Angeles county, commanding him to enter the default of defendants in a certain action pending in said superior court, wherein petitioner is plaintiff and Adna R. Chaffee, sued as a member of the board of public works of the city of Los Angeles, and his official surety, alleged to be a corporation, are defendants, or show cause for his failure so to do.

[1] The petition shows that defendants, within due time, filed their answer to the complaint. Petitioner, however, contends that the purported answer is insufficient for the reason that it is not made to appear therein that Chaffee is a member of the board of public works, or that his codefendant is a corporation. The complaint wherein these facts are alleged is verified, and, since the answer does not deny them, they are deemed admitted.

[2, 3] Moreover, conceding the answer to be defective, irregular, or insufficient to constitute a defense, the clerk possesses no judicial power to pass thereon. The question as to the sufficiency of the answer was one for the court to determine upon a motion for judgment upon the pleadings, or motion to strike the purported answer from the files, upon the granting of which latter motion, there being no answer on file, and the time for pleading to the complaint having expired, the clerk would be warranted in entering a default.

[4] The clerk in entering a default acts ministerially, and in no case is he warranted in making such entry where his authority so to do depends upon a determination of the sufficiency, either as to the substance or form, of a document on file purporting to constitute an answer to the complaint.

The application is wholly without merit, and is therefore denied.

We concur: **ALLEN, P. J.; JAMES, J.**

(20 Cal. App. 379)

**PEOPLE ex rel. DEL VALLE et al. v. BUTLER et al.** (Civ. 1,255.)

(District Court of Appeal, Second District, California. Nov. 21, 1912.)

**1. ELECTIONS (§ 261\*)—COMPELLING CANVASS—JURISDICTION—APPELLATE COURT.**

The District Court of Appeal has power to direct a county board of canvassers to canvass election returns as required by statute.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 237; Dec. Dig. § 261.\*]

**2. MANDAMUS (§ 74\*)—GROUNDS—CANVASS OF ELECTION RETURNS.**

Where a county board of supervisors sitting as a board of canvassers fails to canvass election returns as required by statute, mandamus is the proper remedy.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 150-157; Dec. Dig. § 74.\*]

**3. ELECTIONS (§ 250\*)—CERTIFYING RETURNS.**

Where a precinct board of election fails to certify returns within the time prescribed by Pol. Code, § 1174, such act of certifying, being purely ministerial, could subsequently be completed seasonably, provided the contents of the returns were in no way modified.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 226; Dec. Dig. § 250.\*]

**4. ELECTIONS (§ 250\*)—VALIDITY OF RETURNS.**

Election returns from certain precincts were not invalidated because the number of votes received by each candidate was written in the certificate in figures instead of words, or because the names of the candidates did not appear in the certificate where they appeared on the same horizontal lines on the opposite page which contained the tally sheet.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 226; Dec. Dig. § 250.\*]

**5. ELECTIONS (§ 259\*)—CANVASSING RETURNS—EXTRINSIC EVIDENCE.**

The board of supervisors acting as board of canvassers have no authority to take extrinsic evidence with reference to election returns.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 234, 235; Dec. Dig. § 259.\*]

**6. ELECTIONS (§ 250\*)—TALLY SHEETS—CONTROLLING EFFECT.**

Where more than 100 tally marks appear on the tally sheets after the name of one candidate for presidential elector and few or none appear after the names of the other candidates in the same class, the number of tally marks opposite the name of each candidate must control with the board of canvassers, though the certificate of the board of election shows that each of such candidates has received a number of votes in excess of 100; the presumption being that the clerks of election have placed all the tally marks opposite the name of each candidate as his name was read, and it being the duty of the board of canvassers merely to compute, and not to construe, the effect and character of returns.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 226; Dec. Dig. § 250.\*]

**7. STATUTES (§ 227\*)—"DIRECTORY ACTS."**

"Directory acts" are acts as are not of the substance of the thing provided for.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 308, 309; Dec. Dig. § 227.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2078, 2079.]

**8. STATUTES (§ 227\*)—CONSTRUCTION—MANDATORY ACTS.**

In construing a statute matters of substance are to be construed as mandatory.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 308, 309; Dec. Dig. § 227.\*]

**9. ELECTIONS (§ 241\*)—PREPARATION OF TALLY SHEETS—MANDATORY STATUTE.**

Pol. Code, § 1258, prescribing the duty of election clerks and the manner of placing tallies upon the tally sheets as the name is called aloud by the proper officer, is a mandatory provision.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 218; Dec. Dig. § 241.\*]

**10. ELECTIONS (§ 251\*)—EFFECT OF IRREGULARITY—OPENING RETURNS.**

While the breaking of sealed envelopes containing precinct election returns under the direction of the election board prior to the time set for the opening of the envelopes in public was violative of the statute, it was not such an irregularity as required the returns to

be entirely rejected by the board of canvassers.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 227; Dec. Dig. § 251.\*]

**11. ELECTIONS (§ 253\*)—EFFECT OF IRREGULARITY—CERTIFICATE.**

That the board of canvassers permitted a board of election to insert in their certificate the total number of votes received by candidates for presidential elector did not authorize rejection of the election returns which showed tally marks from which the canvassing board could determine the total vote received by each candidate.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 229; Dec. Dig. § 253.\*]

**12. ELECTIONS (§ 259\*)—ALTERATION OF RETURNS.**

The county board of canvassers is unauthorized to change the tally list opposite the name of a candidate voted for, as shown by the tally sheet returned by the board of election.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 234, 235; Dec. Dig. § 259.\*]

Original application for mandamus by the People, on the relation of R. F. Del Valle and another, against Sydney A. Butler and others, constituting the board of supervisors of the county of Los Angeles, and H. J. Lelande, county clerk. Peremptory writ granted.

Jeff. P. Chandler, Joseph H. Call, Lynn Helm, Milton K. Young, Albert Lee Stephens, and Oscar Trippet, all of Los Angeles, for plaintiffs. J. D. Fredericks, Dist. Atty., Joseph Ford, Asst. Dist. Atty., J. W. Carrigan, and Louis W. Meyers, all of Los Angeles, for defendants.

**PER CURIAM.** This is an original proceeding in mandamus instituted by the petitioners, candidates for the office of presidential elector, through which they pray for an order of this court commanding the board of supervisors of Los Angeles county to canvass the returns at the recent election in the manner provided by law; it being claimed that said board is proceeding and threatening to make such canvass in a manner other than that provided by statute. Respondents have interposed a demurrer to the petition and application as amended, upon general grounds, and specifically on account of certain uncertainties claimed to exist.

[1, 2] We are satisfied that this court upon a proper showing possesses the jurisdictional authority to direct the board to perform a duty devolving upon it by law; that the mode and manner of canvassing election returns is provided by statute and when a showing is made that the duty so devolving upon the board of supervisors, sitting as a board of canvassers, is not being performed, or is being performed in a manner otherwise than that provided by law, mandamus is a proper remedy. We are further satisfied, upon an examination of the application and its amendments, that the allegations therein contained are sufficiently specific and certain to

present the matters and things sought to be interposed as a ground for the issuance of the writ. The demurrer is therefore overruled.

[3] Upon the return and hearing, it was developed that in certain election precincts the boards of election had not completed their duties in and about attaching their signatures to the certificate by section 1174 of the Political Code required to be attached to the lists; that the board of supervisors sitting as a canvassing board had permitted members of such election boards to complete the returns theretofore transmitted to the clerk of the county by attaching to the certificates the signatures of a majority of such election boards. We are of opinion that the duty of certifying such returns is purely a ministerial duty, and that duties of that character may be completed seasonably, even though the officers have neglected such duty at the time specified in the statute for its performance, such completion, however, not to include any modification or correction of the returns, or addition or additions thereto.

[4] It was further developed that in certain election precincts the boards of election had, in lieu of writing in longhand in the certificate the number of votes received by each candidate respectively, inserted the number of votes so received in figures. This we think is a substantial compliance with the statute, and in no sense invalidated the returns. In other precincts the returns submitted to this court by stipulation show that the tally sheets had printed therein in appropriate spaces the names of the various candidates, separated by horizontal lines extending uninterruptedly across the page designated for the tally list and across the opposite page upon which the certificate of the number of votes received by such candidate was printed. The officers intrusted with that duty neglected to insert in the certificate the names of the respective candidates, which, however, were sufficiently indicated by the name printed on the tally sheet within the horizontal lines above referred to, and this we think was a substantial compliance with the statute.

[5] While it appears that evidence was taken by introducing a number of witnesses, it was conceded that such action was without warrant of law, and constituted no ground for any action upon the part of the board in making said canvass, and any such testimony must be disregarded.

[6] The serious and chief question presented for our consideration is a determination as to whether the number of votes which appear to have been given for a candidate, as shown by the tally lists, shall prevail where the same is in conflict with the certificate declaring the result, or whether the board may in its discretion accept the tally lists in one instance and the certificate in another where



the facts in their opinion justified such action. The Political Code, after specifying the duties of election boards preliminary to the count, provides by section 1257: "After the lists are thus signed, the board must proceed to open the ballots and count and ascertain the number of votes cast for each person voted for." Section 1258 provides that "each clerk must write down each office to be filled, and the name of each person marked in each ballot as voted for to fill such office, and keep the number of votes by tallies, as they are read aloud. Such tallies must be made with pen and ink, and immediately upon the completion of the tallies the clerks who respectively complete the same must draw two heavy lines in ink from the last tally-mark to the end of the line in which such tallies terminate, and also write the initials of the person making the last tally in such line." Section 1261 provides that "the board must before it adjourns inclose in a cover, and seal up and direct to the county clerk, the copy of the register upon which one of the judges marked the word 'voted' as the ballots were received, all certificates of registration received by it, one of the lists of the persons challenged, one copy of the list of voters, and one of the tally-lists and list attached thereto. \* \* \* The board must also immediately transmit unsealed to the county clerk a copy of the result of the votes cast at such polling-place, which copy must be signed by the members of the board, and which copy shall be open to the inspection of the public." Section 1263 provides that "the sealed packages containing the register, lists, papers, and ballots, must before the board adjourns be delivered to one of its number, to be determined by lot, unless otherwise agreed upon." Section 1264 provides that the member selected must without delay deliver such packages to the county clerk, nearest postmaster, or other persons designated. Section 1267 provides that these packages must be produced before the board of supervisors when it is in session for the purpose of canvassing the returns. The effect which is to be given these tally lists is influenced much by a determination of the question as to the mandatory or directory character of the provision of the statute requiring such lists to be kept.

[7] It is a well-recognized rule that directory acts are such as are not of the substance of the thing provided for.

[8] In construing a statute matters of substance are to be construed as mandatory.

[9] We are of opinion that section 1258, providing for the duty of clerks and the manner of placing tallies upon the tally sheet as the same are called aloud by the proper officer, is a mandatory provision, notwithstanding the fact that other provisions of that section with reference to the initials of the clerk and of the drawing of the lines have been held to be directory. These last provisions are obviously of form, and not of

substance, but that provision which requires the tallying of the vote as called aloud and the preservation of such tally is certainly to our minds matter of substance, and it is mandatory upon the election officers. We are further of opinion that the result of the election—that is to say, a determination of the number of votes cast for any particular candidate—must be determined from an inspection of these tally lists. While section 1174 provides for a certificate upon the part of a majority of the board which shall declare the number of votes cast for each candidate, such certificate, in legal effect, can be nothing less than a declaration of the result of the computation from the tally lists, and if such declaration upon its face is incorrect, or at variance with the tally lists, such certificate must yield in its importance to that of the tally list itself; not unlike the computation of a column of figures the declared total of which is obviously erroneous, and a question arises as to the accuracy of the addition. This can be determined from the aggregate of the figures appearing in the column constituting the total, and the total, if improperly computed, must yield to the corrected result. We are of opinion, therefore, that when the tally list is presented to the board of canvassers showing the same to have been kept, or purporting to have been kept, in the manner provided by section 1258, the number of votes properly computed from such tallies shall be taken and received as the vote for that individual at such an election, even though the board of election had declared a lesser or greater number than shown by such tally sheets. In this determination we are influenced by the well-reasoned case of *Rice v. Board of Canvassers of Coffey County*, 50 Kan. 149, 32 Pac. 134, a decision by the Supreme Court of the state of Kansas. We have examined the statute there considered, and find it identical with our own. In discussing the question it was there said: "The preponderance of decisions under statute somewhat similar to ours, however, appears to uphold the view that the tally or enumeration of the votes in the poll books may be considered in verifying the returns, and that if a disparity exists between the footings and the tallies the latter should control"—citing *Dalton v. State*, 43 Ohio St. 652, 3 N. E. 685; *State v. Hill*, 20 Neb. 119, 29 N. W. 258; *People v. Ruyle*, 91 Ill. 525; *Simon v. Durham*, 10 Or. 52; *State v. Cavers*, 22 Iowa, 343; *Trueheart v. Addicks*, 2 Tex. 221. See, also, *Hughes v. Parker*, 63 Kan. 297, 65 Pac. 265.

The returns exhibited from one of the precincts showed that one of the candidates for presidential elector, as shown by the tally marks, received upwards of 100 votes, whereas another received, as shown by the tally marks, 5 or 6 votes, while in other cases no tally marks whatever were set opposite the names of other candidates. The certificate, however, showed that each of said candi-

dates had received a number of votes in excess of 100. In our opinion the proper rule in canvassing the vote from such precinct is to give to each candidate the number of votes shown by the tally marks opposite his name, without regard to what may be shown by the certificate declaring the aggregate number of votes received by him, and, where no tally marks whatever are placed upon the tally sheet opposite the name of the candidate, such candidate is entitled to no votes whatever from such precinct, notwithstanding the fact in the certified column he is declared to have received a certain number of votes. The clerks of election are officers and presumed to do their duty, and where they purport to keep the number of tallies by the marks in the manner provided by the statute, and purport to place such marks opposite the name of each candidate as his name is read aloud, it must be presumed that they did their duty and placed all of the tally marks opposite the names as they were called. Much was said as to the effect of this conclusion as tending to disfranchise electors. This cannot be the effect, for there is nothing before the board of canvassers which in any legal manner indicates that any one of the candidates received votes in excess of the number of tallies as shown by the tally marks set opposite their names, and for a canvassing board to undertake, upon a theory of inference, to say that it is only fair to conjecture that the others received an equal number of votes, would be to confer a power upon the board of canvassers not reposed in them by law, their duty being simply to compute and not to construe the effect and character of returns. *People v. Stewart*, 132 Cal. 283, 64 Pac. 285; sections 603, 604, *Payne's Law of Elections*.

To summarize, it is the opinion of this court:

(1) That the board of supervisors acting as a board of canvassers have no authority to take extrinsic evidence with reference to returns.

(2) It is not authorized to call in the precinct officers to alter, change, or correct the returns, but where the returns are complete, save and except the authentication thereof, the election board may be permitted to complete the same by adding their signatures thereto.

(3) It is not authorized to reject the tally lists and accept the result as declared in the certificate, if there be a variance between the two. Its duty is to reject the result as declared by the election board and accept the tally lists where there is a conflict between them.

(4) In estimating or counting the votes as shown by the tally lists each mark represents one vote and the marks, and not the number thereof in the squares, are to be accepted as indicating the votes cast, and it is immaterial in what squares such marks

may be placed. The total number of marks, rather than the squares, should control.

(5) Where there are tally sheets showing the number of votes cast for any candidate for presidential elector, such tallies indicate the number of votes received by him, and, where no tally marks are placed upon such tally sheet indicating that the candidate received any votes, he is entitled to no votes from such precinct.

[10] 6. The breaking of the sealed envelopes containing the precinct returns, under the direction of the board, prior to the time set for the opening thereof in public, was contrary to the provisions of the statute, but did not constitute such an irregularity as to require that the returns be entirely rejected.

[11] 7. In instances where the supervisors have permitted the board of election to insert in their certificate the total number of votes received by candidates, which action, in our opinion, is not warranted by the statute, nevertheless, the tallies appearing from which the canvassing board may determine the number, the total figures as subsequently supplied may be ignored, and no injuries could result therefrom, and the same would constitute no good cause for rejecting the return.

[12] 8. In no case is the board authorized to add, or permit any person to add, or deduct from, or in any manner erase, change, or modify, the tally list opposite the name of a candidate voted for, as shown by the tally sheets returned by the board of election.

A peremptory writ of mandate is ordered to be issued, directing the respondents to canvass the election returns in accordance with the conclusions set forth in this opinion.

20 Cal. App. 398

PEOPLE ex rel. SILL v. MURPHY et al.  
(Civ. 1,246.)

(District Court of Appeal, First District, California. Nov. 23, 1912.)

# 1. ELECTIONS (§ 259\*)—CANVASSING OF RETURNS—POWERS AND PROCEEDINGS OF CANVASSERS.

A canvassing board in making the abstract of the votes at an election should consider the entire returns, including the certificate of the election officers, the list of voters, and the tally list, and, in case of a discrepancy between the certificate and the tally list, must, after comparing them with the list of voters returned, decide which is correct, and make the abstract accordingly, and are not bound in every case of discrepancy to accept the tally list as conclusive.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. §§ 234, 235; Dec. Dig. § 259.\*]

# 2. ELECTIONS (§ 261\*)—CANVASSING OF RETURNS.

While cases may occur where the court will direct a canvassing board, in case of a discrepancy, which particular part of the return should be considered as conclusive, they will not do so unless all the matters contained in



the return before the board are before the court.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 237; Dec. Dig. § 261.\*]

### 3. MANDAMUS (§§ 7, 10\*) — NATURE AND SCOPE.

Relief by mandamus is largely in the discretion of the court, and will be allowed only to secure or protect a clear legal right, and never where its enforcement will work an injustice or accomplish a wrong.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 5, 37; Dec. Dig. §§ 7, 10.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4323-4330; vol. 8, pp. 7714, 7715.]

### 4. ELECTIONS (§ 259\*)—CANVASSING OF RETURNS—DUPLICATE RETURNS.

Where the tally list and certificate of the election officers of a precinct, after being duly returned to the county clerk, have in some manner been lost, the duplicate thereof, originally delivered to the inspector of elections, may be used by the canvassing board after the expiration of the six days, which the law requires them to wait for the production of the returns before proceeding to canvass the vote.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 234, 235; Dec. Dig. § 259.\*]

### 5. EVIDENCE (§ 178\*)—SECONDARY EVIDENCE—LOST INSTRUMENTS.

Where the right of any person depends on the contents of a writing which is lost, destroyed, or cannot be found, its contents may be proved by secondary evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 580-594; Dec. Dig. § 178.\*]

Mandamus by the People, on the relation of Stephen J. Sill, against D. J. Murphy and others, constituting the Board of Supervisors of Alameda County, and another. Alternative writ dismissed, and peremptory writ denied.

W. T. Kearney and Thos. E. Hayden, both of San Francisco, and R. B. Bell, of Berkeley, for petitioner. Wm. H. Donohue, of Pleasanton. Walter J. Burpee, and Wm. T. Satterwhite, both of Oakland, for respondents.

**PER CURIAM.** The petitioner in this proceeding was one of the Democratic candidates at the recent general election for the office of presidential elector. He complains of the means and method employed by the respondents, as the board of supervisors of Alameda county, in canvassing the election returns of the vote cast for presidential electors in three certain precincts known respectively as Oakland precincts Nos. 64, 77, and 103 of said Alameda county. He seeks by mandamus to compel the respondents to exclude from their calculations the certificate of the precinct officers as to the number of votes cast, and for whom cast, in precincts 64 and 103, and prays that respondents be commanded to confine their canvass of the votes cast for presidential electors in these particular precincts to the result alleged to be shown by the tally list, as kept and returned in each instance by the precinct officers. In this behalf it is alleged by the petitioner that there is an apparent conflict between the tally list and the certificate of the

election officers as to the number of votes cast in these two precincts for the several candidates for the office of presidential electors. Because of this alleged conflict in the returns, the petitioner insists that the tally list is the only return which can be properly considered and canvassed by the respondents.

With reference to precinct No. 77, it is the claim of the petitioner that the election officers of this precinct not only neglected to certify to respondents the result of the election, but also failed to return the tally sheet of the vote cast and counted in this particular precinct. It is further alleged by petitioner, and admitted by the return to the alternative writ heretofore issued, that, in the absence of the original returns from precinct No. 77, respondents are proceeding to canvass the vote cast in said precinct from and by means of the duplicate tally sheet which the law requires shall be certified to and authenticated by the election officers, and retained for a period of six months by the precinct officer known and designated as the "inspector." Since the oral argument upon this matter, which was upon demurrer to the petition so far as it relates to matters pertaining to the canvass in precincts Nos. 64 and 103, our attention has been called to and we have carefully considered the opinion rendered by the district court of appeal of the second district in the case of *People ex rel. Del Valle v. Butler*, 129 Pac. 600 (Civ. No. 1,255). From the opinion in that case we cannot determine what the petition disclosed there as to the condition of the returns that were considered in that case. We are not called upon therefore to discuss that case, or consider it as an authority here. Upon the demurrer to the petition before us, we are called upon simply to determine whether or not such petition justifies this court in giving to the petitioner the writ demanded.

[1] At the outset it is well to have a clear understanding of the duty and powers of the canvassing board. We believe the true rule to be as stated in 15 Cyc. 382, as follows: "It is the duty of the canvassing board in making the abstract of the votes of an election to consider the entire returns, to wit, the certificate of the election officers, the list of voters, and the tally list; and, where there is a discrepancy or conflict between the certificate of the officers conducting the election and the tally list as regards the number of votes cast for a particular person or proposition, the canvassers, after comparing the certificate and tally list with the list of voters returned, must decide which is correct and make an abstract of the vote accordingly." *People v. Ruyle*, 91 Ill. 525, holds that both tally list and certificate may be considered—the tally list to be looked to where there is a doubt upon the face of the certificate, because of its informal character, as where the statement of the number of

votes is set down below instead of above the signatures of the election officers. In *State v. McFadden*, 46 Neb. 669, 672, 674, 65 N. W. 800, 801, 802, a case of mandamus, there was a discrepancy between the tally list and the certificate. The court said: "While generally such boards have no discretion in the discharge of their duties, the rule has its exceptions. \* \* \* Where there is a discrepancy between the certificate of votes cast for any person for a particular office, and the tallies of the votes cast for him, the canvassers must determine from the entire returns which is correct. \* \* \* It therefore follows that it is the duty of the canvassing board, in making an abstract of the vote of an election, to consider the entire returns, to wit, the certificate of the election officers, the list of voters and the tally list, and, where there is a discrepancy between the certificate of the officers conducting the election and the tally list as regards the number of votes cast for a particular person, the canvassers, after comparing the certificate and tally list with the list of voters returned, must decide which is correct, and make an abstract of the vote accordingly. No arbitrary rule can be laid down. Upon such comparison the canvassers may be justified in counting the votes as shown by the tally list rather than the number stated in the certificate, and vice versa." We think the above is as complete a statement of the correct rule as can be found in any decision of any court of last resort. What follows in this opinion we believe to be a just application of the above rule.

It is not disputed here but that the board of canvassers had before them the full returns as to precincts Nos. 64 and 103 enumerated in section 1261 of the Political Code, including the poll list, tally list and the certificate of the result, signed as required by law by each of the election officers. This court has before it no such record. It has but a meager statement as to some isolated matters culled by petition from such record. We have found no case in the limited time at our disposal for the examination of the questions involved in this proceeding, where any court has ever assumed to give directions, by writ of mandate, to the canvassing board that any one matter in the return before them shall be conclusive as to the result of the election, unless a full showing as to the contents of the election returns had been in some appropriate way presented to the court. At the election just passed, four separate groups of candidates for presidential electors, representing four different political parties, were voted for. In such case the voters, in exercising their right of franchise, in fact are expressing their preference for president. As a consequence it seldom happens that any voter discriminates between the candidates in his party group.

The only matter presented to this court by the petition on file is the statement that there is a discrepancy between the number

of votes given to each member of the group of presidential electors as shown by the tally and as totaled by the certificates of the officers of election. There is absolutely nothing upon the face of the petition to show that the board of canvassers may not, by the use of all the election returns required by law to be delivered by the board of election to the county clerk, arrive at a correct tabulation of the votes to which each candidate for presidential elector is entitled and which should be credited to him. The meager statement in the petition before us does show that according to the tallies there was a difference between the votes counted for Mr. Wallace and his fellows in the same group of more than 100 votes, a difference that is improbable. It may be that the full returns before the canvassing board disclosed a like difference in the tallies for the first name in each group and the other names in such group, while the certificate of the election officers gave each candidate in any one group the vote as shown by the tallies for the first name in the group.

Having in mind the facts above adverted to as to the character of the office for which these candidates were aspiring, is it not a fair and reasonable conclusion that the returns as a whole justify the assumption that the election officers, as the count progressed, finding that the several names in each separate group were receiving the same votes, decided to tally against the first name as and for all in such group? This assumption will acquit the five election officers of having willfully and fraudulently made a false certificate as to the votes counted for each candidate, when they made such certificate giving to each name in each separate group the number of votes tallied against the first name only.

[2] As before stated, the petition before us does not disclose what is in the full returns; but the observations just made illustrate the danger of any court attempting to direct the canvassing board as to what particular part of the return shall be considered as conclusive as to the votes received by the several candidates, without a full statement in the petition for the writ of all matters contained in the returns before the canvassing board. Cases may occur where, upon a full return being made before the court, it may justly direct the canvassing board upon such a point. No such case is present in the one before us. The only facts before us as to precincts 64 and 103 are such as are stated in the petition and admitted by the demurrer. These facts make out no violation of a clear legal right.

[3] To quote from *Rice v. Board of Canvassers of Coffey County*, 50 Kan. 149, 32 Pac. 134: "The plaintiff seeks relief through an action of mandamus, which lies to a great extent in the discretion of the court. It should be allowed only to secure or protect a clear legal right, and should never be grant-



ed when its enforcement would work an injustice or accomplish a wrong. *State v. Marston*, 6 Kan. 524; *Peters v. Board of State Canvassers*, 17 Kan. 365; *State v. Stevens*, 23 Kan. 456, 33 Am. Rep. 175; *People v. Board of Canvassers*, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 646; *High*, Extr. Rem. § 40; 14 Am. & Eng. Enc. Law, 97." The petition as to the matters relating to precincts Nos. 64 and 103 does not come up to the requirements of the above rule, and for that reason the demurrer thereto should be sustained.

[4] As to precinct No. 77, it appears from respondents' answer and the evidence presented to this court in support thereof that although the tally list and certificate of the election officers as to the result of the election were duly returned to the county clerk, as required by the statute, they have since in some manner been lost, and after the most diligent search cannot be found. The duplicate of such papers, however, originally delivered to the inspector of elections is now in the possession of the board. It is the contention of petitioners that the respondents, although the tally list and certificate cannot be found, have no power to resort to other evidence to establish their contents. And in this connection great stress is laid upon language used by the court in *People v. Stewart*, 132 Cal. 283, 64 Pac. 285, to the effect that no such evidence can be resorted to by the canvassing board, and especially that the board had no right to resort to the duplicate list of voters, tally list, and list attached thereto, kept and retained by the inspector of said board of elections. But the language used by the court must be understood in the light of the facts of that case. In that case the board met on the first Monday after the election. No returns had been received from one precinct of the county, and the board, without waiting for the expiration of six days for the production of such returns, as plainly required by the law, proceeded to canvass the returns and declare the result. In doing so it sent for and used the duplicate list of voters, tally list, and list attached thereto retained under the law by the inspector. This it clearly at that time had no right to do. "It was forbidden to act, if the returns were not all in, until the lapse of six days."

In the present case what appeared to be the returns—that is to say, the packages from all the precincts—were before the board when it commenced to canvass. The six days have now expired; and, if the papers constituting the election returns cannot be found, no substantial or just reason appears why resort may not be had to the duplicate original of such papers which the law requires to be preserved, and which should be in the possession of the inspector. They are official documents, and are duplicates of the ones that should have been sent

to the county clerk—executed by the same officers and at the same time. It would seem that the primary and most important purpose of requiring a duplicate set of these records to be made and preserved was to meet just such a contingency as is presented in this case; in other words, to prevent a miscarriage as to the result of the election where the returns should, through either accident or design, be lost, destroyed, or misplaced. *State v. Nerland*, 7 S. C. 241.

[5] It is a principle of law, found in the common law, laid down in all the text-books, and carried into the statutes of this and of all other states, that where the right of any person depends upon the contents of a writing, and such writing is lost, destroyed or cannot be found, the contents of such writing may be proved by secondary evidence. In accord with this principle and rule of law, the election law of this state requires the board to wait a period of six days for the production of the missing returns before proceeding with the canvass. Upon the expiration of such period, the board must proceed with the canvass, and, if any return cannot be found, we have no doubt but that the duplicate thereof required by the law to be kept may be resorted to to establish the result of the vote. These views are in complete harmony with the views expressed by courts in other jurisdictions, and their adoption will result in effecting the principal object of the law concerning the canvassing of election returns, to wit, the ascertainment of the vote as actually given by the electors. To require the rejection of this safe evidence as to the contents of the lost or destroyed return would result in the disfranchisement of all the voters of a precinct for no fault of theirs. Such a result should not be countenanced if within the principles of law and justice it may be avoided.

Nothing actually decided in *People v. Stewart*, supra, is contrary to the views herein expressed. That the Supreme Court has not considered *People v. Stewart* authoritative as to all that is claimed for it by petitioners is evidenced by the record in the case of *Hosmer v. McGuire et al.* (S. F. No. 4,724, no opinion filed), where the court, upon petition of Hosmer, issued an alternative writ of mandate directed to the respondents, who were acting as a board of canvassers, commanding them to notify the members of certain precinct election boards to assemble at the office of respondents, and there permit them—said precinct officers—to complete their official duty by inserting in writing in the returned tally list a statement of the vote cast for each candidate in the several precincts.

The foregoing disposes of all of the questions of law involved in the pleadings and the admitted facts of the present case; and for the reasons stated it is ordered that the demurrer, so far as it relates to the matters

concerning precincts Nos. 64 and 103, be and it is sustained; and that the application for a peremptory writ of mandate be denied, and the alternative writ heretofore issued be dismissed.

LENNON, P. J.; HALL, J.; MURPHY, J., pro. tem.

(20 Cal. App. 495)

DEVLIN v. DONNELLY et al. (Civ. 1,041.)  
(District Court of Appeal, Third District, California. Dec. 3, 1912.)

**1. ELECTIONS (§§ 259, 290\*)—RECOUNT—RETURNS—SUPERVISORS—POWERS.**

Where a recount is sought in an action, as authorized by Pol. Code, § 1258, the court has authority to go behind the returns, examine the ballots, and correct the tally sheets so as to make them speak the truth, but the board of supervisors in canvassing the returns have no such power, and are only authorized to return the vote as shown by the tally lists.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 234, 235, 306, 307; Dec. Dig. §§ 259, 299.\*]

**2. MANDAMUS (§§ 7, 10\*)—RIGHT TO WRIT—ISSUANCE.**

Whether relief by mandamus shall be granted is a matter largely within the discretion of the court, the writ being allowed only to secure or protect a legal right, and not where its enforcement will work an injustice or accomplish a wrong.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 5, 37; Dec. Dig. §§ 7, 10.\*]

**3. MANDAMUS (§ 74\*)—ELECTIONS—CANVASSING OF RETURNS—TALLY LISTS.**

Where election officers in casting up the returns did not mark on the tally sheets opposite the name of each candidate a tally for each vote, as required by Pol. Code, § 1258, except that defendant did so mark the tally sheets opposite the name of the candidate at the head of each group of candidates, and in other cases entered the total number of votes cast for each candidate without keeping a tally of each vote, a defeated candidate was not entitled to mandamus to compel the board of supervisors to canvass the returns in cases where no tally marks are set opposite the name of the candidate, as though no votes had been deposited for such candidate in such precinct.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 150-157; Dec. Dig. § 74.\*]

Mandamus by Frank R. Devlin against J. H. Donnelly and others, members of the board of supervisors of Sacramento county. Writ denied.

Charles O. Busick and Clinton L. White, both of Sacramento, for petitioner. Hugh B. Bradford and J. O. Brown, Deputy Dist. Atty., both of Sacramento, for respondents.

CHIPMAN, P. J. At the election held on November 5, 1912, plaintiff was one of the candidates of the Progressive party for the office of presidential elector. He seeks by the writ of mandamus to have the vote canvassed in certain election precincts in Sacramento county. Among other grounds for issuing the writ it is alleged that the canvass of election precincts for presidential electors

"has proceeded sufficiently to show that there is a small margin as between the Republican party and Progressive party candidates on the one part and the Democratic candidates for electors on the other part, and the result of the election in Sacramento county for presidential electors, if lawful and regular canvass, will be controlling and decisive as to the result throughout the state as to which set of electors has been duly elected."

Without setting forth the averments of the petition, we understand from the facts admitted at the argument on the demurrer that the election officers did not mark on the tally sheets opposite each candidate's name a tally for each vote as called, except that they did so mark the tally sheets opposite the name of the candidate at the head of each group of candidates. In the other cases the election officers entered the total number of votes cast for each candidate, but did not keep a tally of each vote, as is required to be done by section 1258 of the Political Code. The contention is that, where the tally sheets fail to show any tallies or did not show a number of tallies corresponding with the number carried out as the total number of votes counted for the candidates, the board violated its duty in canvassing the vote in accordance with the total number so given in the certified returns. The result of the canvass of the returns thus made up was declared by the board of supervisors and entered on the records of such board. The clerk of the board, under section 1308 of the Political Code, made certified abstract of so much of the record as relates to the vote given for persons for electors for President and Vice President of the United States. Pursuant to section 1309 of the same Code, the clerk proceeded "to seal up such abstract, indorse it 'Presidential Election Returns,' and without delay transmit it to the Secretary of State by mail or as in the manner hereinafter prescribed." It is admitted, for the purpose of the hearing on the demurrer, that the required certificate is now in the hands of the Secretary of State, and that he has not yet certified the returns or the result of said election to the Governor.

We are asked by the writ of mandate to compel the board of supervisors to proceed to canvass the returns in accordance with the tally sheets, and that said board be directed not "to canvass any votes except as the same are shown by the tally marks on the tally sheets opposite the name of such candidate without regard to what may be shown by the certificate declaring the aggregate number of votes received by such candidate," and that, "where the returns show no tally marks whatever upon the tally sheets opposite the name of the candidate," the said board "be directed to canvass the returns the same as if such candidates are entitled to no votes whatsoever" from such precincts as are involved.

There is no averment in the petition that there was fraud or mistake in the result cer-



tified, nor is it shown that the certificate of the result entered upon the records of the board does not state the correct number of votes cast for and against each candidate. The contention is that it was the duty of the election officers to "keep the number of votes by tallies, as they are read aloud," as provided by section 1258, *supra*, and in every instance, where the election officers failed to follow this plain mandate of the statute, the aggregate vote certified by such officers should be wholly disregarded by the board of supervisors, and that such "candidates are entitled to no votes whatsoever."

[1] There are many and cogent reasons for holding that the election officers should strictly follow the directions given in section 1258; and in an action where a recount is sought under the provisions of the statute, the court may go behind the returns, examine the ballots and correct the tally sheets so as to make them speak the truth. But the board of supervisors have no such power in canvassing the returns. They have before them the lists attached to the tally lists, "containing the names of persons voted for and for what office, and the number of votes given for each candidate and such lists must be signed by the members of the election board and attested by the clerks. Section 1260, Pol. Code. The board of supervisors in canvassing the returns have only the ministerial duty to perform as directed by sections 1280 and 1281 and to cause the clerk to enter upon their records a statement of the vote thus canvassed as provided in section 1282. In the present case the board of supervisors had before it the certified returns of the vote for presidential electors which showed that petitioner and certain other candidates had received a certain number of votes in the precincts designated, but the tally sheets did not show tallies corresponding in number with the certified aggregate vote, in some cases there being no tallies whatever. The board in making its statement on its records accepted these totals as correctly showing the votes cast for candidates, and the clerk made a certified abstract accordingly and transmitted it to the secretary of state as required by section 1309. The question here is not whether the election officers performed their duties as required by law, nor is it whether, by the writ of mandate, the board of supervisors can be directed to correct the election returns, but the question is, Should the writ be used to compel the board of supervisors to make the canvass so that "where the returns show no tally marks whatever upon the tally sheets opposite the name of the candidate, the said board be directed to canvass the returns the same as if such candidates are entitled to no votes whatever"?

In the case recently decided by the District Court of Appeal for the Second district, entitled—*People, on the relation of Del Valle and Foy, v. Butler and others*, members of the board of supervisors of Los Angeles county,

129 Pac. 600, the writ was asked to compel the defendants then convened to so canvass the returns of the election for presidential electors (as we assume from what appears in the opinion of the court) that they shall be guided exclusively by the tallies as shown on the tally sheets, and, where there is a conflict between such tallies and the aggregate vote as certified on the election returns, the tally sheets must govern. In that case the board of supervisors were engaged in canvassing the returns and the court held that the writ would lie to compel the board, in making the canvass, to follow the tally sheets. We express no opinion upon the question whether the writ will lie where, on proper showing, it is seasonably sought to direct the board in the performance of its duty. Such is not the case here. The board of supervisors has completed its canvass and the result has been duly certified to the secretary of state. In the Los Angeles case the court followed the decision in *Rice v. Board of Canvassers of Coffey County*, 50 Kan. 149, 32 Pac. 134, a decision by the Supreme Court of Kansas, and other cases cited, in which it was held: "That the tally or enumeration of the votes in the pollbooks may be considered in verifying the returns, and that if a disparity exists between the footing and the tallies the latter should control." In *People ex rel. Sill v. Murphy et al., Supervisors of Alameda County*, 129 Pac. 603, recently before the District Court of Appeal for the First district, that court considered the question. Of the Los Angeles decision it is said: "We cannot determine from the opinion what the petition disclosed as to the condition of the returns that were considered in that case. We are not called upon, therefore, to discuss that case, or consider it as an authority here." Speaking of that case and the absence of a statement of what the full returns might show, the court said: "Cases may occur where, upon a full return being before the court, it may justly direct the canvassing board upon such points." In the Alameda county case, as we infer from the opinion, the board of supervisors had completed the canvass of the precinct involved when the writ was asked, but the votes for the entire county had not been canvassed or a certified abstract sent to the secretary of state. Much the same facts as to the method adopted by the board in making the canvass existed as in the Los Angeles county case. Upon the question whether the board should, in making its canvass, be controlled by the tally sheets, the two decisions are not in harmony. The court, in the Alameda county case, cited *State v. McFadden*, 46 Neb. 669, 672, 674, 65 N. W. 801, 802, where there was a discrepancy between the tally list and the certificate, and the court said: "While generally such boards have no discretion in the discharge of their duties, the rule has its exceptions. \* \* \* Where there is a discrepancy be-

tween the certificate of votes cast for any person for a particular office and the tallies of the votes for him, the canvassers must determine from the entire returns which is correct. \* \* \* The canvassers, after comparing the certificate and tally list returned, must decide which is correct, and make an abstract of the votes accordingly. No arbitrary rule can be laid down. Upon such comparison the canvassers may be justified in counting the votes as shown by the tally list, rather than the number stated in the certificate, and vice versa." This was deemed by the judges in the Alameda county case to be "as complete a statement of the correct rule as can be found in any decision of any court of last resort." The rule similarly stated in 15 Cyc. 382, also met the approval of that court. This conflict of opinion becomes of importance in cases like the present one where the statute makes no provision for a recount. It is of less consequence in cases where the ballots may be resorted to by a disappointed candidate.

[2] Whatever, then, may be the true rule ultimately to be established in this state, there still remains the question whether we should allow the writ of mandamus to be resorted to under the circumstances of the present case. We said, in *Neto v. Conselho Amor Da Sociedade*, 18 Cal. App. 234, 122 Pac. 973, that the writ of mandate should not issue "for a vain and nugatory purpose." "It is not issued on mere technical grounds. Its design is to do substantial justice and prevent substantial injury"—citing cases. From *Rice v. Board of Canvassers of Coffey County*, 50 Kan. 149, 32 Pac. 134, cited in both the Los Angeles county and Alameda county cases, recently decided by the District Courts of Appeal, the court, in the Alameda county case, quoted as follows: "The plaintiff seeks relief through an action of mandamus, which lies to a great extent in the discretion of the court. It should be allowed only to secure or protect a clear legal right, and should never be granted where its enforcement would work an injustice or accomplish a wrong"—citing cases.

[3] We have here a case where the canvassers were confronted with the certificate of the election officers showing that certain presidential electors had received a stated number of votes. They also had before them the tally sheets which did not show tallies in corresponding numbers. The canvassers could readily discover from the tallies given the leading candidate among the electors, that they must either accept the certificate as to the total number of votes counted for the candidates, or do an apparent injustice to one or more of them. No suspicion of any incorrectness in the count thus certified was discoverable from the face of the returns and no incorrectness is now alleged. To grant the writ with the directions prayed for would, after much delay, result in a certified abstract to

the secretary of state different from that now in his hands; and, in all probability, it would be a certificate disfranchising all voters whose votes happened not to be shown in the tallies, and would bring about a result in direct contravention of a certified result, the correctness of which is not questioned and cannot be, in this action, otherwise than by an arbitrary pronouncement that the tally sheets alone shall govern. Then, too, which certified abstract would the secretary of state follow? He is not a party to the action. Should he refuse to be guided by the second certified abstract, it would be necessary to resort again to the writ. We are not willing, under the circumstances, to issue the writ where the inevitable consequences would work what we conceive would be an injustice; especially so where neither the good faith of the canvassers nor the correctness of their work is challenged. It may not be amiss to suggest what may easily be seen might happen should petitioner be granted the writ. Our judgment does not become final for 30 days and the unsuccessful party has 20 days thereafter in which to apply for a rehearing in the Supreme Court, which application would be granted or refused 10 days later. What delay would follow if granted cannot be determined. Furthermore, other actions may be brought to bring about like results in other counties and by this means the final returns to the Governor may be postponed to a date beyond the assembling of the electors on the "second Monday in January next following their election," as required by section 1315, Political Code. Indeed, it would be quite within the ingenuity of interested parties to hold back the final returns to a date beyond the meeting of the electoral college at Washington to declare the result of the election for President and Vice President.

It is true that, where there is a clear legal right, the courts will not ordinarily refuse to enforce it in disregard of possible consequences. But, where the right is not clear and the duty of the court imperative, the consequences to flow from granting the remedy may be considered. And this is especially true in determining whether the extraordinary writ of mandamus should issue. We do not think the right here claimed is by any means so clear as to deprive the court of its discretion in determining whether the writ should issue.

We feel justified in refusing the writ for the further reason that plaintiff may, if so minded, apply at once to the Supreme Court for relief, the only tribunal of the state with power to finally determine the true rule in this very important matter and to clear away the apparent conflict of decision in the district courts of appeal.

The demurrer is sustained and the writ denied.

We concur: BURNETT, J.; HART, J.



20 Cal. App. 807

**DEVLIN v. WRIGHT et al.** (Civ. 1,042.)  
(District Court of Appeal, Third District, California. Dec. 3, 1912.)

Mandamus by Frank R. Devlin against Arthur H. Wright and others, members of the board of supervisors of San Joaquin county. Writ denied.

Charles O. Busick and Clinton L. White, both of Sacramento, for petitioner. Hugh B. Bradford and J. Q. Brown, Deputy Dist. Atty., both of Sacramento, for respondents.

**CHIPMAN, P. J.** By stipulation in open court it was agreed that the decision in the case of Frank R. Devlin v. J. H. Donnelly et al. (No. 1,041) 129 Pac. 607, should be determinative of the decision in this case. On the authority of that case,

The writ is denied.

20 Cal. App. 412

**BAKERSFIELD & V. R. CO. v. FAIRBANKS, MORSE & CO.** (Civ. 1,217.)  
(District Court of Appeal, Second District, California. Nov. 27, 1912.)

**1. MONEY PAID (§ 8\*)—ALLEGATIONS OF COMPLAINT.**

A complaint alleged the purchase of a motor car from defendant, and that, upon being notified of its defective condition, defendant attempted to repair it, but failed, and then authorized plaintiff to purchase the necessary material and employ labor to repair it, and that plaintiff, "by authority of said defendant as hereinbefore stated, thereupon purchased material and employed skilled labor in an attempt to repair said car \* \* \* which labor and material amounted to the sum of \$841, which sum and amount defendant agreed to pay plaintiff, but it has not paid the same," though requested. *Held*, that the complaint stated a cause of action for money expended in repairing the car under defendant's authority and agreement to repay such money.

[Ed. Note.—For other cases, see Money Paid, Cent. Dig. §§ 24-26; Dec. Dig. § 8.\*]

**2. EVIDENCE (§ 265\*)—ADMISSIONS—ADMISSIONS OF COUNSEL.**

In an action for expenditures in repairing a motor car purchased from defendant and repaired on defendant's authority, a statement by plaintiff's counsel that he did not propose to rely on the warranty as a warranty, but was relying upon an express promise of defendant to pay the money, and also upon the quantum meruit, was not an admission that plaintiff abandoned all claims that the motor was not properly constructed, merely meaning that plaintiff would not rely wholly upon the warranty as to the condition of material and workmanship, and proof of breach, but also relied upon defendant's express promise to reimburse plaintiff.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1029-1050; Dec. Dig. § 265.\*]

**3. APPEAL AND ERROR (§ 231\*)—OBJECTIONS—STATEMENT OF GROUNDS.**

Where no cause of objection to the admission of evidence is stated in the record, error in its admission cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. § 231.\*]

Appeal from Superior Court, Ventura County; Robert M. Clark, Judge.

Action by the Bakersfield & Ventura Rail-

road Company against Fairbanks, Morse & Co. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

Stutsman & Stutsman and George Greer, all of Los Angeles, for appellant. Charles F. Blackstock, of Oxnard, for respondent.

**JAMES, J.** Plaintiff purchased from defendant in the year 1909 a motor car for use on its street railway. Upon being put to the use for which it was purchased the motor soon became out of order, a number of its parts gave way while it was being so operated, and plaintiff complained to defendant that the motor car was defective in material and workmanship, and requested defendant to repair it. After some negotiation was had between the parties, plaintiff caused the repairs to be made upon the car, and by this action sought to recover the sum of \$841.55 paid out on that account. In its amended complaint the plaintiff first alleged that, upon being notified of the defective condition of the car, defendant attempted to repair it but failed, and that it then authorized plaintiff to purchase the necessary material and employ the necessary labor for the repair thereof so as to make the car conform to the purposes for which it was sold. It was then alleged: "That said plaintiff under and by authority of said defendant as hereinbefore stated, thereupon purchased material and employed skilled labor in an attempt to repair said car, engine and equipment thereof, all of which was done and performed in the county of Ventura, state of California, and which labor and material amounted to the sum of \$841.55, which sum and amount defendant agreed to pay to plaintiff, but that he has not paid the same nor any part thereof, although often requested so to do, and that the said sum of \$841.55 and the whole thereof is now due, owing and unpaid." In a second count contained in its complaint plaintiff alleged, after setting forth the circumstances of the sale of the motor car, that after it became in disrepair and its parts broken defendant was notified of the facts, whereupon defendant attempted to repair the car, but failed to put it in good condition, and that thereupon plaintiff purchased the necessary material, and employed the necessary labor in an attempt to make the car suitable for the purposes for which it was sold, which labor and material amounted to the sum of \$841.55, which sum was the reasonable value thereof. Allegations as to nonpayment and demand followed. In its answer defendant admitted that it had represented the car sold to have standard equipment, and that it was good, sound, and substantial and of the best material, and that the workmanship on the car and engine were of the highest and best

mechanical construction. Upon trial being had, testimony was introduced on behalf of plaintiff. A motion for judgment of nonsuit was denied, and, defendant offering no evidence, judgment in favor of plaintiff for the sum of \$800 was entered. Motion for new trial was thereafter made and denied, and an appeal was then taken from the order denying the motion for a new trial and from the judgment.

[1] We cannot agree with the contention made on behalf of appellant that the complaint of plaintiff failed to state a cause of action. In the first count therein contained the character of the defects which the motor car developed after use were fully set forth, and these defects were such as to entitle plaintiff to damages, considering alone the representations admitted by the answer of defendant to have been made as to the kind and condition of the workmanship and material which had been employed in the manufacture of the car. Having first sufficiently alleged facts showing a breach of contract, plaintiff proceeded then to allege that defendant had attempted to repair the car and failed, and had then authorized plaintiff to purchase the necessary material and employ the necessary labor for the repair thereof, and that plaintiff did so purchase such material and labor at an expense of \$841.55, which amount it is alleged defendant agreed to pay. Construing these allegations together, we think that the cause of action stated was that defendant authorized plaintiff to purchase the necessary material and labor to repair the car, and that defendant's agreement was to pay whatever sum plaintiff necessarily incurred in that behalf. The following allegation, that the sum of \$841.55 was agreed to be paid by the defendant to plaintiff, we think, when read in connection with the allegations immediately preceding it, means nothing more than that defendant agreed to pay the expense necessarily incurred, and that the amount stated was the amount which plaintiff had been caused to pay as a necessary expense in repairing the car. If the amount charged and claimed as having been necessarily expended in causing the repairs to be made was excessive or unreasonable, that, as we view it, was a matter of defense which defendant was entitled to urge, and which it did urge, against the claim of plaintiff.

[2] We do not construe the language of counsel for plaintiff, when he said at the opening of the trial that he "did not now propose to rely upon the warranty as a warranty, but we are relying upon an express promise that these people made to pay this money, and also upon the quantum meruit," to mean that he abandoned all claim that the machine was not made of good material and under proper workmanship, for without there having been committed a breach of

contract in that regard, or at least a claim that such breach had been committed, there would have been no consideration upon which to rest defendant's alleged promise to pay for the repairs. It seems quite clear to us that this statement was intended only to mean that plaintiff would not rely wholly upon the warranty as to the condition of material and workmanship and proof of a breach thereof, but that it intended to show an express promise made by defendant to reimburse plaintiff, referable to the contention that material and workmanship on the car were deficient in kind and quality, as a consideration therefor. In other words, we cannot assume that plaintiff intended at the outset of the trial to stipulate itself out of court. In our opinion the proof was amply sufficient to sustain the allegations contained in the first alleged cause of action at least. All of the material testimony pertinent to the issues was furnished by a witness, Mr. Blackburn, and this testimony was offered and received without any objection being interposed thereto on the part of defendant.

[3] At one point in the examination of this witness the record contains the phrase, "Counsel for defendant objects," but no grounds are stated showing cause for the objection, and therefore it must be wholly disregarded.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

20 Cal. App. 465

MARSTON v. WATSON. (Civ. 974.)

(District Court of Appeal, Third District, California. Nov. 29, 1912.)

1. APPEAL AND ERROR (§ 1024\*)—DENIAL—CHANGE OF VENUE—FINDINGS—CONCLUSIVENESS.

The court on appeal from an order denying a change of venue on the ground of the nonresidence of defendant must accept as established the facts recited in the affidavits of plaintiff; and, if therefrom an inference can be drawn justifying the order, it must be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3816-3823, 3836, 3837, 4020-4022, 4025-4028; Dec. Dig. § 1024.\*]

2. DOMICILE (§ 1\*)—"RESIDENCE" DEFINED.

"Residence" defined by Pol. Code, § 52, as the place where one remains when not called elsewhere for special purposes, and to which he returns, indicates permanency of occupation as distinct from lodging or boarding or temporary occupation; and, where a person actually lives in a certain place with the intention of remaining there indefinitely, that place is his residence.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6151-6161; vol. 8, p. 778S.]

3. APPEAL AND ERROR (§ 1024\*) — REVIEW — DENIAL OF CHANGE OF VENUE.

The court on appeal will not disturb an order denying a change of venue on the ground of a nonresidence of defendant, where the affidavits of plaintiff show that at the time of the



making of the order and for four months prior thereto defendant kept house on a ranch in the county in which the action was brought; that at no time during the period did she live outside of the county; that she actually occupied the premises as her home during the period; that about two weeks prior to the commencement of the action she declared that she had leased the ranch from another, and that she had taken up her abode there; and that she was making her home there, and expected to develop the ranch.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3816-3823, 3836, 3837, 4020-4022, 4025-4028; Dec. Dig. § 1024.\*]

Appeal from Superior Court, Napa County; J. O. Prewett, Judge.

Action by G. W. Marston against Rowena Watson. From an order denying a motion for a change of venue, defendant appeals. Affirmed.

L. C. Pistolesi and O. F. Meldon, both of Sausalito, for appellant. E. S. Bell, of Napa, for respondent.

**BURNETT, J.** This is an appeal from an order denying a motion for a change of venue. The action was brought in Napa county, and defendant claimed to be a resident of Marin county, and the only question is whether there is any conflict in the evidence as to her residence.

[1] The matter was submitted upon affidavits, and it is not disputed that the rule in such case for the guidance of an appellate court is the same as where oral testimony is presented; and therefore we must accept as established the facts recited in the affidavits of the prevailing party, and, if therefrom a rational inference can be drawn in consonance with the order of the lower court we must affirm said order. *Bernou v. Bernou*, 15 Cal. App. 341, 114 Pac. 1000.

Three affidavits were filed on the part of plaintiff. In that of E. S. Bell it was stated that "he had been personally acquainted with the above named defendant for a period of ten or fifteen years; that about two weeks prior to the commencement of this action defendant visited the offices of this affiant in the city of Napa, and in the discussion of the matters of the issues involved in the above-entitled action informed this affiant that she had leased the ranch upon which she then lived from her mother, Sarah Watson; that she had taken up her abode on said ranch as her residence, and intended to give the running of the said ranch her personal attention; that she was making her home upon said ranch, and expected to develop said ranch and put it upon a paying basis; that, to affiant's knowledge, she had been on said ranch for a period of several months prior thereto, and ever since the said date of said conversation at affiant's offices defendant has been an actual bona fide resident of the county of Napa, state of California."

In his affidavit, G. W. Watson declared

that "he has known the defendant above named since the time of her birth; that he has been acquainted with her place of residence from her said birth up to the time of the making of this affidavit and does now depose and say: That she, at the time of the commencement of the above entitled action, was a resident of the county of Napa, and had been for a long time prior thereto, and is still at the present time a resident of the county of Napa; that she lived upon the adjoining premises to those occupied by this affiant, situate in Napa county, Cal., as her place of residence for a period of more than four months prior to the commencement of this action; and that said defendant actually occupied said premises as her home and place of abode during all the times herein mentioned."

G. W. Marston, the plaintiff, also deposed and said: "That for more than four months prior to the commencement of this action he was residing upon the ranch commonly known as the 'Ring Watson Ranch' situate in the county of Napa; that during all that time the defendant Rowena Watson was keeping house and residing upon said premises; that at no time during that period did Rowena Watson live outside of the county of Napa; that said defendant Rowena Watson up to said time and up to the time of the making of this affidavit has been actually a resident of the county of Napa, state of California."

It may be admitted that the declaration in said affidavits that defendant is a "resident" of said Napa county is a mere conclusion, and should be disregarded, but, nevertheless, sufficient facts are set out to justify the trial court in reaching the conclusion that defendant did actually reside in Napa county.

[2] "Residence," in the language of the Code (section 52, Pol. Code), is "the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose." In the Civil Code the term is used as synonymous with "domicile," section 129. Residence indicates permanency of occupation as distinct from lodging or boarding or temporary occupation. If a person actually "lives" in a certain place with the intention of remaining there indefinitely, that place must be said to be his residence. In other words, the abiding is *animo manendi* when residence is acquired.

[3] But as to the significance of the term there is no controversy, and we proceed to recapitulate the facts which must be taken as true in the determination of this appeal. At the time the order denying the motion was made, and for four months prior thereto, the defendant was keeping house upon the ranch known as the "Ring Watson Ranch" in Napa county; that at no time during said period did she "live" outside of Napa county; that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

she actually occupied said premises as her home and place of abode during said time, and that about two weeks prior to the commencement of the action she declared that she had leased the ranch from her mother, that she had taken up her abode there, and intended giving the running of the ranch her personal attention; that she was making her home there, and she expected to develop the ranch and put it upon a paying basis. Believing the foregoing, as we must assume he did, it would be not only a rational, but probably the only rational, conclusion that the trial judge could reach that defendant had established her home in Napa county and intended to remain there indefinitely; in other words, that she was a resident of Napa county.

The cases cited by appellant are so dissimilar to this in their facts that no specific notice of them is deemed necessary.

The order is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

20 Cal. App. 479

McMANUS v. PATCH et al. (Civ. 979.)

(District Court of Appeal, Third District, California. Nov. 29, 1912.)

**1. VENDOR AND PURCHASER (§ 334\*)—RESCISSION BY PURCHASER.**

Where the vendee tendered the balance of the purchase price within the prescribed time and demanded a deed, upon vendor's failure to convey, vendee may, upon promptly rescinding, demand repayment of the part of the price paid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959-980; Dec. Dig. § 334.\*]

**2. VENDOR AND PURCHASER (§ 170\*)—PERFORMANCE OF CONTRACT—TENDER OF PURCHASE PRICE—INFORMAL TENDER.**

In absence of objection made at the time by a vendor as to the form or sufficiency of the tender of the price, any objection that the tender was informal was waived; Civ. Code, § 1501, providing that objections to the mode of an offer of performance which the creditor has an opportunity to state at the time, which could be then obviated by the offering party, are waived if not then stated.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 344-348; Dec. Dig. § 170.\*]

**3. VENDOR AND PURCHASER (§ 144\*)—PARTIES—EXECUTION OF DEED—TIME.**

Where a contract for the sale of land made time of the essence, a tender of the deed by vendor when an action was brought for his breach would not cure his default in refusing to execute a deed when the balance of the purchase price was tendered by vendee.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 271-275; Dec. Dig. § 144.\*]

**4. VENDOR AND PURCHASER (§ 339\*)—RESCISSION—PROOF OF PERFORMANCE.**

Where vendor does not have title, or his title is defective at the time fixed for conveyance, the purchaser may treat the contract as rescinded, and recover the purchase price paid without proving performance on his part.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 994-1002; Dec. Dig. § 339.\*]

Appeal from Superior Court, Modoc County; C. A. Raker, Judge.

Action by O. C. McManus against E. R. Patch and another. From a judgment for plaintiff, and an order denying a motion for a new trial, defendants appeal. Affirmed.

Jamison & Wylie, of Alturas, for appellants. N. A. Cornish, of Alturas, for respondent.

**BURNETT, J.** By a written contract plaintiff agreed to purchase of defendants for the sum of \$800 a 10-acre tract of land in Modoc county. At the time of the execution of the agreement he paid them \$400 in cash, and it was provided in said contract that the entire purchase price with interest thereon at the rate of 8 per cent. per annum should be paid on or before one year from date, and, "if the sum of money herein mentioned shall be paid according to the agreement herein expressed, and time to be of the essence of this contract, then the said party of the first part agrees to make, execute and deliver unto the said party of the second part and to his heirs, executors and assigns, a good and sufficient warranty deed describing said premises." The theory of plaintiff, embodied in his complaint, is that before the expiration of the year he tendered to defendants the balance due and demanded a deed to the premises, but that they refused and neglected to make him a deed to the property, whereupon plaintiff promptly served upon appellants a written notice that he would not be further bound by the terms of the contract, that he rescinded the same, and he demanded of them the return of the \$400 paid by him as a part of the said purchase price, that they refused to return the money, but notified him that in due time they would make him a deed. The prayer of the complaint was, therefore, that plaintiff have judgment against the defendants for the said sum of \$400, with interest and costs. The findings cover all the material issues, and they and the judgment were in favor of plaintiff. There is some conflict in the evidence, but the testimony of plaintiff, in connection with the admissions of defendants as to the notice of rescission, is abundantly sufficient to legally support the court's conclusion. We quote a portion of said testimony as follows: "I paid Patch and King \$400 in cash when the contract was entered into, at the date of the contract. This \$400 nor any part thereof has never been returned to me. Since then I tendered them the balance due on the contract and demanded a deed. The tender was made in Lakeview, Or., on May 8, 1911. When I spoke to Mr. King about giving me the deed, he said, 'We cannot give you a deed until next October.' He did not give me any reason why he could not give me a deed. I did not stop to argue with him at all. I just walked out of his place



of business. At the time I demanded the deed I had the money in my hand to pay the balance. At the time we made the contract the only information I had of the title to the tract of land was as follows: At the time of signing the contract Patch and King were both present, and I said to them, 'You fellows have an abstract and a good title to this land, have you? If you can make me a deed at any time I want it,' and Mr. Patch answered, 'Yes, sir.' At that time I knew nothing about the title to the land, or whether it was incumbered or not or any means of so knowing. This contract was made in Lakeview, Or."

[1] In the view that we must take of the record, therefore, we have the simple case of a contract of sale of real estate, the payment of a part of the purchase price by the vendee, the tender of the balance within the time prescribed and a demand for the deed, the default of the vendor by reason of his failure to make the deed, the prompt rescission of the contract and demand for repayment of the portion of the price paid and the refusal of the vendor to comply with this demand. The statement of these facts is sufficient to carry the conviction that plaintiff was entitled to the repayment of the said \$400.

[2] It is suggested that the tender of the money was informal, but it is sufficient to answer that no objection was made by appellants as to the form or sufficiency of the tender. It is well settled that such objection must be made at the time so as to afford the debtor an opportunity to obviate the objection. "All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor if not then stated." Section 1501, Civ. Code.

[3] It is clear that the tender of the deed at the time the action was brought could not cure the default of appellants, since time was of the essence of the contract. If their claim to demand the balance of the purchase price could thus be revived by the tender of a sufficient deed, the principle would not apply to the present case by reason of the burdens imposed upon the land in the terms of the deed to defendants by their grantor; in other words, by reason of their inability to convey a good title. Furthermore, it is not disputed that at the time of the contract of purchase and at the time demand was made by plaintiff for the deed defendants were not the owners of the land, and that, during all this time and at the time when the action was brought, the property was heavily incumbered by valid subsisting liens to the amount of over \$2,000.

[4] We may, therefore, apply to the case another principle, stated in 22 Encyclopedia of Pleading and Practice, 692, as follows:

"When there is no title, or a defective title in the grantor at the time fixed for the conveyance, the purchaser may treat the contract as rescinded and need not aver or offer to prove a performance of the contract on his part"—and in the case of *Schroeder v. Wittram*, 66 Cal. 636, 6 Pac. 737, as follows: "If the plaintiff could not obtain what he proposed to buy—i. e., title to the land—he had the right to refuse to buy and to recover back any money he may have deposited as security for the performance of his contract. \* \* \* In legal effect the consideration of such a contract fails; and a failure of the consideration ends the contract."

We think no further discussion is demanded as the legal principles involved are elementary and well settled. For a further elucidation of them, however, reference may be had to the following cases cited by respondent: *Frothingham et al. v. Jenkins et al.*, 1 Cal. 42, 52 Am. Dec. 286; *Dashaway Association v. Rogers*, 79 Cal. 211, 21 Pac. 742; *Woodruff v. Semi-Tropic L. & W. Co.*, 87 Cal. 280, 25 Pac. 354.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

20 Cal. App. 471

BUTTERFIELD v. HARRIS. (Civ. 1,094.)  
(District Court of Appeal, Second District, California. Nov. 29, 1912.)

1. PATENTS (§ 215\*)—CONTRACTS FOR SALE—CONSTRUCTION.

Defendant contracted to transfer to a corporation theretofore organized all of his patent rights covering inventions by himself, and to sell to plaintiff one-fourth of the capital stock of the corporation in consideration of a sum named, a part to be paid by April 1, 1906, and the remainder by applying half of the dividends on the stock issued to plaintiff, the stock to which plaintiff was entitled to be deposited with a trustee to be held until April 1st, and then delivered upon payment according to the agreement, and further provided that, if plaintiff failed to make any payments due, the contract should be void, and the stock held in escrow delivered to defendant, together with the purchase money paid by plaintiff. *Held*, that the contract did not contemplate that plaintiff should have any interest in the patent rights except through the stock held by him, and, since defendant was the majority stockholder, he could, through the corporation, dispose of the patent rights.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 328; Dec. Dig. § 215.\*]

2. TRUSTS (§ 634\*)—CONSTRUCTIVE TRUSTS.

Where property is held by one person for the benefit of another, equity will in a proper case impose a trust thereon, and award to the several parties the interest to which they are entitled.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 91, 92, 98–100; Dec. Dig. § 634.\*]

3. PATENTS (§ 215\*)—CONTRACTS—CONSTRUCTION.

Plaintiff executed an agreement with defendant, whereby defendant agreed to transfer to a corporation all of his patent rights, and sell plaintiff one-fourth of the capital stock in consideration of \$25,000, \$10,000 to be paid by

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a certain date and the remainder by applying thereto one-half of the dividends declared, and the contract further provided as a part of the consideration that an indebtedness of defendant of \$9,162 should be paid by him to the corporation. Held that, in determining plaintiff's interest in the patents, such indebtedness should be considered, especially where the corporation had no assets other than the patent rights, since it was a charge against the stock.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 328; Dec. Dig. § 215.\*]

4. CORPORATIONS (§ 118\*)—SALE OF STOCK—PERFORMANCE BY BUYER.

One who agreed to pay a certain sum in consideration of the transfer of stock to her would be required to offer to pay the balance of such sum, if due, as a condition to obtaining the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 497, 498; Dec. Dig. § 118.\*]

5. CONTRACTS (§ 279\*)—PERFORMANCE OF CONTRACT.

Where a party to a contract of sale had repudiated his contract, the other party would be excused from himself performing as a condition to relief against such first party.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1233-1248; Dec. Dig. § 279.\*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by Rosalind O. Butterfield against Emily J. Harris, executrix of John T. Harris, substituted for John T. Harris. From a judgment for plaintiff, defendant appeals. Reversed, with directions to sustain demurrer to complaint.

John D. Pope and Arthur L. Hawes, both of Los Angeles (S. Lawrence Miller, of counsel), for appellant. Valentine & Newby and Shirley C. Ward, all of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment entered in favor of plaintiff and against defendant. The record on appeal consists of a judgment roll.

The substance of the facts set out in plaintiff's complaint is contained in the following narrative: Defendant John T. Harris was the inventor and owner of a certain device, process, and apparatus designed for purifying water and other liquids. Being without funds to secure patents to protect his invention and process, he solicited the plaintiff to advance to him money to meet his expenses in that direction, and prior to the 22d day of September, 1905, plaintiff had advanced to defendant about the sum of \$1,000. On the date last mentioned a written agreement was entered into between the parties by which it was provided that Harris was to transfer to a corporation called the Acme Holding Company, which had theretofore been duly organized, all his patent rights, and that he was to sell to plaintiff one-fourth of the capital stock of said corporation in consideration of the payment by her of the sum of \$25,000, \$10,000 of which amount was to be paid on or before April 1, 1906, and the remainder thereof, to wit,

\$15,000, was to be paid by applying one-half of the dividends which might be declared from time to time on the stock issued to plaintiff until said amount of \$15,000 was fully paid. The shares of stock to which plaintiff was to become entitled were to be deposited with a trustee to be held by him until April 1, 1906, and thereupon delivered to plaintiff, providing she had then made payment according to the terms of the agreement. It was further provided that in the event that she should fail to make the payments, or any of them, then the contract should be void, and the stock held in escrow be immediately delivered to Harris, together with all parts of the purchase money paid by plaintiff on account thereof. The contract contained the further condition as a part consideration therefor that an indebtedness of Harris in the sum of \$9,162 should be paid to him by the Acme Holding Company, together with all expenses for home and foreign patents which he might have incurred. It was alleged that plaintiff devoted much time, effort, and money in promoting and introducing the invention, process, and apparatus, and had paid to defendant between September 22, 1905, and July 1, 1907, more than the sum of \$10,000; that on February 15, 1907, defendant sent a written notification to plaintiff advising that, because of her failure to make payments under the contract as she had agreed to make at the time specified, the contract was void and subject to his willingness to reinstate it; that, notwithstanding this notification, defendant continued to solicit financial aid and assistance from plaintiff, and urged her to continue to devote her time and energies to the promotion of the enterprises in which defendant was engaged, and she did so continue her efforts and continued to pay money in satisfaction of the terms of the contract; that defendant at the time of the commencement of the action denied that plaintiff was entitled to any rights in his invention, or in any of the patents obtained by him protecting the same, and that, in violation of plaintiff's rights, he was engaged in attempting to sell, transfer, and dispose of the invention, discovery, process, and apparatus without consulting plaintiff and without obtaining her consent thereto; that defendant was wholly insolvent and had no means of responding in damages to any judgment that might be obtained against him, and that the value of the invention and discovery was incapable of being calculated in money, but that the same was of great value. Plaintiff's prayer was for a decree determining that defendant held title to the invention and process, together with all patents acquired by him, in trust for plaintiff as to an undivided one-fourth interest therein, and that the court decree that he execute, acknowledge, and deliver a transfer to her of said



one-fourth interest. It is further set forth in the complaint that plaintiff was ready and willing, and that she offered to pay the unpaid balance of the \$25,000 of the purchase price of her alleged interest in the invention by paying one-half of the net proceeds derived from such interest until the whole of the balance was fully paid. There was a demurrer to the complaint, which being overruled, an answer was filed, and after a trial had the court made its findings, finding all of the facts in accordance with the complaint of plaintiff, except it was found that plaintiff had not paid the sum of \$10,000 on account of the purchase of the alleged one-quarter interest in the invention and process referred to, but had paid only the sum of \$6,000, and the trial court held that she was entitled to be awarded, and by the judgment there was awarded to her six-tenths of a one-quarter interest in the said patents and process. No account was taken by the trial judge, so far as the findings show, of the condition of the contract which required that there be paid to Harris by the Acme Holding Company the sum of \$9,162, and the interest in the patent rights and process was decreed to plaintiff wholly freed from any charge or deduction to be made on account of this indebtedness.

It is the contention of appellant that the complaint of plaintiff did not state sufficient facts to entitle her to the relief demanded; and, further, that, conceding that the complaint did show facts appropriate to the awarding of the character of relief for which she prayed, the judgment of the court was erroneous in that the matter of the indebtedness agreed to be paid by the Acme Holding Company to the defendant was wholly and improperly left out of the calculation of the trial judge when he made up his judgment.

[1] We think that in both of these contentions defendant is clearly right. The contract entered into between the parties was clear and unmistakable in its terms, and it did not contemplate in any event that any interest in the patent rights or process should become the property of plaintiff, except as such interest might be represented by shares of stock in the holding corporation. In this holding corporation Harris was to be the majority owner of stock, and consequently he thereby would control altogether the management of the business, and might, if he saw fit, do through the corporation the very thing that plaintiff complains he was about to do, to wit, dispose of and sell the patents and process. To be sure, it would be assumed that whatever return was made upon such sale would become of the assets of the corporation, which would give some value to the shares of stock to be held by plaintiff, but, as we have before stated, there would be no right in plaintiff to control the handling of the patents or the business incident thereto. The court by its decree attempted

to award to her a direct interest as a part owner in the patents and process, something which was not in contemplation of the parties under the terms of their contract.

[2] There is no question but that a court of equity, where it finds property in the hands of one person which is held in whole or in part for the benefit of another, will, under all proper circumstances, impose upon the relations so existing the character of a trust and decree interests to the several parties as they may appear, but the facts of this case, as we view them, do not authorize it to be classified with transactions which may be so dealt with. We do not doubt that plaintiff by establishing all of the facts alleged by her might have secured a decree requiring Harris to specifically perform the obligations which he had assumed toward her, but her complaint was not designed with a view to securing that character of relief. In the kind of an action last referred to the court might properly have compelled Harris to transfer his patents and process to the holding company, and cause stock to be issued to plaintiff according to the agreed terms of the contract.

[3,4] Further, the findings do not support the judgment for two reasons: First, the indebtedness which was ascertained and stated in the contract of \$9,162, which was to be paid by the holding company to Harris, should have been taken into account in adjusting any interest in the patents and process that plaintiff was found to be entitled to. She alleged that the holding company had no assets, and was not to have any assets, except those which would be made up of the patent rights to be transferred by Harris to it, and therefore the burden of this indebtedness would be a direct charge against the stock of the corporation of which, had the agreement been carried out as contemplated, plaintiff would have held one-fourth. Second. It may further be noted that by the findings of the court plaintiff had only paid \$6,000 of the \$10,000 required to be paid in cash by her, and there was no finding that she had offered to make all of the payments required by her to be made as a condition to obtaining the amount of stock agreed to be transferred to her.

[5] While in a proper case, and where it appeared that the party against whom relief was sought had repudiated his contract and denied the existence of such a contract, the complaining party might be excused from full compliance or offer of compliance with the terms of the agreement by him to be performed as a condition to relief being awarded, the pleadings and findings here considered do not make out such a case.

The judgment is reversed, with direction to the trial court to sustain the demurrer of defendant as interposed to the amended complaint of plaintiff.

We concur: ALLEN, P. J.; SHAW, J.

20 Cal. App. 492

**WILSON v. DURKEE.** (Civ. 1,171.)

(District Court of Appeal, Second District, California. Dec. 3, 1912. Rehearing Denied by Supreme Court Feb. 1, 1913.)

**1. EVIDENCE (§ 80\*)—LAWS OF OTHER STATES—PRESUMPTIONS.**

The rule that the law of a sister state is presumed, in the absence of proof, to be the same as the law of the forum applies to statutory as well as the common law.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.\*]

**2. JUDGMENT (§ 944\*)—JUDICIAL ACTS—CERTIFICATION—SUFFICIENCY.**

A certificate by the clerk of the court of a sister state, reciting that, on an inspection of the records of the court, the clerk finds an original record of a judgment, a copy of which is set out, shows that the judgment is of record, and in effect shows the entry of the judgment within Code Civ. Proc. §§ 664, 668, providing that a judgment is not effectual until entered in the judgment book, which the clerk must keep, and supports a judgment on the foreign judgment in an action thereon.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1783; Dec. Dig. § 944.\*]

**3. JUDGMENT (§ 270\*)—"ENTRY OF JUDGMENT"—ACTS CONSTITUTING.**

The entry of a judgment, within Code Civ. Proc. §§ 664, 668, providing that a judgment is ineffectual until entered in the judgment book which the clerk of the court must keep, consists in the recording of it in the judgment book, and in a legal sense there can be no record of the judgment until so entered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 501-503; Dec. Dig. § 270.\*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by John J. Wilson, administrator of C. C. Ellis, deceased, against Daniel Durkee. From a judgment for plaintiff, defendant appeals. Affirmed.

E. W. Freeman, of Los Angeles, for appellant. G. P. Adams and McNutt & Hannon, all of Los Angeles, for respondent.

SHAW, J. This is an action based upon a judgment rendered in favor of plaintiff and against defendant by the Supreme Court of the state of Vermont. Judgment went for plaintiff, from which defendant appeals upon the judgment roll, accompanied by a bill of exceptions.

The existence of the judgment alleged in the complaint was by the answer denied. To prove the allegation, plaintiff offered in evidence an exemplified copy of a document purporting to constitute the record of the proceedings had in the courts of Vermont and the judgment herein sued upon.

[1] No evidence was offered tending to prove the laws of Vermont. In the absence of such proof, the laws of another state will be presumed to be the same as our own, and this rule applies to statutory as well as the common law. *Cavallaro v. Texas Ry. Co.*, 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94; *O'Sullivan v. Griffith*, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323.

[2] Section 668 of the Code of Civil Procedure of California provides that "the clerk must keep, with the records of the court, a book to be called the 'judgment book,' in which judgments must be entered"; and section 664 of the same Code provides that "in no case is the judgment effectual for any purpose until so entered." The sole contention of appellant is that the exemplified copy of the record received in evidence was insufficient to justify the finding of the court that the judgment was duly made and given, as alleged in the complaint, for the reason that such copy of the record fails to show that the judgment was entered in accordance with the provisions of the Code above cited. The only question, therefore, presented for consideration is whether the exemplified copy of the record received in evidence sufficiently shows the entry of the judgment, which appears to have been rendered by the Supreme Court on an appeal prosecuted from the county court of Windsor county. That portion of the certificate and copy of the proceedings, which seems pertinent to this inquiry, is as follows: "Know ye, that having inspected the records and proceedings in the office of the clerk of our Supreme Court for the county of Windsor, we do there find remaining a certain original record of judgment, \* \* \* in an action brought by C. C. Ellis (plaintiff's intestate) v. Daniel Durkee, in the words and figures following, to wit: \* \* \* And at the term of the honorable Supreme Court aforesaid, to wit, on the day and year last aforesaid, said cause is duly entered in said Supreme Court, and the parties come by their respective attorneys, to be heard upon the exceptions of the defendant, as in his bill, now here remaining on file, fully and at large doth appear; whereupon, the parties having been fully heard, as well the plaintiff as the defendant, upon said judgment and exceptions, and mature deliberation being thereupon had, it is considered and adjudged by the court here that the judgment of the honorable county court in this cause be reversed, and that the said plaintiff, administrator, have and recover of the said defendant the sum of three thousand and three hundred and fifty dollars and sixty-six cents, with interest on said sum from the twenty-sixth day of June, A. D. 1906, being \$65.34, and costs in the court below, which costs have heretofore been taxed and allowed in said county court at the sum of thirty-six dollars and sixty cents, making in the whole the sum of three thousand four hundred and fifty-two dollars and sixty cents, damages and interest and costs, for which the said plaintiff, administrator, may have execution against the said defendant. A true record. Attest: Jay Reed Pember, Clerk."

Conceding that, in order to render the judgment effectual as an instrument upon



which to base a suit, it must have been entered by the clerk of the court wherein it was given, in a book kept by him for that purpose, all as required by section 668, supra, nevertheless, since official duty is presumed to have been regularly performed (subdivision 15, § 1963, Code Civ. Proc.), it must be presumed, in the absence of evidence to the contrary, that the clerk did keep the book so required wherein to enter the judgments given by the court.

[3] The entry of a judgment consists in the recording of it in such book; hence, in a legal sense, there can be no record of a judgment until so entered. The statement made in the certificate by the clerk that, upon an inspection of the records of the court, he finds "a certain original record of judgment," a copy of which is set out, clearly shows that the judgment was of record; and, in the absence of evidence to the contrary, such fact must be accepted as true. It could not be true unless such entry of record was made in the judgment book. In our opinion, the showing that the judgment was recorded is in effect the same as a showing that the judgment was entered. When thus used, the terms have like meaning, and in either case imply that the judgment has been copied or transcribed in the judgment book, without which there could be no record of the judgment. The finding attacked is supported by the evidence.

The judgment is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

20 Cal. App. 469

ROUSSEAU et al. v. COHN. (Civ. 1,111.)  
(District Court of Appeal, First District, California. Nov. 29, 1912.)

**1. APPEAL AND ERROR (§ 731\*)—ASSIGNMENTS OF ERROR—SPECIFICATIONS.**

A specification that the evidence is wholly insufficient to justify a judgment in favor of the plaintiff is not a compliance with Code Civ. Proc. § 648, requiring a specification of the particulars wherein the evidence is insufficient to justify the decision.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3017-3021; Dec. Dig. § 731.\*]

**2. CONTRACTS (§ 278\*)—ARCHITECTS—PERFORMANCE OF SERVICES—SUFFICIENCY.**

Though a contract for the employment of architects stipulated that the plans and specifications were to be accepted by defendant in writing, and that the contractor procured by them was to be satisfactory to defendant, where the architects prepared plans and specifications and found a contractor who would construct it for less than the price agreed upon, the architects are entitled to recover a reasonable compensation for their services rendered and damages arising from a prevention of complete performance, where the specifications, though not accepted by defendant in writing, were satisfactory to him and were approved by him, and there is no evidence that the contractor procured was in any sense objectionable.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1207-1213; Dec. Dig. § 278.\*]

Appeal from Superior Court, City and County of San Francisco; George H. Caba-niss, Judge.

Action by Charles M. Rousseau and another, copartners, against Morris Cohn. From a judgment for plaintiffs and an order denying a new trial, defendant appeals. Affirmed.

Schlesinger & Shaw, of San Francisco, for appellant. tum Suden & tum Suden, of San Francisco, for respondents.

KERRIGAN, J. This is an appeal from a judgment against the defendant and from an order denying his motion for a new trial in an action for services rendered by plaintiffs as architects.

[1] Defendant relies for a reversal of the judgment and order upon the insufficiency of the evidence. The only specification of such insufficiency is "that the evidence is wholly insufficient to justify a judgment in favor of the plaintiffs." We think, with the plaintiffs, that this is not a compliance with section 648, Code of Civil Procedure, requiring a specification of the particulars wherein the evidence is insufficient to justify the decision. *Matter of Baker*, 153 Cal. 537, 96 Pac. 12; *Meek v. S. Cal. Ry. Co.*, 7 Cal. App. 607, 95 Pac. 166; *Porter v. Counts*, 6 Cal. App. 551, 92 Pac. 655. But as defendant claims that there is an entire absence of evidence to support the finding assailed, in which event he asserts that a specification of particulars is unnecessary (*San Luis Water Co. v. Estrada*, 117 Cal. 168-184, 48 Pac. 1075), we have examined the evidence, and will therefore rest our decision upon the principal point in the case, without further noticing respondents' claim that the specification set forth above is entirely insufficient.

[2] Plaintiffs prepared plans and specifications for the construction of a building to be erected in San Francisco; a builder was found who would construct the building for less than \$14,000, and who furnished at once a satisfactory bond for the performance of his contract. As all these things were according to the terms of plaintiffs' contract with defendant, they were entitled—the defendant having refused to permit them to proceed further—to recover a reasonable compensation for services already rendered and the damages arising from a prevention of complete performance. It is true that the contract also stipulated that the plans and specifications were to be accepted by the defendant in writing, and that the contractor was to be satisfactory to defendant. But, while the plans and specifications were not accepted by the defendant in writing, the evidence introduced by plaintiffs shows that they were satisfactory to him and were approved by him; and this is doubtless true, for the defendant does not even now complain of the plans and specifications. While, as just

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

stated, a provision of the contract was that the defendant was to be satisfied with the contractor, this did not give the defendant a right to reject a builder arbitrarily; and there is not a word of evidence in this record to show that this contractor was in any sense objectionable. His bid was just a little within the figure which the defendant agreed to pay for the erection of the building, and he provided a good bond for the faithful performance of that contract. In fact, according to the witnesses for the defendant, his only excuse for failing and refusing to permit the plaintiffs to perform their part of the contract was that he had heard some rumors that, if the plaintiffs were permitted to proceed with the work, the contract would be violated and the defendant involved in the annoyance and expense of litigation. In brief, there is evidence in the record to sustain the view that the defendant, without good reason, refused to permit the plaintiffs to complete their contract, which they were willing and able to do.

It follows that the judgment and order of the trial court should be affirmed, and it is so ordered.

We concur: LENNON, P. J.; HALL, J.

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machinery, tools, or appliances, it is his duty to use proper care to furnish him with suitable machinery, tools, and appliances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178, 179, 180-184, 192; Dec. Dig. §§ 101, 102.\*]

**2. MASTER AND SERVANT (§§ 285, 286\*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.**

In a teamster's action for injuries, where the evidence showed that the wagon was not equipped with a brake and had no seat except a loose board across the sideboards, that the team ran away, causing the wagon box to swing from side to side and the loose board to fall, precipitating plaintiff on his back, and that, before he could recover himself, the wagon struck the curb and threw him therefrom, causing his injuries, it was a question for the jury whether the failure to equip the wagon with a brake and to furnish a proper brake was negligence, and whether the lack of either or both was the proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002, 1003, 1007, 1008, 1016, 1035, 1043, 1053; Dec. Dig. §§ 285, 286.\*]

**3. MASTER AND SERVANT (§ 288\*)—ACTIONS FOR INJURIES—QUESTION FOR JURY.**

Where a teamster, who had been driving a dump wagon, was told by the foreman to take a wagon not equipped with a brake and haul bricks, and, upon telling the foreman that he wanted a brake on the wagon, was told that no brake was needed, that he would only have to haul brick for one day, and would then go back to his former employment, it was a question for the jury whether he assumed the risk of injury from the lack of a brake by using the wagon.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1005, 1068-1088; Dec. Dig. § 288.\*]

**4. TRIAL (§ 296\*)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.**

Where an instruction that it was the employer's duty to furnish suitable appliances by which the service was to be performed, and to keep them in repair and order, and make such provisions for the safety of the employés as would reasonably protect them from the dangers incident to their employment, was merely a preliminary announcement, and other instructions fully stated that the employer was only required to exercise ordinary care and diligence in securing proper appliances, there was no error, since the first instruction was sound in itself, and merely failed to contain a full exposition of the law, and hence was not in conflict with the other instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

**5. TRIAL (§ 296\*)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.**

While an instruction on the measure of damages for personal injuries, authorizing a recovery of the damages "reasonably probable" to result in the future, might better have conformed to Civ. Code, § 3283, authorizing damages for detriment resulting after the commencement of the action or "certain to result" in the future, it was not erroneous, where it summed up its declaration of the law with a pronouncement of the correct rule.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

Department 2. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by James Lonnergan against Charles Stansbury and another, copartners under the

164 Cal. 488

LONNERGAN v. STANSBURY et al.  
(L. A. 2,868.)

(Supreme Court of California. Jan. 14, 1913.)

**1. MASTER AND SERVANT (§§ 101, 102\*)—LIABILITY FOR INJURIES—MACHINERY, TOOLS, AND APPLIANCES.**

While an employer is not obliged to furnish his employé with the latest improvements in

firm name of Charles Stansbury. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

Scarborough & Bowen, of Los Angeles, for appellants. Morton, Riddle & Hollzer, of Los Angeles, for respondent.

HENSHAW, J. Plaintiff was a teamster employed by defendants, a contracting firm. His horses ran away. He was thrown from the wagon in which he was riding, and sustained injuries. His action for damages against his employers resulted in a verdict and judgment in his favor. From that judgment, and from the order denying their motion for a new trial, the defendants appeal.

The gravamen of the complaint lies in the allegation that defendants furnished to plaintiff a wagon that was dangerous and unfit to be used, in that there was no brake or other appliance provided, by means of which the wagon could be impeded or stopped; that the sides of the wagon were loosely and insecurely placed upon and attached to it, and thereby plaintiff's seat, which consisted of a board placed horizontally across the sides, became insecure and dangerous. It is then alleged that, while plaintiff, engaged in his work, was driving this empty wagon down a hill, the horses became unmanageable, ran away, and, because of the swaying wagon box and shifting seat and absence of brake, the plaintiff was unable to control them, and was thrown from the wagon, when, in their career, they dashed it against the curb. The testimony supporting these allegations is sufficient. That of the plaintiff is to the effect that he was experienced in the use of horses, had been a teamster, and had driven this particular team of horses, which, it is conceded, were ordinarily gentle. He was told to put his horses in this particular wagon upon the morning of the accident, and to haul bricks from a brickyard, delivering them at various points where defendants were engaged in work. Prior to the accident, he had never driven a wagon that was not equipped with a brake or some appliance for stopping it. When told by the foreman to use this particular wagon, he noticed that it was without a brake, and told the foreman that he wanted a brake on the wagon. The foreman replied that he needed no brake, as his draught was up hill; that he would have to haul brick but one day, and on the following day would go back to his former employment—that of driving a dump wagon. There was no seat in the wagon, simply a loose board across the sideboards. The seat shifted so, because of the swaying of the wagon box, that he tried to drive standing in the wagon; but he could not stand because of the swaying of the wagon bed. Once or twice during the day, on downgrades, the team had started with him; but he had checked them. At the time of the accident, he was returning with the team from his

work. The horses had galled necks; the galled places being more inflamed at night after the day's work than in the morning. As he started down the grade, it is probable that the first horse started because of the pain produced by the collar bearing on its galled neck in holding back the weight. The plaintiff at the time "had the lines through his hand." The other horse became frightened, and the first one lunged ahead, and "the two horses just plunged right down that grade." The wagon box began to swing from side to side; the loose board upon which he was sitting fell off and precipitated plaintiff on his back in the wagon. He recovered himself as quickly as possible, but too late to prevent the wagon striking the curb. This sufficiently indicates the evidence in the case; and from it appellants urge that there is not the slightest evidence of negligence upon their part; and, in the same connection, that, whatever were the defects in the appliances furnished to plaintiff, he, as a skilled teamster, knew them, knew their danger, and accepted their risk.

[1] As to the first of these propositions, however, while it is quite true that the master is not obliged to furnish his employé with the latest improvements in machinery, tools, or appliances, he is always under the duty in the use of proper care to furnish him with suitable machinery, tools, and appliances.

[2] It was at least for the jury in this case to say whether, for the work in which the plaintiff was engaged, a wagon such as was furnished by defendants came up to the requirements of the law as a suitable instrumentality. To the argument of appellants that it is not established that the lack of brake and insecure seat were, or was either of them, the proximate cause of the injury, it must be answered that, while in such a case as this it never can be demonstrated beyond peradventure that if the seat had been secure, or if there had been a brake, the accident would have been avoided, still enough is shown to establish the probability, at least, that, with the brake and the secure seat, he could have controlled the horses, which were recognized as being ordinarily a gentle team.

[3] Upon the proposition of assumed risk, it is true that, after protest concerning the absence of a brake and the assurance of the foreman to the effect that he would not need one, plaintiff undertook the work with the wagon furnished. It is probably not true that he quite appreciated the defective condition of the wagon bed until he learned it by experience in driving. But this experience was his first day's experience. Unless we can say, under these circumstances, that it was the duty of the plaintiff to have abandoned his work upon the discovery, then, we cannot say, as a matter of law, that plaintiff had assumed the risks with full appreciation of their nature and danger. But such a peremptory assertion of right and



sudden cessation of employment is not expected of one in a dependant position. The case upon which appellants principally rely, and the one nearest to the case at bar in its facts, is *Limberg v. Glenwood Lumber Co.*, 127 Cal. 598, 60 Pac. 176, 49 L. R. A. 33. There an experienced teamster fell or was thrown from his wagon and suffered the loss of a leg. He sued, alleging, as here, the furnishing of defective appliances. The defects consisted "of a wagon having no seat and also of a pair of lines that were too short." The opinion of this court goes off upon the concession that the appliances were defective, but holds that as plaintiff had continuously used them for a period of 11 months, without objection or protest of any kind, it must be held that he assumed all of the risks incident to their use. What has already been said makes plain the broad distinction between that case and the case at bar, where plaintiff had in fact protested over the absence of a brake, had been assured that he would not need a brake, and where he was engaged in his first day's employment with the defective appliance, under an assurance that the first would be the only day. These questions, then, were properly submitted to the jury, and its determination will not here be disturbed.

[4] Touching asserted errors in the giving and refusing to give instructions, preliminarily it may be said that the instructions were quite as favorable to the defendants as the law warrants. In one of its earliest instructions, the court, speaking generally of the employer's duty, declared a part of that duty to be "to furnish suitable appliances by which the service is to be performed and to keep them in repair and order and to make such provisions for the safety of the employes as will reasonably protect them from the dangers incident to their employment." It is contended that this instruction was erroneous in its failure to announce that the employer is liable only if he has failed to exercise reasonable care and ordinary diligence in the selection and furnishing of such appliances. If this instruction were standing alone, appellants' contention would have much force. *Sterne v. Mariposa Coml. Co.*, 153 Cal. 516, 97 Pac. 66. But it is manifestly a preliminary announcement, and sound enough in and of itself. In point of law, it is the employer's duty so to do; but, in point of law, he has fulfilled that duty when he has exercised ordinary care and diligence in securing proper appliances. All this was abundantly set forth in numerous instructions. It is found in many specific instructions proposed by the defendants and given by the court. So that we repeat, while, if the instruction complained of stood alone, it would be impeachable as not containing a full exposition of the law, taken in connection with the numerous explanatory in-

structions which followed, there could have been no misunderstanding upon the part of the jury. The case does not present at all the same situation shown by the instructions in *Melone v. Sierra Railway Co.*, 151 Cal. 114, 91 Pac. 522. There the instructions were in absolute conflict, and, it was said by this court, that it could not be determined under which the jury acted. Here there is no conflict in the instructions. There is in the preliminary instruction the absence of a qualification, the lack of a full exposition of the law, which absence and lack are fully and harmoniously set forth in all the succeeding instructions.

[5] Upon the measure of damages, the court gave an instruction identical with one reviewed in *Hersperger v. Pacific Lumber Co.*, 4 Cal. App. 460, 88 Pac. 587, 591. The instruction was there affirmed, and a petition for a hearing of the cause before this court was denied. The phrase "reasonably probable" may well be omitted from all such instructions, and the statutory requirement of the Civil Code (section 3283) strictly adhered to. That section declares that a plaintiff is entitled to damages for "detriment resulting after the commencement thereof or certain to result in the future." But the instruction here in question, while using the unhappy phrase "reasonably probable," sums up its declaration of the law with the pronouncement of the correct rule.

For these reasons, the judgment and order appealed from are affirmed.

We concur: MELVIN, J.; LORIGAN, J.

164 Cal. 508

KINGS COUNTY et al. v. REA, County Auditor. (S. F. 6,431.)

(Supreme Court of California. Jan. 14, 1913.)  
BONDS (§ 9\*) — VALIDITY — DESCRIPTION OF MONEY.

In the absence of a specific requirement of law, it is not essential that a bond shall designate money of any particular form or kind, but it is sufficient that it calls for "lawful money of the United States."

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 28; Dec. Dig. § 9.\*]

In Bank. Petition for mandamus by Kings County and others against D. Bunn Rea, as Auditor, etc. Mandate ordered to issue.

J. L. C. Irwin, of Hanford, for petitioners.  
H. Scott Jacobs, of Hanford, for respondent.

IIENSHAW, Acting Chief Justice. If those are your two propositions, I speak for the court in saying that, where there is no specific requirement of the law declaring that money of a particular form or kind shall be designated, it is a good bond, and it is in full compliance with the law, when it calls for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"lawful money of the United States." And, second, it is clearly a power vested with the supervisors, after election, to determine whether the interest shall be paid semiannually or annually.

If those are your two propositions, they are resolved in favor of petitioner, and mandate will issue accordingly.

164 Cal. 504

Ex parte McMULLIN. (Cr. 1,748.)

(Supreme Court of California. Jan. 14, 1913.)

HABEAS CORPUS (§ 99\*)—SUPPORT OF CHILDREN — DIVORCE AND GUARDIANSHIP DECREES.

Where a mother obtained in another state, upon substituted service of summons, a divorce and custody of minor children, and then obtained letters of guardianship of such children in this state, the legal effect of the guardianship decree, and also of the divorce decree, in the absence of supplementary proceedings in this state upon personal service to secure an award against the father for a custody of the children and provision of their support by him, was to give the mother the custody of the children without charging the father with their support, under Civ. Code, § 196, providing that the parent entitled to the custody of a child must support him.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84; Dec. Dig. § 99.\*]

In Bank. Petition for writ of habeas corpus by Smith McMullin. Petitioner discharged.

See, also, 126 Pac. 368.

C. D. Dorn, of San Francisco, and Phil Ware, of Santa Rosa, for petitioner. Clarence F. Lea, G. W. Hoyle, and J. W. Ford, all of Santa Rosa, for respondent. L. Horwitz, of San Francisco, amicus curiæ.

PER CURIAM. Petitioner alleges that he is unlawfully imprisoned by the sheriff of the county of Sonoma by reason of an order of a committing magistrate holding him to answer for trial in the superior court for an alleged violation of section 270 of the Penal Code, in failing to furnish his minor child, Juanita McMullin, with necessary food, clothing, shelter, and medical attendance. It appears from the evidence taken at the preliminary examination that petitioner and Emma H. McMullin were husband and wife and the parents of Juanita; that Emma H. McMullin went to the state of Nevada, taking with her said child, and thereafter instituted in that state an action for divorce against this petitioner; that he was personally served with summons in the county of Sonoma, state of California, the place of his residence; that petitioner did not appear in said action; that on March 21, 1910, a decree was given and made by the district court of the first judicial district of Nevada, granting a divorce to said Emma H. McMullin from petitioner, awarding her the custody of her two minor chil-

dren, and ordering the payment to her of \$100 per month by way of alimony; that thereafter, in 1911, Emma H. McMullin returned to the county of Sonoma and took up her residence there; that in April, 1912, she was appointed guardian of the person and estate of said Juanita; that petitioner did not since the divorce provide his daughter with support, maintenance, or education, except that he paid for her tuition at school and did furnish her with a few articles of necessity; that the mother has been supporting said child; and that said Emma H. McMullin has had the custody of her daughter ever since said divorce.

The question presented to us is whether, after a decree of divorce obtained in another state upon substituted service of summons and granting custody of a minor child to the mother, and after she has sought and obtained letters of guardianship of said child in this state, the father is under the duty of supporting such child. Respondent depends largely upon the principles announced in the recent case of *People v. Schlott*, 162 Cal. 348, 122 Pac. 846. But this case differs in several essential particulars from that. In the *Schlott* Case there was a valid decree of divorce depriving the father of the custody of his child, while requiring him to pay alimony partly for the support of said minor, and it was held that section 196 of the Civil Code had no application to a father who, because of his own misconduct, had been deprived of the custody of his child, but required to pay for the support of said minor. But here, while the decree of divorce had conferred the right to the custody of the minor upon the mother, there had been no order with reference to the payment by the father for the support of his offspring, unless we read such a provision into the decree for the payment of alimony to the plaintiff in that action. Respondent's position is that the amount of alimony (\$100 a month) decreed by the court in Nevada shows that that court must have intended a part thereof for the support of the children (there were two), and that the order itself is tantamount to a declaration that the husband must support the offspring of the marriage. We cannot so interpret that part of the decree adjudging that the defendant must pay alimony to his wife; but, even if we could do so, we are confronted with the fact that, owing to the substituted service upon defendant of the summons in that action, the part of the judgment requiring the payment of alimony cannot be enforced against petitioner. The court that rendered that judgment, never acquired jurisdiction of his person. Code Civ. Proc. § 413; *First Nat. Bank v. Eastman*, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95, 1 Ann. Cas. 626; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *De la Montanya v. De la Montanya*,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



112 Cal. 109, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165. In this case we find the mother, at the time of the preliminary examination of petitioner, entitled to the custody of her minor child, either by virtue of the decree of the court in Nevada or by reason of the issuance to her of letters of guardianship by a court of competent jurisdiction in California. If she is qualified under the former authority, she is required to support the minor, because section 196 of the Civil Code provides that "The parent entitled to the custody of a child must give him support and education suitable to his circumstances," and there is no valid adjudication, equivalent to an order made under a power similar to that granted by section 139 of our Civil Code, by which the husband is obligated to support his progeny while denied their custody. If we attribute her custody of the children to her letters of guardianship, we must read section 196 in conjunction with section 204 of the Civil Code, which declares that the authority of a parent ceases "upon the appointment, by a court, of a guardian of the person of a child," and the same result is reached.

The conclusion, therefore, is inevitable that neither by force of the Nevada decree, nor by force of the California proceedings in guardianship, had a duty to support the children been cast upon petitioner. The Nevada decree dissolved the marriage status and fixed the right of custody of the children with the wife while they remained in Nevada. It could do nothing more. To this extent full faith and credit will be accorded to the Nevada decree. Thus it fell within the power of the wife, under supplementary proceedings brought in this state, with personal service upon the former husband, to have procured, if the facts warranted, an award of the custody of the children, with provision for her own and their support. She did not do this, but resorted to guardianship proceedings, under which, in terms, she was awarded the custody of the persons and estates of the minors. The legal effect, then, of both the Nevada decree and the guardianship decree was to give the mother the custody and control of the children, *without* charging upon the husband their support. Under section 196, Civil Code, this situation *prima facie* relieves the husband of the duty of support and casts it on the wife. If it be said that it is a reproach to our law that a father be thus permitted to escape the paternal duty of aiding in the support of his minor offspring, the answer is that no such reproach attaches. Our law is adequate, but the obvious steps to be taken, and which, if taken, clearly would have fixed the father's duty in this regard, and so made him penally liable for his breach of duty, were disregarded. Instead of resorting to appropriate measures, by proceed-

ings under the Nevada judgment, to straighten the legal tangle which now exonerates the husband from the duty of furnishing such support, resort was had to the criminal court, where the only result of success would be to make it impossible for the husband to earn the money with which he could furnish such support.

The petitioner is discharged.

184 Cal. 517

**McCLUNG v. PARADISE GOLD MINING CO. (S. F. 5,670.)**

(Supreme Court of California. Jan. 15, 1913.)

**1. MINES AND MINERALS (§ 114\*) — MINING CLAIMS—CLAIMS FOR LABOR.**

A statement of a claim of lien for labor recited that claimant performed 31½ days' labor upon the realty under an agreement with the owner's agent to pay a certain sum per day, and that there was justly due him the sum claimed, and further stated that defendant was and is the owner of the realty, and that the person named as agent was the person by whom plaintiff was employed, and who caused the work to be done. Code Civ. Proc. § 1183, requires every person performing work in a mining claim to file for record a claim containing a statement of his demand, the owner's name, that of the person employing him, with the statement of the terms, time, and conditions of his contract, and the description of the property. *Held*, that the statute did not require claimant to state the character of his labor, though his proof must show that it was such as to be lienable, so that the statement was not defective for not stating that the labor was performed in development or work by the subtractive process, for which work a lien is given by section 1187, being sufficient to authorize proof of the nature of the labor.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 236; Dec. Dig. § 114.\*]

**2. MECHANICS' LIENS (§ 5\*)—CONSTRUCTION OF STATUTES.**

The mechanics' lien law is remedial in its character, and should be liberally construed to effectuate its purpose.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 3, 5; Dec. Dig. § 5.\*]

**3. MINES AND MINERALS (§ 112\*)—LIENS FOR LABOR—CONTRACTS.**

An option contract to purchase mining stock, which authorized the prospective purchaser to go upon the corporation's claims, repair the flume for the company, etc., was sufficient to put the corporate officers on notice that such purchaser intended to go to the mines for the purpose stated in the contract, and to engage laborers, who would be entitled to a lien for their services.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 233-235; Dec. Dig. § 112.\*]

**4. MINES AND MINERALS (§ 117\*)—LABORER'S LIEN—EXISTENCE OF AGENCY—SUFFICIENCY OF EVIDENCE.**

In an action to establish and enforce a laborer's lien for work done in a mine, evidence *held* to show that the person who employed plaintiff was the owner's statutory agent for employing labor.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 239; Dec. Dig. § 117.\*]

# 5. MINES AND MINERALS (§ 112\*)—LIENS—"AGENT."

One who was in charge of a mine, with the owner's consent, under a contract permitting him to do work in the mine with a view to developing and purchasing it, and was controlling the operations in part for the owner's benefit, was the owner's statutory agent for employing labor.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 233-235; Dec. Dig. § 112.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 262-270; vol. 8, p. 7569.]

# 6. MINES AND MINERALS (§ 112\*)—LIENS—"DEVELOPMENT WORK."

The construction of a flume to bring water from a mine for the sole purpose of working it, which was the only way it could be prospected, was development work within Code Civ. Proc. § 1183, giving one a lien for work performed in developing a mine.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 233-235; Dec. Dig. § 112.\*]

# 7. MINES AND MINERALS (§ 112\*)—LABORERS' LIENS—ASSIGNMENT—TIME EFFECTIVE.

An assignment of a laborer's mining lien, reciting the assignment of all claims against an amount due, from the person named, for labor performed upon the property of a mining company, "together with the claim of lien heretofore filed by each of" the assignors against the property and recorded in the volumes of liens stated, which assignment bore date subsequent to the recordation of the liens, took effect only after the filing of the liens, though they were in fact executed and verified when the assignment was executed, and were filed by the assignee as agent for the assignor, and hence the lien was not invalid as having been filed after assignment of the claim.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 233-235; Dec. Dig. § 112.\*]

# 8. MINES AND MINERALS (§ 114\*)—LABORER'S LIEN—FILING—FILING BY AGENT.

The physical act of filing the paper constituting a lien for mining labor may be done by claimant's agent.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 236; Dec. Dig. § 114.\*]

# 9. MINES AND MINERALS (§ 117\*)—LABORER'S LIEN—PERSONS ENTITLED—AGENT FILING LIEN.

One who acted as the agent of a claimant for filing a lien for mining labor could enforce the lien, as assignee thereof, after it was perfected by filing.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 239; Dec. Dig. § 117.\*]

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by M. C. McClung against the Paradise Gold Mining Company. From a judgment of the appellate court, reversing in part a judgment for plaintiff, defendant appeals. Judgment of trial court for plaintiff. Affirmed.

L. L. Cory, of Fresno, and Carrier & Richards and Canfield & Starbuck, all of Santa Barbara, for appellant. Geo. Cosgrave, of Fresno, for respondent.

PER CURIAM. This case was decided by the District Court of the Third appellate

district. That court sustained the judgment upon plaintiff's individual claim and that against defendant Lyall, who does not appeal, but reversed the judgment as to those claims assigned to plaintiff. Since we agree with the District Court of Appeal, except as to the last conclusion, we adopt so much of the opinion of that court, written by Mr. Presiding Justice Chipman, as is applicable:

"The action is for the enforcement of laborer's liens against the property of defendant mining company, and for judgment against defendant Lyall. Plaintiff brings the action in his own behalf and as assignee of the claims of eight other persons. The court made findings in favor of plaintiff, and entered judgment against defendant Lyall for the sum of \$839.66, with interest from June 25, 1909, and for costs, and adjudged that plaintiff 'have a lien upon the real property hereinafter described for the payment of the sum of \$680, together with interest thereon since June 25, 1909, at the rate of 7 per cent.,' with costs, amounting in all, exclusive of costs, to \$695.50. The usual decree for a sale of the property was made.

"Within 60 days from the entry of judgment, defendant, Paradise Gold Mining Company, appealed from the judgment on bill of exceptions. Defendant Lyall does not appeal. \* \* \*

[1] "The individual claim of plaintiff is \* \* \* to be noticed. His claim states: 'I performed 31½ days labor upon said real property, commencing the same May 3, 1909, and ending June 8, 1909, under an agreement with Dr. Robert Lyall to pay the sum of \$2.50 per day, or the sum of \$78.25 in all, for said labor, and there is justly due me, on account thereof, the sum of \$78.25, after deducting all just credits and offsets.' The claim then states that defendant corporation is and was at the time the owner and reputed owner of said real property; that defendant Lyall was the person by whom plaintiff was employed, 'and said labor was performed as tending giant'; that said Lyall 'is and was, at all times herein mentioned, the person who caused said work to be done, who claimed an interest therein, and was and is the agent of the said owner.' There was no statement in the claim, in terms, that the labor performed was in the development of any mining claim or work thereon by the subtractive process, and it is hence argued that no legitimate inference can be drawn from the facts that plaintiff is entitled to a lien. It was not necessary that the claim should use the language of the statute. The averment was sufficient to warrant proof of just what the labor was, and from such proof it was to be determined whether the labor was in development work or mining by the subtractive process. Section 1183, Code of Civil Procedure, pre-



scribes the class of persons entitled to the lien, and the purpose for which the labor is to be performed in the case of a mining claim or real property worked as a mine, namely, 'either in the development thereof or in working thereon by the subtractive process.' The preparation of the claim and its recordation are provided for by section 1187. It is there provided: 'Every person \* \* \* within thirty days after the performance of any labor in a mining claim, must file for record \* \* \* a claim containing a statement of his demand \* \* \* with the name of the owner, \* \* \* also the name of the person by whom he was employed, \* \* \* with a statement of the terms, time given, and conditions of his contract and also a description of the property to be charged with the lien,' etc. This section does not require the claimant to state the particular character of his labor, although he must show by his proof that it was of such kind as is made lienable by the statute—i. e., development work or mining by the subtractive process. It was held, in *Continental, etc., Assn. v. Hutton*, 144 Cal. 609, 78 Pac. 21, that the mechanics' lien law is part of the Code of Civil Procedure adopted pursuant to the requirements of the Constitution.

[2] "It is remedial in its character, and should be liberally construed with a view to effect its objects and promote justice.

"Plaintiff testified that defendant Lyall employed him to work in the mine of defendant company and at the agreed rate of \$2.50 per day and board, and that he worked 31½ days. He testified: 'I was employed to do general work about the mine until they worked two shifts with the hydraulic, and after that I ran the giant hydraulic nights. I did that a week just preceding the time I left.' We think plaintiff's claim of lien was sufficient in form, and was supported by the evidence, unless rendered ineffective on other grounds urged against its validity.

"It is contended by appellant that there was no evidence that defendant Lyall was either the actual or constructive agent of appellant, or that any portion of the work was done in the development of the mine, or in working thereon by the subtractive process. It appeared that defendant corporation owned the mining property involved; and on April 5, 1909, defendant Lyall had in contemplation the purchase of a large block of the shares of defendant corporation, and on that day took an option to that end from the corporation, by which he was given authority 'to go in and upon its claims on Sycamore creek, near Trimmer, Fresno county,' and he was to 'repair the flume for said company as in his best judgment he may think necessary, but in any event sufficient to run water for the whole length of it,' and he was also to deliver 'to the treasurer of

the corporation one-half of all the gold he and his associates and workmen may have secured or taken out of the company's property prior to July 1, 1909.' He was also authorized to 'prospect and examine the same up to July 1, 1909, and to remove the gold therefrom, and to keep one-half thereof, paying and delivering the other one-half thereof to' the company. Lyall, shortly after April 5th, went to Selma, in Fresno county, and, as directed by the officers of the corporation, reported to a Mr. Matthews at that place, who was a stockholder in the corporation, for information how to reach the mine. Matthews gave him this information; and Lyall reached the mine between April 10th and 20th. He informed Mr. Matthews by letter of his arrival at the mine, and this letter was forwarded to the corporation.

[3] "It appears that the officers of the corporation knew that Lyall was at work at the mine; the contract itself was sufficient to put these officers on notice that Lyall intended to go to the mine to carry out its objects. *Hines v. Miller*, 122 Cal. 517, 55 Pac. 401. And later, learning that the men were not getting their pay promptly, the corporation caused the statutory notice of nonliability to be posted at the mine. The men quit work, and hence these claims, all of which had already accrued. The work necessary to be done to prospect or work the mine required that the flume referred to in the contract should first be restored, and it was over a rough country and a mile long. It was finished and water brought to the mine and the giant started; the mine being a hydraulic proposition. The ground was worked in this way for some time, but proved unsatisfactory, and Lyall gave up the venture.

[4] "Without going into the evidence further, of which there was considerable, we think enough appears to show that Lyall was the statutory agent of the corporation, as defined in section 1192, Code of Civil Procedure.

[5] "He was there in charge with the consent of the owner, and was controlling the mining operations in part, at least for the benefit of the owner. *Higgins v. Carlotta G. M. Co.*, 148 Cal. 700, 84 Pac. 758, 113 Am. St. Rep. 344. While it is true his primary object was to prospect the mine, both parties anticipated a possible output of gold, and provided for its division by the contract. We think also that the work done may reasonably be said to be development work, and it requires no unwarranted construction to treat the work as having in view the operation of the mine by the subtractive process. They did take out some gold, but not enough to satisfy Dr. Lyall.

[6] "In constructing the flume and bringing the water to the mine for the sole purpose of working it, the only way, indeed,

that it could be worked or prospected was, in our opinion, development work."

Discussing the claims upon which plaintiff sued as assignee, the District Court of Appeal said: "The evidence was that the various claims of lien were prepared and sent to plaintiff at Trimmer Springs, near the mine, where the claimants were assembled; that the assignment, executed by the claimants, purports to assign plaintiff 'all claim or claims, demands against, and amounts due, from Dr. Robert Lyall and others for work and labor performed upon the property of the Paradise Mining Company, or Paradise Gold Mining Company, together with the claim of lien heretofore filed by each of us against the property of said company, and recorded in the office of the county recorder of Fresno county in volumes H and I of liens, at pages variously numbered.' The assignment bears date June 30, 1909, which was subsequent to the date of the recordings of the liens; but the evidence was that the liens were all executed and verified at the time the assignment was executed, which was before the liens were recorded; that after their execution, and after the execution of the assignment, they were sent down by the assignee to Fresno to be recorded; that the assignment was made solely for the purpose of collection. Upon the point the court made finding 9 that 'after the due execution of said liens, but before the recordation thereof, all of said persons \* \* \* assigned their said claims of lien to plaintiff; but said assignment was made to take effect after the recordation of said claims of lien, and not before, and was made for collection only, and was not an absolute assignment; and the said plaintiff at no time had or claimed ownership of any of said claims filed by the persons other than himself, except for the purposes of collection only.' The plaintiff testified: 'It was through the consent of all the parties that I got this assignment. I had written to Mr. Cosgrave for information, and as the result he sent up this paper to me. I took it around myself and had the signatures attached to it. \* \* \* I don't know the exact date when it was signed; it was after we stopped work. They were all right there in Trimmer; \* \* \* that was before I filed my lien.' (The liens were all filed June 25, 1909.) He testified that he was 'simply collecting it for these different people. \* \* \* It was before the liens were filed that the assignment was made. I know that because I had part of the liens in my possession at the time. \* \* \* At the time I was getting the liens signed, I got the assignment signed. I know the assignment was signed before the liens were recorded.' The averment of the complaint in each of these assigned claims is that 'said claimant, \* \* \* since the recordation thereof, and prior to the filing of the complaint herein, duly assigned the said claim of lien, together with all claim

and demand against said defendants to this plaintiff.' We have given substantially all the testimony in support of this averment and in support of the finding of the court."

[7] From these facts, the District Court of Appeal determined that there was no evidence to support the finding of the lower court that "the assignment was made to take effect after the recordation of said claims," and that neither by averment in the complaint nor by evidence is the finding that it was "not an absolute assignment" justified further than, on the testimony above quoted, that it was "made for collection only." With the latter view, we agree but it is immaterial for the purposes of this case, whether the assignment was absolute or not. The material question is whether or not the assignment took effect only after the filing of the liens. Relying on *Mills v. La Verne Land Co.*, 97 Cal. 254, 32 Pac. 169, 33 Am. St. Rep. 168, in which it was held that a laborer or materialman cannot assign his mere right to assert a lien and clothe the assignee with the power to create final evidence thereof for himself, the District Court concluded that, since the actual signing and delivering of the assignment occurred before the final step in establishing the liens by filing the notices had taken place, the assignors had attempted to assign the inchoate right considered in the cited case, and that under that authority their act was a nullity. We reach a different conclusion. *Mills v. La Verne Land Co.* has been very severely criticised in the opinion in a well-considered case in Utah (*Smoot v. Checketts*, 125 Pac. 415); but its doctrine has long been the established law in this state. See, also, *Duncan v. Hawn*, 104 Cal. 14, 37 Pac. 626. However, the doctrine of that case has never been extended nor amplified. *People v. Moxley*, 17 Cal. App. 469, 120 Pac. 43. The gist of it is that an assignee cannot file the lien in his own name, and that therefore the attempted assignment of the personal right to perfect it is of no value nor effect. The lien has practically no existence for the purposes of assignment until the notice has been duly filed by the lien claimant in his own name. That is all that the case of *Mills v. La Verne Land Co.* decides.

[8] The physical act of filing the paper may of course be done as well by an agent as by the lien claimant in person. In this case the plaintiff deposited the claims with the proper officer; but there was evidence sufficient to show that in so doing he acted as the agent of his associates, and to justify the court's findings to the effect that each assignor had filed his own. The assignments in terms operated upon the indebtedness of defendants to the assignors only after the filing of the claim of lien. There was nothing to prevent the claimants from assigning something not yet created in such manner that the assignments should not be effective until the happening of a future event.



[9] If McClung had gone to the county seat, carrying the notices of lien and an envelope containing the assignments directed to an agent of the other claimants, and if after filing the claims and delivering the envelope said agent had given him the assignments, we think there could be no question of the regularity of the proceeding and the validity of his title; and we see no incongruity in his acting both as agent, for the purpose of perfecting the liens, and as assignee of them after they should be perfected. Under the text of the assignment, it operated neither upon the indebtedness nor the evidence thereof, until the due filing and recordation of the latter. We conclude, therefore, that the superior court's finding in this regard was justified.

The judgment is therefore affirmed.

164 Cal. 525

In re PACKER'S ESTATE.

SAMPSON et al. v. GORDON et al.  
(Sac. 2,021.)

(Supreme Court of California. Jan. 16, 1913.)

1. WILLS (§ 155\*)—VALIDITY—"UNDUE INFLUENCE."

To render a will invalid because of undue influence, it must have been executed by the testator under pressure which destroyed his free agency.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375-381; Dec. Dig. § 155.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7166-7172.]

2. WILLS (§ 163\*)—UNDUE INFLUENCE—BURDEN OF PROOF.

That a will makes provision for one occupying a fiduciary relation to the testator does not raise a presumption of undue influence, or throw the burden on him of disproving undue influence, unless he took some part in making the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 388-402; Dec. Dig. § 163.\*]

3. WILLS (§ 166\*)—UNDUE INFLUENCE—SUFFICIENCY OF PROOF.

Testimony that a person charged with undue influence was in the house shortly after the will was executed was insufficient to show that he was present when the will was made.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.\*]

4. WILLS (§ 47\*)—TESTAMENTARY CAPACITY—SUFFICIENCY.

A will will not be set aside merely because the testator was a man of advanced years, whose sight was failing.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 94; Dec. Dig. § 47.\*]

5. WILLS (§ 82\*)—VALIDITY—UNNATURAL WILLS.

A will cannot be set aside merely because its dispositions do not conform to the jurors' notions of justice or propriety.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 203; Dec. Dig. § 82.\*]

6. WILLS (§ 82\*)—VALIDITY—UNNATURAL WILLS.

A testator gave the bulk of his estate to a nephew and another person, who had been taken into the testator's family as a mere child, and virtually treated as his son. These two

with the testator's wife were closest to the testator, enjoyed his confidence, and assisted in the management of his affairs. His other heirs were nephews and nieces, who did not live near him, and whose relations with him were not particularly intimate. His wife at the date of the will was suffering from a disease believed to be incurable, and she died before his death. Held, that the will was neither unnatural or unjust.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 203; Dec. Dig. § 82.\*]

7. WILLS (§ 55\*)—TESTAMENTARY CAPACITY—WEIGHT OF EVIDENCE.

Testimony that a testator would walk around the table where the hired men were eating, and go out without saying anything, and that he set fire to some fox-tails along a road, and when a witness observed that a fence post was on fire, and went to put it out, the testator said he was old enough to watch his own affairs, was too trivial to show lack of testamentary capacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-161; Dec. Dig. § 55.\*]

8. WILLS (§ 55\*)—TESTAMENTARY CAPACITY—WEIGHT OF EVIDENCE.

Testimony tending to show that a testator's memory was somewhat weakened, without any showing of impairment of his ability to grasp the salient facts in relation to his property, its situation, and the objects of his bounty, was insufficient to show want of testamentary capacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-161; Dec. Dig. § 55.\*]

9. WILLS (§ 55\*)—TESTAMENTARY CAPACITY—WEIGHT OF EVIDENCE.

In action to revoke the probate of a will, evidence held insufficient to show want of testamentary capacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-161; Dec. Dig. § 55.\*]

10. WITNESSES (§ 257\*)—REFRESHING RECOLLECTION—ADMISSIBILITY OF WRITING IN EVIDENCE.

Where letters are used by a witness to refresh his recollection, they cannot be read to the jury by the party calling such witness, nor can he examine the witness concerning their contents, although, under the express provisions of Code Civ. Proc. § 2047, the adverse party may read them to the jury.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 892; Dec. Dig. § 257.\*]

11. WILLS (§ 384\*)—REVIEW—HARMLESS ERROR.

In a will contest, where there was no evidence showing an exercise of undue influence, the exclusion of testimony that those charged with exercising it entertained feelings of hostility toward the contestants, if erroneous, was harmless.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 855-858; Dec. Dig. § 384.\*]

12. APPEAL AND ERROR (§ 1058\*)—ERROR—CURE.

The exclusion of questions was not prejudicial error, where everything of consequence that could have been brought out thereby was covered by other answers of the witnesses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.\*]

13. EVIDENCE (§ 471\*)—FACTS OR CONCLUSIONS.

The exclusion of questions asked witnesses which called for conclusions or opinions, rather than facts, was proper.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\*]

#### 14. APPEAL AND ERROR (§ 105S\*)—EVIDENCE—HARMLESS ERROR.

The exclusion of a question whether a witness had ever heard Mrs. P. "say anything to her husband" about a certain matter was not prejudicial error, where she subsequently testified that she never heard any conversation between P. and his wife regarding the same matter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 105S.\*]

Department 1. Appeal from Superior Court, Colusa County; H. M. Alberty, Judge.

Petition by Olive Sampson and others against E. W. Gordon and others to revoke the probate of the will of George F. Packer, deceased. From a judgment of dismissal, the petitioners appeal. Affirmed.

Arthur C. Huston, of Woodland, and Seth Millington, of Colusa, for appellants. White, Miller & McLaughlin and Seymour & Yell, all of Sacramento, and Thomas Rutledge, of Colusa, for respondents.

SLOSS, J. On February 15, 1910, the superior court of the county of Colusa admitted to probate an instrument purporting to be the last will of George F. Packer. The appellants, children of deceased brothers and sisters of said George F. Packer, filed a petition for revocation of the probate of said will. The grounds upon which revocation was asked were that the document was not executed by George F. Packer in the manner required for the execution of wills, that the decedent was not of sound mind at the time of executing the alleged will, and that the execution was induced by undue influence and fraud. The proponents having answered denying the material allegations of the petition with respect to each of these grounds, the matter came on for trial before a jury. At the close of the contestants' case, the proponents moved for a nonsuit on the ground that no evidence in support of any of the causes of contest had been introduced. The motion was granted, and judgment of dismissal entered. The contestants appeal from the judgment.

The alleged will bore date the 27th day of April, 1907, some two years before Packer's death. By its terms, the decedent bequeathed \$500 to his niece, Mary Glanning, a like sum to his sister, Jane Packer, a steam harvester to George H. Gordon, and the residue of his estate in equal shares to Edward M. Gordon and the decedent's nephew, Albert M. Packer. George F. Packer was a farmer owning a large ranch and other property in Colusa county, where he had resided for many years. At the date of the will he was of the age of 88 years. He was married, but had never had any children. His wife, Hannah Packer, was alive when the instrument in controversy was signed. She died on March 20, 1908, during Packer's lifetime. The only other persons who would, at the

date of the will, have been entitled to succeed to his estate as heirs, were his sister, Jane Packer, and children of deceased brothers and sisters, such children including Albert M. Packer and the contestants.

[1] There was no attempt to offer any evidence in support of the averment that the paper had not been executed in due form. Nor does the record contain any evidence tending to show the exercise of undue influence or the commission of fraud. There is a total want of testimony which would justify an inference that any of the beneficiaries, or their wives, or the wife of the decedent (the persons named in the petition for revocation as having exercised undue influence and made fraudulent representations), undertook to influence the testator in any manner whatever. So far as the evidence shows, the will was the product of George F. Packer's free and independent volition. Certainly there is nothing to indicate that he acted under pressure which destroyed his free agency. Nothing less than this is undue influence. In re Kaufman, 117 Cal. 288, 49 Pac. 192, 59 Am. St. Rep. 179; Estate of Ricks, 160 Cal. 459, 117 Pac. 532; Estate of Morcel, 162 Cal. 188, 121 Pac. 733.

[2, 3] It is argued that there was a confidential relation between the decedent and Albert M. Packer, and that this threw upon the latter, benefiting by the will, the burden of disproving undue influence. But no presumption that the testator was unduly influenced arises from the mere fact that the will makes provision for one occupying a fiduciary relation to him. There must, in addition, be at least a showing that the person so benefited had some part in the making of the will. Estate of Higgins, 156 Cal. 257, 104 Pac. 6. The appellants assert in their brief that Albert M. Packer was present when this will was executed. But the record does not bear them out. All that was testified to was that he was in the house when E. M. Gordon entered after the will had been executed. This is clearly insufficient to raise a presumption of undue influence. Of the issue of fraud nothing more need be said than that evidence to sustain the allegations of the petition is not to be found in the transcript.

[4-6] The testimony regarding mental incompetency was not such as to have justified the submission of the question to the jury. George F. Packer was a man of advanced years. His sight was failing. But these circumstances alone are not sufficient to justify the court or a jury in setting aside a will. Estate of Dole, 147 Cal. 188, 81 Pac. 534; Estate of Motz, 136 Cal. 558, 69 Pac. 294. After giving to the contestants the benefit of every favorable interpretation and inference which the testimony can reasonably bear, as we are bound to do on this appeal (Estate of Arnold, 147 Cal. 583, 82 Pac. 252), we are still forced to the conclusion that



nothing substantially tending to show a lack of mental capacity to make a will was produced. Stress is laid upon what is called the "unnatural" character of the will. It can hardly be necessary to repeat that a jury is not authorized to overturn a will merely because its dispositions do not conform to the jurors' notions of justice or propriety. "It is well to remember that one has a right to make an unjust will, an unreasonable will, or even a cruel will." *Estate of McDevitt*, 95 Cal. 33, 30 Pac. 101. But, in fact, it cannot truthfully be said that the will before us is either unnatural or unjust. The principal beneficiaries are the persons who were (except for his wife) closest to the testator, who enjoyed his confidence and assisted him in the management of his affairs. One of them, Albert Packer, was his nephew. The other, Edward M. Gordon, had been taken into the testator's family as a mere child, and had lived upon the Packer property, and been treated virtually as a son of George and Hannah Packer all his life. The contesting nephews and nieces did not live near the Packers, and the relations between them and the testator were not particularly intimate. Much is made of the failure of the testator to provide for his wife. This is a somewhat strange criticism, in view of the fact that the wife herself is named in the contest as one of the parties exerting undue influence. But, apart from this, the omission to give anything to the wife is not surprising when we note that she was, at the date of the will, suffering from a disease which was believed to be incurable. Indeed, the appellants themselves, in their petition, allege that at the date of the will she was so afflicted, "and that both she and the said George F. Packer knew that she could not recover."

[7-9] There was no testimony by either expert witnesses or intimate acquaintances that in their opinion George F. Packer was not of sound mind. One of appellants' witnesses testified that the decedent's health had been failing for some years, but that his mind, so far as she knew, was strong. One witness, who had worked for Packer as a farm hand, stated that his employer "appeared irrational," but based this statement upon grounds which wholly fail to support the conclusion. One of the circumstances mentioned was that Packer would ask the witness his name and what he was doing, and then, on meeting him another day, would repeat the same questions. Again, that Packer often spoke of things that had occurred many years before, while he was living in Pennsylvania; that the testator would walk around the table where the hired men were eating, and go out without saying anything. Another witness testified that in 1907, he saw Packer set fire to some fox-tails along the road, that he observed that a fence post was on fire, and went to put the fire out, whereupon Mr. Packer said he was old enough to watch

his own affairs. At the time of the incident, Packer "appeared" to this witness, too, to be irrational. The facts testified to by the two witnesses just mentioned are too trivial to deserve extended comment. It must be apparent that they can furnish no support for a conclusion that the testator did not possess the mental capacity required for the making of a will. The only circumstance having any bearing on the matter of mental soundness is the repetition of questions that had already been asked and answered. It had a tendency to show that Packer's memory was somewhat weakened. But this, without any showing of impairment of his ability to grasp the salient facts in relation to his property, its situation, and the objects of his bounty, would not suffice as proof of want of testamentary capacity. *Estate of Dole*, supra. Taking the case as a whole, it may fairly be said that the evidence in support of the allegation of unsoundness of mind is decidedly weaker than that presented in various cases in which this court has as matter of law held the proof offered to have been insufficient.

[10] We think no material error was committed in ruling upon the admission and exclusion of testimony. The appellants offered the deposition of Henria Compton, a niece of decedent. The deposition was taken in June, 1911. In 1909 Mrs. Compton had written letters to relatives, in which she made certain declarations concerning the decedent and other members of his family. The appellants sought to get these letters before the jury upon the plea that they could be used to refresh the recollection of the witnesses. The court declined to permit them to be read. We are satisfied that it was right in so ruling. Even if it be assumed that the circumstances were such as to authorize the use of the letters to refresh the witness' recollection (Code Civ. Proc. § 2047), the party calling her was not thereby authorized to put the papers before the jury. Such a paper is "in no sense testimony. \* \* \* The opponent, but not the offering party, has a right to have the jury see it. \* \* \* That the offering party has not the right to treat it as evidence, by reading it or showing it or handing it to the jury, is well established." 1 Wigmore on Ev. § 763. And such seems to be the fair construction of section 2047 of the Code of Civil Procedure, which expressly declares the right of the adverse party to read the writing to the jury. *Reid v. Reid*, 73 Cal. 206, 208, 14 Pac. 781. To permit this to be done by the party producing the witness would open the door to the admission of hearsay and manufactured evidence without limit. For like reasons, it was proper to exclude questions in which counsel for appellants, after reading a passage from one of the letters, asked the witness what she meant by the declaration quoted, or based other inquiries upon such passage.

[11-13] Some other rulings are criticized,

but we think none of them, if erroneous, was of sufficient importance to justify a reversal. If it be conceded that appellants were entitled to show that the persons charged with exercising undue influence entertained feelings of hostility toward the contesting relatives, such evidence could not have availed to make a case sufficient to go to the jury in the absence of anything tending to prove that undue influence had in fact been exercised. Besides, while some questions on this line were excluded, others were permitted to be answered, and the appellants had the benefit of everything of consequence that could have been brought out if the rulings on the earlier questions had been as appellants contend they should have been. Many other questions on this line called for conclusions or opinions, rather than facts, and were properly ruled out for this reason.

[14] The witness Henria Compton was asked whether she had ever heard Hannah Packer "say anything to her husband about doing anything for Jane Packer." An objection was sustained. If the ruling was erroneous (see *Estate of Snowball*, 157 Cal. 301, 309, 107 Pac. 598), the error was harmless, since it appears that the witness subsequently testified that she had never heard any conversation between George Packer and his wife "in regard to doing anything for Jane Packer."

The appellants urge that the court erred in excluding testimony tending to show that the testator, before and after making his will, had made gifts of property to E. M. Gordon and Albert Packer. We need not pass on the admissibility of this testimony. If it had been admitted, it could not have strengthened the appellants' case to such an extent as to justify the submission of the issue to the jury.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

(164 Cal. 497)

HOBBS v. TOM REED GOLD MIN. CO.  
et al. (L. A. 3,246.)

(Supreme Court of California. Jan. 14, 1913.  
Rehearing Denied Feb. 13, 1913.)

**1. CORPORATIONS (§ 174\*) — AGENCY FOR STOCKHOLDERS.**

A corporation is the agent and trustee of the stockholders, holding and managing the business for their benefit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 649-652; Dec. Dig. § 174.\*]

**2. COURTS (§ 29\*)—JURISDICTION—TERRITORIAL SCOPE.**

A writ of mandamus cannot run to persons, or be enforced upon realty, without the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 82½, 112-118; Dec. Dig. § 29.\*]

**3. COURTS (§ 12\*)—JURISDICTION—RESIDENCE OF PARTIES.**

Where a corporation, organized under the laws of another state, holds its directors' meet-

ings in the state, and its directors reside there, and a part of its business is done there, mandamus will issue to compel the officers to order the persons in charge of its mine in another state to permit a stockholder to examine the mine; Code Civ. Proc. § 1097, providing adequate remedy to compel obedience by authorizing punishment for refusal to obey an injunction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 32-36, 40, 41, 43, 45; Dec. Dig. § 12.\*]

**4. MINES AND MINERALS (§ 104\*)—INSPECTION BY STOCKHOLDERS.**

A stockholder of a mining corporation has a right to inspect the company's mines.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 228; Dec. Dig. § 104.\*]

**5. CORPORATIONS (§ 181\*)—RIGHTS OF STOCKHOLDERS—INSPECTION OF BOOKS.**

At common law a stockholder has a right to inspect the corporate books.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 674-682, 685; Dec. Dig. § 181.\*]

**6. MANDAMUS (§ 129\*)—PURPOSE.**

The right of inspection by stockholders of corporate records and business, when given by statute, is absolute, and may be enforced by mandamus, though, where the right depends on the common law, the issuance of the writ is discretionary as applicant's motives may be questioned, and he must show good cause.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 264; Dec. Dig. § 129.\*]

**7. EVIDENCE (§ 80\*)—PRESUMPTIONS—LAW OF ANOTHER STATE.**

The statute law of Arizona as to a mining stockholder's right to examine the corporation's mines is presumed to be the same as that of California.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.\*]

In Bank. Appeal from Superior Court, Los Angeles County; Curtis A. Wilbur, Judge.

Mandamus proceedings by John H. Hobbs against the Tom Reed Gold Mining Company and others. From a judgment for defendants, plaintiff appeals. Reversed.

J. W. McKinley, of Los Angeles, Thomas, Bryant, Nye & Malburn, of Denver, Colo., and H. L. McNair, of Los Angeles, for appellant. N. P. Moerdyke and Hunsaker & Britt, all of Los Angeles, for respondents.

SHAW, J. This is a proceeding in mandamus. The writ of mandate may be issued to any corporation, board, or person "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station, or to compel the admission of a party to the use or enjoyment of a right" to which he is entitled, and there is not a plain, speedy, and adequate remedy in the ordinary course of law. Code Civ. Proc. §§ 1085, 1086. The natural persons named as defendants to the action are the persons composing the board of directors of the corporation defendant, and including its president and secretary. The plaintiff is a holder of stock in the defendant corporation.

[1] A corporation is the agent and trustee of its stockholders, in their behalf and for



their use and benefit holding, controlling and managing the corporate property and business. *Wright v. Oroville M. Co.*, 40 Cal. 27; *Ashton v. Dashaway Ass'n*, 84 Cal. 65, 22 Pac. 660, 23 Pac. 1091, 7 L. R. A. 809. The directors are the trustees for the stockholders and also for the corporation. It is practically conceded that there is no plain, speedy, and adequate remedy in the ordinary course of law, whereby the plaintiff may obtain the relief he seeks. The foregoing statements show that the defendants occupy the position of official trustees from which duties may arise to perform acts on behalf of the plaintiff. The two questions presented for determination are, first, whether or not upon the facts alleged in the complaint there is any act which the law specially enjoins as a duty resulting from this trust or station, and, second, whether or not the superior court of Los Angeles county can enforce performance of such act by means of the writ of mandate.

Tom Reed Gold Mining Company is a corporation organized under the laws of Arizona, and having its principal place of business in Pasadena, in Los Angeles county, Cal., and it there maintains an office and holds meetings of its directors. All of the directors, the president and secretary being members of the board, reside in Los Angeles county. None of them "reside or remain" in Arizona. The company owns a gold mine in Arizona, the operations of which are carried on by agents and employes in Arizona, and subject to the direction and control of said board of directors. The plaintiff owns more than 2,000 shares of the stock of said company. Having heard that there had recently been a discovery of a new body of ore in the underground workings of said mine, and desiring to examine said mine and inspect said ore, and ascertain whether the mining operations were carried on with skill and good judgment, so as to be advised of the value of his stock, the plaintiff demanded of the company permission to visit, inspect, and examine the mine accompanied by an expert mining engineer to assist him. The company refused to permit him to do so. The prayer of the complaint is for a writ of mandate commanding the defendants to permit plaintiff to visit, inspect, and examine said mine, accompanied by a mining engineer to assist him therein, and requiring defendants to make and deliver to plaintiff an order directed to its agents and servants in charge of the mine, instructing them to show him such parts of the mine as he wishes to examine, and for such other relief as may be just and proper.

[2] The mine being in Arizona, it is not within the jurisdiction of the courts of this state. Our personal writs cannot run to persons who are not present in the state, and they cannot be enforced upon real property beyond its limits. The writ of man-

date cannot be invoked to compel performance of an act which cannot be performed within this state, but must be done, if at all, at some place in another state. So far as these objections go, the refusal of the writ was proper.

[3] But there is an act in furtherance of the proposed inspection, which the defendants may perform, and which it is their duty to perform in this state, to which the plaintiff upon the facts stated is clearly entitled and which comes within the scope of the relief prayed for. The corporation holds its directors' meetings in this state, its directors reside here, and the corporate business in part, at least, is done here. The corporation, although organized under the laws of Arizona, is for many purposes a resident of this state. *Wait v. Kern R. M. Co.*, 157 Cal. 21, 106 Pac. 98. Its directors, acting in this state, may make and deliver to the plaintiff an order to the persons in charge of the mine, instructing them to permit the plaintiff to enter and examine the same. In the ordinary course of business, it is to be presumed that such an order would be made in this state, rather than in Arizona, since the directors and officers reside here and hold meetings here. There is, therefore, no physical or jurisdictional obstacle to prevent the issuance and execution of a writ of mandate to compel the defendants to perform such act. Ample power to compel obedience is conferred by section 1097 of the Code of Civil Procedure, although, doubtless, the power would exist in the absence of such express grant. There is therefore an act which the defendants may do in this state in their trust capacity, the performance of which the court can compel.

[4] The remaining question is whether or not this act is a duty resulting from the relations between the parties. Has a stockholder of a mining corporation the right to visit and inspect the mines of the company? We think there can be no doubt that the right exists.

[5] It is settled that at common law a stockholder has the right to inspect the books of the corporation. 2 Cook on Corp. § 511; 4 Thompson on Corp. § 4406 et seq. The reasoning on which this rule is founded is that a stockholder has an interest in the assets and business of the corporation, and that such inspection may be necessary or proper for the protection of his interest or for his information as to the condition of the corporation and the value of his interest therein. There is not a feature of this reasoning that does not apply with equal force to the claim of a right to examine the property of the corporation, especially where it is mining property, the condition and value of which is so easily concealed or misrepresented. The books would often afford no information of the nature of the ore bodies exposed or of the manner in which the work

was carried on. "The stockholders of a corporation are the owners of its franchises and its assets, and they have a right to be informed of the financial condition of the company." *Kuhbach v. Irving, etc., Co.*, 220 Pa. 431, 69 Atl. 981, 20 L. R. A. (N. S.) 185. In *Guthrie v. Harkness*, 199 U. S. 153, 26 Sup. Ct. 5, 50 L. Ed. 130, 4 Ann. Cas. 433, the court quotes with approval the following passage from *Cockburn v. Union Bank*, 13 La. Ann. 289: "A stockholder in a corporation possesses all his individual rights, except so far as he is deprived of them by the charter or the law of the land. As long as the charter or the rules and by-laws, passed in conformity thereto, do not restrict his individual rights, he possesses them in full and can demand to exercise them. It cannot be denied that it is the right of one to see that his property is well managed and to have access to the proper sources of knowledge in this respect." Again the court says (199 U. S. page 155, 26 Sup. Ct. page 6, 50 L. Ed. 130, 4 Ann. Cas. 433): "The right of inspection rests upon the proposition that those in charge of the corporation are merely the agents of the stockholders who are the real owners of the property"—citing *Cincinnati V. Co. v. Hoffmeister*, 62 Ohio St. 201, 56 N. E. 1033, 48 L. R. A. 732, 78 Am. St. Rep. 707. In the *Guthrie* Case the United States Supreme Court held that the stockholders had the right, not only to inspect the books of the banking company, but also to examine its accounts and loans, or, in other words, its property. It would, indeed, be a strange rule which would allow the stockholder to examine the books of a corporation to ascertain its condition and deny him an inspection of the property to verify the statements contained in the books. The rule at common law, in our opinion, extends to the corporate property as fully as to the books.

[6] Where such right is given by statute, the rule is that, unless the statute imposes restrictions or limitations, the right is absolute, and may be enforced by mandamus, regardless of the purposes or motives of the stockholder, or the existence of good cause. *Johnson v. Langdon*, 135 Cal. 626, 67 Pac. 1050, 87 Am. St. Rep. 156. Where the right to be enforced is a common-law right, the issuance of the writ is discretionary, and the motives of the applicant may be questioned, and he is required to show good cause for granting the relief. *Id.* Section 589 of our Civil Code provides that any stockholder of a mining corporation, formed under the laws of this state, is entitled to visit and examine its mines accompanied by his expert, and that, on his application, the president of the corporation must cause its secretary to issue and deliver to him an order to the superintendent of the mine to show the stockholder such parts of the mine as he may wish to see. The case was de-

cided below on a demurrer to the complaint, which contains no allegations as to the law of Arizona on the subject.

[7] It is therefore presumed to be the same as the law of this state. Conceding for the purposes of this decision the claim of the defendant that section 589 does not apply to an Arizona mining corporation having its principal place of business in this state, and having mines only in Arizona, it would follow that under the law of Arizona, as we presume it to be, the same right would exist, and the same duty would rest upon the defendants as under the section of the Civil Code above mentioned. If it should turn out that Arizona has no such law and that section 589 should be held inapplicable, substantially the same right and duty would exist under the common law, provided the inspection was desired for a legitimate purpose and good cause was shown therefor.

It is suggested that the court should not indulge in useless or ineffectual proceedings, and that it would be useless to require the officers of the corporation to give an order to the mining superintendent in Arizona to allow an inspection of the mine, unless the court possessed the power and the means to compel the superintendent to obey the order. There seems to be a suggestion here that the defendants are disposed to be refractory and to resist the judgments of the courts of this state so far as they dare, while at the same time availing themselves of the privilege of carrying on the general corporate business here. We will not indulge the supposition that this motive or intent exists. Obedience to the writ commanding the issuance of a permit means an obedience in good faith with the sincere intent to carry out the judgment of the court, and we will presume that such obedience will be promptly accorded. It is true the court cannot send its officers into Arizona to induct plaintiff into the mine, but it can compel the issuance by the defendants in this state of the order for the inspection thereof, under such restrictions as may seem proper, and it can see that there is no trifling with the court in the manner of performing that act. It is not to be supposed that the mine superintendent will disobey or disregard a real order from his superiors. The court will give such relief as its powers and territorial jurisdiction authorizes it to give. It will not refuse any relief because it cannot give the full relief that plaintiff asks, or because it cannot act directly upon the premises to which the relief relates. From what we have said the conclusion necessarily follows that the court below erred in sustaining the demurrer to the complaint and in giving judgment for the defendants.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.



164 Cal. 476

**SNOWBALL v. SNOWBALL.** (Sac. 1,974.)  
(Supreme Court of California. Jan. 10, 1913.  
Rehearing Denied Feb. 8, 1913.)

**1. APPEAL AND ERROR (§ 205\*)—EXCLUSION OF EVIDENCE—STATEMENT OF EXPECTED ANSWER.**

Where the defendant made no statement to the court as to the substance of a conversation, it cannot be determined whether the exclusion of evidence of such conversation was error or not, and there was no ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1281, 1282; Dec. Dig. § 205.\*]

**2. APPEAL AND ERROR (§ 1056\*)—HARMLESS ERROR—EVIDENCE—EXCLUSION.**

The exclusion of a statement of a beneficiary that he was satisfied with the will, though tending to show bad faith in his later threats to contest, was not reversible error in an action on notes given him in a settlement of the estate arising out of such threats, where he conveyed his entire interest in the estate, and thus divested himself of the right to make a contest.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.\*]

Department 1. Appeal from Superior Court, Yolo County; H. M. Alberty, Judge.

Action by Leutie C. Snowball, executrix of the estate of Milton S. Snowball, against H. H. Snowball, administrator of the estate of Lucy A. Snowball, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

Arthur C. Huston, of Woodland, for appellant. Thomas & Thomas, of Ukiah, and Hudson Grant, of Woodland, for respondent.

**SHAW, J.** The defendant appeals from the judgment, and presents the proceedings at the trial upon a bill of exceptions.

On March 7, 1906, Lucy A. Snowball executed to Milton S. Snowball two promissory notes, one for \$1,500, due two years thereafter, and the other for \$500, due three years thereafter. Afterwards both the payer and payee died. This action was begun by the executrix of Milton S. Snowball's estate to recover from the estate of Lucy A. Snowball the amount due on said notes. After hearing the evidence the court below directed the jury to return a verdict for the plaintiff for the amount due upon the notes. This was done, and a judgment was entered accordingly.

The defense set up in the answer was that there was no consideration for the notes sued on. There was also an attempt to allege that the notes were procured by fraud exercised upon the maker by the deceased, Milton S. Snowball, and Leutie A. Snowball. Defendant charges that Milton and Leutie for the purpose of inducing their mother to execute said notes falsely stated to her that Milton intended to contest the will of John W. Snowball in order to secure a judgment that he died intestate; that Milton

in fact had no intention to make such contest, but that the mother believed he did so intend; and that relying on that belief and on his said declarations that he did so intend, and by reason thereof, she executed the said notes, and that there was no consideration for the said notes. These allegations constitute a detailed statement of the defense that the notes were given without consideration. It is not alleged that they were given in settlement of the threatened contest or to induce Milton to refrain from making the same. The evidence, however, shows that they were given to accomplish that purpose. It is conceded that the evidence admitted was sufficient to establish the fact that the notes were given for a good and sufficient consideration. The only errors alleged are that the court erred in certain rulings excluding evidence offered by the defendant.

John W. Snowball, the husband of Lucy A. Snowball, died on February 5, 1906. He left four surviving children, namely, Leutie A., Milton S., Leon, and H. H. Snowball. The will of John W. was admitted to probate on March 5, 1906, and Leutie A. Snowball was appointed executrix thereof. The facts shown by the evidence are substantially as follows: John W. Snowball's will was made some two years before his death. It gave to Milton two parcels of land. Milton had been living upon one parcel and paying the taxes thereon for some ten years, and claimed that it belonged to him. The other tract was sold by John W. before his death. The will also gave to Leon bank stock of the value of \$2,000. Milton and Leon were dissatisfied with the provisions of the will in their favor and made threats to the mother, Lucy, and to their sister, Leutie, that they would initiate a contest against it. Thereupon a settlement agreement was made between these four, in pursuance of which said contest was abandoned. This agreement was made on the 7th of March, 1906, and the notes in controversy were executed as a part thereof. In substance, the agreement was that Milton was to receive \$5,000 and Leon was to receive the sum of \$5,000, in consideration whereof they were to refrain from making the contest. Leutie was to give \$3,000 to Leon and \$2,000 to Milton, and Lucy, the mother, was to execute the two notes to Milton amounting to \$2,000, and Milton was to accept the lot which had not been sold and of which he claimed to be the owner, in lieu of \$1,000 of the \$5,000 to be received by him. In pursuance of this agreement Leutie gave the \$3,000 to Leon and the \$2,000 to Milton. Lucy executed to Milton the two notes sued on, and Milton and Leon thereupon executed to Leutie conveyances of all of their interest in the estate of their said father. Leutie agreed that upon the settlement of the father's estate she would reconvey the said home place

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to Milton. As a matter of fact, they did abandon the contest, and no such contest was ever filed or instituted.

[1] H. H. Snowball was called as a witness for the defendant, and he testified that, after John W. Snowball's death and before his will was filed for probate, he had a conversation with Milton in regard to contesting his father's will. The will was filed on February 17, 1906. He was asked to state what the conversation was, and the court refused to allow the question to be answered on the ground that it was immaterial, irrelevant and incompetent. This ruling is assigned as error. The defendant made no statement to the court showing what he claimed the substance of the conversation to be; hence, it cannot be determined whether the exclusion of the evidence was erroneous or not, and this ruling of itself constitutes no ground for reversal. *Marshall v. Hancock*, 80 Cal. 84, 22 Pac. 61; *Houghton v. Clarke*, 80 Cal. 420, 22 Pac. 288; *Taylor v. Kelley*, 103 Cal. 186, 37 Pac. 216. As was observed in *Marshall v. Hancock*, "the conversation, if there was one, may have been about a matter entirely aside from the matter under investigation."

[2] The witness was then asked whether or not after the father's will was read, which was a few days after his death on February 5th, and before March 7, 1906, he had a conversation with Milton wherein Milton stated that he was satisfied with his father's will, and had no intention whatever of contesting the same. An objection that this question was immaterial, incompetent, and irrelevant was sustained. A similar question as to a conversation after the 7th of March was also excluded. It is claimed that these rulings are erroneous.

The evidence of the settlement agreement, of which the notes constituted a part, was introduced by the defendant, it is clear and positive, and there is no claim that it is not substantially correct. Milton and Leon, in consideration of the money and notes received by them, respectively, not only agreed not to contest the will, but each also conveyed to Leutie all his interest in the estate, thereby divesting himself of the right to make such contest. Code Civ. Proc. § 1327; *Estate of Edelman*, 148 Cal. 236, 82 Pac. 962, 113 Am. St. Rep. 231; *State v. Superior Court*, 148 Cal. 56, 82 Pac. 672, 2 L. R. A. (N. S.) 643; *Estate of Wickersham*, 153 Cal. 612, 96 Pac. 311. This conveyance was necessary in order to make the settlement secure, and it formed a material part of the consideration for the notes. It is true that an agreement to settle a claim upon which suit has not been begun is not supported by a sufficient consideration if the party seeking to enforce it knew his claim to be groundless and did not assert it in good faith. *McGlynn v. Scott*, 4 N. D. 24, 58 N. W. 460; *McClure v. McClure*, 100

Cal. 343, 34 Pac. 822. The answer to the question, if affirmative, might perhaps tend to prove bad faith in Milton. But a person's intentions readily change. An expression of intent at one time is but slight evidence that it has continued to a subsequent time, especially when, as here, the contrary purpose is positively declared on the subsequent occasion and is followed up by action to the extent of conveying a valuable right and interest. Counsel did not even state to the trial court that he expected an affirmative answer. It would have been better policy for that court to have admitted the evidence, but, under the circumstances and in the absence of any indication as to the nature of the answer, we deem the error, if it can be so termed, to be too trivial to justify a reversal. Declarations of intent not to contest, made after the settlement, would be entirely consistent therewith and would not tend to impeach the settlement agreement or to show bad faith in making the claim.

A considerable part of the discussion in the appellant's brief relates to the question of confidential relations and the effect thereof upon the duty of one to show good consideration for a contract in his favor made by another party to whom he stands in confidential relations. We do not think this question is of any importance. Although the relation between Milton and Lucy was that of parent and child, it is clear from the evidence that there was no confidential relation between them sufficient to impose upon him any duty to have his mother call in independent advice in the matter. Furthermore, the evidence also shows that the settlement was made upon the advice of an attorney called for that purpose by the mother herself.

There are no other points of sufficient importance to deserve mention.

The judgment is affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

164 Cal. 451

PEOPLE v. SMITH. (Cr. 1,720.)

(Supreme Court of California. Jan. 8, 1913.)

1. HOMICIDE (§ 203\*)—EVIDENCE—DYING DECLARATIONS—EXPECTATION OF DEATH.

Deceased, after a necessarily fatal wound, in answer to questions of the district attorney an hour before his death, said that he did not know that he was pretty badly hurt, but presumed so; that the doctor had not told him that he had a poor chance; that he did not know that he was going to die and hoped not; that he was not feeling weak; and that so long as there was life there was hope. *Held*, that his statement as to the encounter with accused was not made without hope or expectation of recovery, so as to be admissible as a dying declaration.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 430-437; Dec. Dig. § 203.\*]



## 2. HOMICIDE (§ 203\*)—EVIDENCE—"DYING DECLARATIONS"—IMMINENT DEATH.

It is the abandonment of hope, the expectation of certain and imminent death, and the belief of the law that at such a time a man will tell the truth, that justify the reception of dying declarations against the defendant, thus deprived of a confrontation and cross-examination of witnesses.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2297, 2298.]

## 3. HOMICIDE (§ 210\*)—EVIDENCE—DYING DECLARATIONS—REAFFIRMANCE OF INADMISSIBLE STATEMENTS.

While a declaration not made under the belief of immediate and impending death may, under fear of death, be reaffirmed by the declarant under circumstances entitling it to admission, a greater care should be exercised by the trial court and a more satisfactory showing of the patient's condition of mind required than when the declaration was in the first instance admissible; and where the answers of deceased, necessarily fatally wounded, were not, in the first instance, made with a sense of impending death, and his later statements in answer to leading questions were made when in such condition that he either could not appreciate their consequences, or from extreme illness or recklessness was willing to give the answers he thought wanted, reaffirmation was not sufficiently shown.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 442; Dec. Dig. § 210.\*]

## 4. HOMICIDE (§ 300\*)—INSTRUCTIONS—SELF-DEFENSE.

In a trial for homicide defended on the ground of self-defense, an instruction that, if defendant acted from reasonable and honest convictions, he was not criminally responsible for a mistake in the actual extent of the danger, where other judicious men would have been so mistaken, using the word "judicious" in place of the word "reasonable," and an instruction that if one kills another under circumstances not sufficient to induce a reasonable and well-founded belief of danger to life or great bodily harm in the mind of an "ordinarily courageous man," instead of an ordinarily reasonable and prudent man, the law would not justify the killing on the ground of self-defense, are useless changes from the ordinary definitions, and are disapproved.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.\*]

## 5. HOMICIDE (§ 116\*)—"SELF-DEFENSE"—RELiance ON APPEARANCES.

One may rely upon appearances and act in self-defense, if the appearances are sufficient to excite the fears of a reasonable man that he is then in immediate danger of death or great bodily injury at the hands of another.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158-163; Dec. Dig. § 116.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6402-6405; vol. 8, p. 7797.]

## 6. HOMICIDE (§ 300\*)—INSTRUCTIONS—SELF-DEFENSE—APPEARANCES.

An instruction that the fact that a person of violent and dangerous character threatened the life of another would not justify an immediate resort to self-defense in the absence of some "demonstration, real or apparent, of an attempt," coupled with ability to take life, instead of a demonstration "or" attempt, coupled with a real or apparent ability to take life, was erroneous.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.\*]

## 7. CRIMINAL LAW (§ 789\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE—REASONABLE DOUBT.

An instruction in a trial for murder that a doubt to justify acquittal must be reasonable, and that, if upon all the evidence the jury had an abiding conviction of the truth of the charge, they were satisfied beyond a reasonable doubt, was objectionable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1904-1922, 1960, 1967; Dec. Dig. § 789.\*]

In Bank. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Thomas J. Smith was convicted of murder in the second degree, and he appeals. Reversed and remanded.

William Tomsy and T. J. Crowley, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HENSHAW, J. The defendant, charged with murder, was convicted of murder in the second degree. From the judgment and from the order denying his motion for new trial he prosecuted his appeal to the Court of Appeals, where his appeal was denied. A hearing was ordered before this court for the further consideration of certain of the legal questions involved.

The theory of the prosecution, as outlined in the opening statement of the prosecuting attorney and in the instructions given by the court at the request of the prosecution, was that defendant Smith nursed a feeling of bitter hostility against Wolters; that about 10 o'clock on Sunday, the 4th day of September, 1910, in the city of Sacramento, Smith purchased a pistol, lay in wait for Wolters, met him in front of the Western Hotel, and then "without one word spoken by either side, by either the deceased or the defendant," drew his pistol, or, at the time firing "exclaiming at the same time, 'You will not beat me out of another job, you son of a bitch'" (both quotations are from the opening statement of the district attorney), shot Wolters to death.

By the defense it was contended that as early as half past 5 o'clock of that Sunday morning the deceased, in a saloon, had twice made an unprovoked savage assault upon the defendant, who was crippled in one hand, and that the defendant escaped serious bodily injury only by the intervention of bystanders; that the deceased made threats, both communicated and uncommunicated, to beat, injure, and kill defendant; that, still upon the morning of Sunday, the defendant made appeal to the police department of Sacramento for a warrant for the deceased's arrest, and was told to come back the next day, and, failing thus of police protection, purchased a pistol with which to defend himself; that defendant was employed as a solicitor or "runner" for the Western Hotel; that he repeatedly avoided the deceased dur-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing the day, but that deceased hung about the hotel, threatening injury to the defendant, and apparently seeking a conflict with him; that, leaving the hotel early in the evening in the pursuit of his regular business, he was approached by the deceased, who had been standing on the sidewalk in front of the hotel, and who, with vile language of abuse, began to threaten him as he approached; and that, in fear of death or great bodily injury, he drew his pistol and fired. The killing was thus admitted, and the defense was self-defense.

The evidence of the prosecution bearing upon the homicide consisted of the testimony of the witness Simmons, who conducted a cigar store next to the Western Hotel. He had seen deceased in front of the Western Hotel about half an hour before the shooting, leaning against a post upon the sidewalk. Witness was reading a newspaper, when he heard a pistol shot. Looking up at the pistol shot, he saw Wolters falling off the sidewalk and into the gutter. "Smith was standing kind of sideways, and, after the first shot, why, he turned around and fired two more shots." When his eye first caught the scene, Smith was standing near to the wall of the building, between him and Wolters, and about eight feet from the latter. He saw nothing of the affray before this moment of time, and heard no words spoken by either of the men.

Another witness, Perry, testified that he had a slight acquaintance with both the defendant and deceased; that, passing the Western Hotel, he saw the defendant standing up against the wall, spoke to him, and received no response, but as he passed the defendant "stepped right behind me and said to somebody—I didn't notice who it was—he says, 'You damned son of a bitch, you will not beat me out of another job,' and just then he fired." By the time the witness had turned three shots had been fired, and the deceased was falling or had fallen into the gutter.

All the other evidence of the prosecution is contained in the dying declaration of Wolters, which was admitted in evidence over the objection of the defense. The matter of this dying declaration will require more detailed consideration. For the present it is sufficient to say that Wolters' statement is that the defendant shot him to death, the shooting being sudden, unexpected and unprovoked.

For the defense, it was shown that both men were solicitors or "runners" for the same hotel; that the deceased, and not the defendant, had by the proprietor upon Saturday the 3d of September been discharged. It was further shown that Smith had not been discharged from that or any other employment, and was at the time of the homicide still in the employ of the hotel. Also, it was shown by a mass of testimony that the reputation of Smith for peace and quiet

was good, and that of the deceased very bad. Still further it was shown by testimony presumably disinterested, and certainly unimpeached, that upon the morning of the homicide the deceased, ugly and inflamed with liquor, had between half past 5 and 6 o'clock demanded that Smith pay him \$1.75 which he insisted Smith owed him; that Smith replied that he did not owe him the money, but would pay him for the sake of peace, and gave Wolters \$1.75; notwithstanding this, that Wolters assaulted Smith and struck him, Smith making no resistance. The barkeeper who testified to these things, as well as did Smith, declares that he pulled Wolters from Smith, and protested against his assaulting an inoffensive man; that nevertheless, when the barkeeper had returned behind the bar, Wolters again assaulted Smith, and again the barkeeper, with assistance, stopped the assault, and Smith left the saloon, Wolters saying as Smith left, "If I had a gun, I would kill that man." Evidence of other assaults and attempted assaults by Wolters upon Smith during the day are in evidence. It is in evidence, also, that after Smith had purchased his weapon he left at least two places upon the entry therein of Wolters, one the office of the hotel, another the adjoining saloon. Threats of violence against Smith by Wolters are also shown by other witnesses. Thus witness Hyde testifies that during that day Wolters said, referring to Smith, "I will get him. I will make a good dog out of him yet." Another witness, Hoffman, testifies that upon the same day Wolters said, referring to Smith, that "he would lick him every time he met him in Sacramento; and, if he left Sacramento and went to San Francisco, he would go to San Francisco and lick him there, and, if he went to New York, he would follow him to New York and lick him there." And, finally, there is the evidence of the witness Bascherini testifying for the defense, the one witness who, aside from the defendant himself, was an eyewitness to the occurrences, immediately preceding the shooting. He testified that he was a bootblack; that his bootblack stand was in the immediate neighborhood of the place of the shooting; that he was there at work upon the evening of and at the time of the shooting; that he saw Smith standing by the wall; that Wolters was close to him, about two feet or two feet and a half away; that Wolters' attitude and appearance were those of an angry man; that he was shaking his head and his lips were moving as though in speech, though he could not distinguish the words; that at this moment he turned to his work of polishing shoes and immediately thereafter heard the first shot.

Reverting to the evidence of the prosecution, it is manifest that the only testimony (aside from the dying declaration) tending to show the deliberate and unprovoked murder for which the prosecution contended was



given by the witness Perry, and that Perry's account material support for the reason that, while his testimony would abundantly justify the inference of a willful and cold-blooded murder, the testimony itself is lame and halting by reason of the language which he puts in the defendant's mouth; for, as has been stated, it would be strange for the defendant to have said to the deceased, "You will not beat me out of another job," when the facts were that the defendant had not been beaten out of any job, was still holding his position, while the deceased had been discharged, and thus "beaten out of his job" but the day before. Therefore it is that the evidence contained in the dying statement of the deceased becomes most material in the establishment of the crime charged and in the overthrowing of the self-defense asserted by the defendant in justification of his act; for, without the evidence of the dying declaration, it cannot be said that the jury would have accepted the somewhat curious account given by the witness Perry.

The facts concerning and attending the dying statement are that a bullet from defendant's pistol had pierced the abdominal cavity from the front, passed through the body, and lodged in the spine. The wound was necessarily fatal, and from it Wolters died about 12 o'clock the following day. He was taken to a hospital upon the evening of the shooting. The next morning the abdomen was much extended, peritonitis had set in, and by the testimony of one of the physicians Wolters was irrational from the fever of that inflammation. However, by the testimony of the district attorney, who received the dying statement, and by the testimony of another physician, Wolters was rational and appreciated what was said to him. The district attorney called upon Wolters in the hospital about 11 o'clock on Monday morning. There came to the bedside of the dying man the district attorney, his deputy, Mr. Brown, and Mr. Doan, the stenographic reporter.

[1] By the stenographic report the preliminary conversation is as follows: "Charley, I am the district attorney, and I want to take a little statement from you, if you feel like you can give it to us. Now, Charley, are you pretty badly hurt? A. Well, by God, I don't know. Q. Well, do you think you are going to die? A. I hope not. Q. Well, how do you feel about it? Did the doctor tell you you didn't have much chance? A. No. Q. You know you are shot pretty bad, don't you? A. I presume. Q. The doctor said, Charley, that the chances are that you are going to die. Now, how do you feel about it? A. If he feels that way, I don't know. Q. You think you are going to die? A. Well, I can't say. Q. You feel pretty weak, do you? A. No." Immediately following this the district attorney proceeded by questions to elicit from Wolters his version of the fatal affray. Certainly no word up to this

time gives evidence that Wolters was answering these questions in the presence of death, in the prospect of "almost immediate dissolution," without expectation or hope of recovery. *People v. Hogdon*, 55 Cal. 72, 36 Am. Rep. 30; 1 Greenleaf, Ev. § 158. Moreover, in the course of the inquiries put to him by the district attorney, Wolters, having stated that just before the shooting he was talking to a conductor on the sidewalk, is asked: "Is that conductor going to work to-day or to-morrow? A. I can get his name if I get better. So long as there is life, there is hope." At the conclusion of the district attorney's inquiry, Dr. White was called in from the operating room, and had a conversation with Wolters, lasting about a minute and a half, in which he stated to Wolters that he was going to die. The doctor was asked what he said to the wounded man, and answered: "I told him he was in a dying condition, and my opinion was that he was going to die." Asked what the patient replied, he answered: "I don't know. In fact, I have forgotten." Mr. Wachhorst, the district attorney, testifies: "Do you say that the wounded man expressed himself any more strongly as to his condition after the doctor had spoken to him than appears in this report or transcript by the reporter? A. Well, all I can say in response to that question is to repeat what he did say in response to the statement made by the doctor. Q. I understand you then, Mr. Wachhorst, to say that the wounded man said, 'All right, doctor, I understand. Go ahead.' A. Something to that effect, substantially so." The testimony of Mr. Doan, the stenographic reporter, is found in the transcript of his notes. By them, what took place is the following: "Now, Charley, you know I am the district attorney. A. Yes. Q. This is the shorthand reporter. A. Yes. Q. Now, of course, if you are going to die, Charley, we want to get a statement from you, you see, before you die. Now, the doctor will talk to you. [Dr. White talks to Wolters.] Mr. Wachhorst: Now Charley we won't bother you much more, but this is very important. Now, the doctor has advised you that you are going to die. Do you realize it now, Charley? A. Yes. Q. And you feel that you are pretty bad off? A. Yes. Q. Now, all that statement that you have made to us has been under the belief that you are going to die? A. Yes. Q. You have told us the whole story, have you? A. Yes; I can't tell any more. Q. What you have told us is the truth, is it? A. That is the truth. Q. The whole truth, and nothing but the truth? A. Yes. Q. Now, Charley, before you die do you want to say anything more? A. No."

[2] The conditions under which the declarations of a deceased may be received in evidence as a dying declaration, the anomaly which permits the reception of such evidence at all, have both received such elaborate exposition that it would be a waste of time to

expatiate upon the subject. It is the abandonment of hope, the expectation of certain and imminent death, and the belief of the law that, at such an awe-inspiring time, a man about to be called to account before his Maker will tell the truth, that alone have justified the reception of such statements against a defendant who is thus deprived of his most valuable rights of confrontation of witnesses and cross-examination. *People v. Sanchez*, 24 Cal. 17. The extracts which we have quoted give evidence of an assiduous effort upon the part of the district attorney by leading and suggestive questions to evoke a declaration from the lips of the wounded man measuring up to the requirements of the law. But they show no more than this: That the man was injured unto death, that he was indeed in a moribund condition at the time the so-called statement was taken, are unquestioned facts; but that he appreciated this and made his declarations with a sense of the gravity of the situation and of the consequences of his words we cannot for one moment believe. As has been said, and as will be further shown, the whole statement was made after the sick man's declaration that he did not know whether he was badly hurt or not, that he hoped he was not, that he did not know whether he was going to die or not, and that he did not feel "pretty weak." In the course of his answers, as has been pointed out, he declares that "while there is life there is hope." Yet to the district attorney, at the conclusion of the interrogatories, he answered "Yes" to the most leading question: "Now, all that statement that you have made to us has been under the belief that you are going to die?" Still further, the internal evidence of the asserted dying declaration may itself help establish the state of mind of the declarant, and in this case does so. One cannot read the statement here offered, made up in all essential particulars, as it is, of leading questions, designed to draw particular answers from the witness, without becoming convinced that the sick man was either semi-irrational, as one of the physicians testified, or that from extreme illness or extreme recklessness, he was willing to answer any question as he thought the district attorney desired it to be answered.

It may be well to make some quotations: "Q. How many shots did he fire at you? A. Two. Q. Two shots? A. Yes. Q. Well, he fired three shots, Charley? A. Well, that is all I know. Q. All you know, he fired two shots? A. Yes. Q. Struck you once in the stomach? A. Yes. Q. And once on the finger? A. Yes. Q. Now, Sunday you met him in the saloon there—in Cody's saloon—didn't you? A. Yes. Q. Did you have any trouble with him there? A. No. Q. Did you strike him there? A. No. Q. Sure, Charley? A. I am sure. I will tell you, after he called me all the Dutch sons of bitches and all that, I think I gave him one punch, but

that wasn't when the shooting took place. That was before. Q. Yes; in the morning? A. Yes. Q. Now, how many times did you strike him Sunday? A. Once. Q. That was in Cody's saloon? A. Yes; I guess it must have been. Q. You only struck him once, Charley? A. Yes. I am no fighting man. Q. That is the only trouble you had with him? A. That is all, because I refused to give him money. Q. Now, did he pay you the \$1.75 in Cody's saloon? A. Yes; he did. Q. You hit him first, didn't you? A. He looked at me, and he said to me, 'Here, you son of a bitch,' he says, 'that is not the way I let you have the money that time.' Q. Well, when you struck him in Cody's saloon, did he strike you? A. Of course, he struck me. Q. Where did he strike you? A. In the face. Q. Can you move your face over this way? Is that where he struck you, down here [indicating]? A. Yes. Q. There is a mark here on the right temple. Is that where he struck you? A. Yes. Q. He struck you there, did he, Charley? A. Yes. Q. What time in the afternoon was the shooting, about, as near as you can remember? A. Oh, it was about half past 5—quarter past 5, probably a quarter to 6. Q. It was later than that, Charley. It was about 7 o'clock. A. Well, it may have been. It was getting dusk. Mr. Brown: It was getting dark, wasn't it? A. Oh, boys, I want a drink of water. Mr. Wachhorst: Well, we will see if we can get you a drink, Charley. [Wolters was given a drink of water.] Mr. Brown: Charley, did Smith say anything to you before he commenced to shoot? A. Not a word. Q. Did you see him pull a gun or pistol or anything? A. No. Mr. Wachhorst: Q. Charley, did he call you any name when he shot? A. He says, 'Take that, you ——.' Q. Then he shot the second time? A. Yes. Q. Did you walk toward him when he shot? A. I don't think I did. Q. You don't think you walked toward him at the second shot, do you? A. No. Mr. Brown: After you heard the first shot, did he come towards you then? Did you see him coming towards you? A. Yes. Q. Was he walking quickly or slowly? A. Well, he was trying to get me more; don't you see? Q. Where did he first hit you, if you remember? A. In the back. Mr. Wachhorst: Did you have your back toward him when he shot? A. Yes. Q. Did you turn toward him then? A. Why, of course, naturally. Q. Did you know that he was standing there when you walked up? A. No, no. Q. You didn't know he was there at all? A. No. Q. You had no intention of doing him any harm, had you? A. No."

In the one breath, the deceased states that he saw the defendant talking to a woman and the defendant saw him coming down the street and walked toward him. In the next he says that he did not know that Smith was standing there when he walked toward him. In one sentence, in answer to the question "Did Smith say anything to you before



he commenced to shoot?" he replies, "Not a word." Here Mr. Wachhorst takes the interrogations away from his assistant, Mr. Brown, with the question: "Charley, did he call you any name when he shot?" And the witness answered: "He says, take that you ———." Again, he says that he had his back toward Smith at the time Smith first shot him, that the first shot struck him in the back. He had previously testified that Smith approached him from in front, and the physical fact is that he was not shot in the back, but that the fatal wound, unquestionably the first shot fired, struck him from the front in the abdomen.

[3] To sum up on this matter: It is not because the declarations of the deceased were not in the first instance made under the belief of immediate and impending death that they are inadmissible. It is recognized that a statement not so made may under fear of death be reaffirmed by the declarant under circumstances entitling it to admission. *People v. Crews*, 102 Cal. 174, 36 Pac. 367. But certainly considering the character of such evidence and the tremendous consequences following to a defendant from its admission, considering that if a declaration is taken from the injured person when he is not in fear of death, if subsequently he has abandoned hope and feels that death is imminent, he is frequently, if not usually, in a debilitated state of mind and body, it is not too much to say that a greater care should be exercised by the trial court and a more satisfactory showing of the patient's condition of mind made manifest than where the statement itself is uttered in the first instance under the circumstances required by the law. What, then, we do mean to say is that the evidence is conclusive that the statement was not made originally under the circumstances contemplated by the law, and that the showing is wholly insufficient to establish that it was reaffirmed afterward under such circumstances. The fact that the man was dying has, of course, its significance, but it is not the fact of controlling significance. The fact of controlling significance is his belief that the hand of death was upon him. *People v. Cord*, 157 Cal. 562, 108 Pac. 511. The materiality of the evidence thus improperly introduced has been sufficiently commented on. In view of the new trial which must be ordered, certain instructions demand attention. In contemplation of the character of the evidence and the plea of self-defense in justification, the instructions given at the request of the prosecution could with advantage be made much briefer.

[4] As a part of an instruction, the court charged that, if the defendant "acted from reasonable and honest convictions, he cannot be held criminally responsible for a mistake in the actual extent of the danger, when other judicious men would have been

alike mistaken." "Judicious" is here used in place of the well-accepted word "reasonable." Fundamentally, a defendant's conduct, it has been over and over said, is measured by the standard of what the ordinarily reasonable and prudent man would have done under the same circumstances. The introduction or injection of new words is without benefit, and serves only to afford a ground of more or less reasonable complaint. The same may be said of the following instruction: "If one person kills another through mere cowardice or under circumstances which are not, in the opinion of the jury, sufficient to induce a reasonable and well founded belief of danger to life or of great bodily harm in the mind of an ordinarily courageous man, the law will not justify the killing on the ground of self-defense." Here, again, the court shifts the standard from that of the ordinarily reasonable and prudent man to that of the "ordinarily courageous man." It might be that the logician could establish that the ordinarily reasonable and prudent man was the ordinarily courageous man. It might be that the logician could not do this. But, again, we say that nothing is gained by the introduction before the jury of these new measures and standards.

[5, 6] The following instruction is unhappily worded: "Nor does the fact that one person had made threats against the life of another, though taken in connection with the fact that the threatener was of a violent and dangerous character, justify or excuse an immediate resort to deadly weapons, resulting in killing him, in the absence of some demonstration, real or apparent, of an attempt, coupled with ability, to take life." Elsewhere the jury was properly instructed as to a defendant's right to rely upon appearances, if those appearances were sufficient to excite the fears of a reasonable man that he was then in immediate danger of death or great bodily injury at the hands of the deceased. But here the jury is told that the "demonstration of an attempt" (meaning probably demonstration or attempt) shall be "coupled with ability to take life" before the defendant may resort to a deadly weapon in his self-defense. This, of course, is not the law. It may be that the jury was not misled by this instruction. It is unfortunate, however, that inconsistent instructions should be given. What the court probably meant, and certainly should have said, is that the demonstration or attempt should be coupled with a real or apparent ability to take life. The court instructed the jury upon the distinction between direct and circumstantial evidence. There was not only direct evidence of the homicide in this case, but it was admitted. There was, therefore, no occasion to instruct upon the character and value of circumstantial evidence.

[17] The court further instructed the jury as follows: "A doubt to justify an acquittal must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case. If, after considering all the evidence, you can say that you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt." A like instruction was criticised and condemned in *People v. Schoedde*, 126 Cal. 376, 58 Pac. 859. It certainly does not better the long approved instruction of Chief Justice Shaw.

None of the asserted errors in the rulings of the court admitting and rejecting evidence require detailed consideration. The rulings themselves were either correct or were without prejudice to the defendant. But for the error of the court in admitting against the defendant the purported dying declaration of Wolters, the judgment and order are reversed, and the cause remanded.

We concur: MELVIN, J.; ANGELLOTTI, J.; SLOSS, J.; SHAW, J.

164 Cal. 481

GRAY v. ELLIS et al. (L. A. 2,969.)

(Supreme Court of California. Jan. 11, 1913.)

**1. MONEY RECEIVED (§ 8\*) — LIABILITY OF PRINCIPAL.**

Where an agent representing two corporations received plaintiff's money for stock in one of them, but delivered it to the other corporation for its stock, which plaintiff refused to accept, the corporation receiving his money was liable to plaintiff on an implied promise to repay it, although it received it without notice of the terms under which its agent received it.

[Ed. Note.—For other cases, see *Money Received*, Cent. Dig. § 30; Dec. Dig. § 8.\*]

**2. PRINCIPAL AND AGENT (§ 136\*)—PERSONAL LIABILITY OF AGENT.**

In such case, the agent, who was unable to furnish stock in the corporation for which plaintiff paid, was also liable on an implied promise to repay the money to plaintiff.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 476-491; Dec. Dig. § 136.\*]

**3. MONEY RECEIVED (§ 17\*)—ACTIONS—COMPLAINT—SUFFICIENCY.**

A complaint alleged an agreement by which plaintiff promised to pay money to E. and C., agents, for stock in the Northern or Western Trust Companies, a payment thereof, an election by plaintiff to take stock in the Western Company in which election E. and C. acquiesced, and which they acknowledged in the receipt for the money, the payment of the money by E. and C. to the Northern Company for its stock, a refusal by plaintiff to accept it, that the Northern Company had retained plaintiff's money, insisting that it was entitled to retain it, and that E. and C. had refused to apply the money on account of a subscription for stock in the Western Company. *Held*, that the complaint stated a cause of action against both E. and C. and the Northern Company on an implied promise to repay the money to plaintiff.

[Ed. Note.—For other cases, see *Money Received*, Cent. Dig. §§ 54-68; Dec. Dig. § 17.\*]

**4. MONEY RECEIVED (§ 12\*)—ACTIONS—DEFENSES.**

Where plaintiff paid money to the agent for two corporations for stock in one of them, and the agent diverted it to the other corporation, whose stock plaintiff refused to accept, the fact that there was no difference in the value of the stock of the two companies, and that the property of each was the same in character and value, was not a defense to an action to recover back the money paid.

[Ed. Note.—For other cases, see *Money Received*, Cent. Dig. §§ 38, 39; Dec. Dig. § 12.\*]

**5. APPEAL AND ERROR (§ 882\*)—REVIEW—INVITED ERROR.**

Plaintiff signed a subscription to the stock of the Northern or Western Trust Companies. When he paid the subscription, he elected to take stock in the Western Company, in which election the agent of the two corporations acquiesced. The agent, however, transmitted the money to the Northern Company, whose stock plaintiff refused to accept. In an action to recover the money, the court at defendants' request charged that the jury should determine whether plaintiff's subscription meant that he was to choose the company in which the stock was to be purchased, or whether the agent had a right to put him as a subscriber in either company as they might elect; that they should determine whether at the time of the issuance of the receipt for the money paid or prior thereto it was agreed between the agent and plaintiff that stock in the Western Company would be delivered, and what the arrangement between the parties as to delivery was, and that if they found that the right to place plaintiff's subscription in either company was in the agent, and they elected the Northern Company, the verdict should be for defendants. *Held* that, in view of these requests, defendants could not complain because the court did not determine as a matter of law what the agreement meant as to who should elect where the subscription should be placed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

**6. CORPORATIONS (§ 78\*)—SUBSCRIPTIONS TO STOCK—RIGHTS OF STOCKHOLDERS.**

A subscriber to the stock of a corporation whose contract was to take stock as an original subscriber could not be compelled to accept stock which had been subscribed for by, issued to, and was then owned by other persons.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 219-231, 420-424, 429-434; Dec. Dig. § 78.\*]

Department 1. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by Harry Gray against George B. Ellis and another, copartners doing business as Ellis & Church, and another. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

Denis & Loewenthal, Cedric E. Johnson, Thomas O. Toland, and T. F. Welch, all of Los Angeles, for appellants. Hatch & Lloyd and Hatch, Lloyd & Hunt, all of Los Angeles (Harvey D. Cheney, of Los Angeles, of counsel), for respondent.

PER CURIAM. This is an appeal from a judgment in favor of plaintiff, and from an order denying defendants' motion for a new



trial. The case was tried with a jury, which rendered a verdict in favor of plaintiff for the full amount claimed.

The action is one to recover \$2,250 paid by plaintiff to Ellis & Church on account of a subscription for the purchase of certain corporate stock, which money, it is substantially alleged, was diverted by Ellis & Church to payment on account of a subscription for stock in another and a different corporation from the one for whose stock he had subscribed, viz., the defendant Northern Investment Company, which diversion he promptly repudiated. The memorandum of agreement for such purchase executed by plaintiff is set forth in the complaint, the same being as follows:

"We, the undersigned, hereby severally agree to pay to Ellis & Church, agents, the sums set after our names respectively, on the following terms and conditions:

"Fifteen per cent. (15%) in cash, and the balance as called for, being payments on account of purchase of stock of the Northern or Western Trust Companies, said Northern or Western Trust Companies' stock representing bonds and stock of the Home Telephone Company of San Francisco:

Names.	Amounts to be Paid.
S. W. Clark.....	\$ 3,000
C. C. Ames.....	15,000
F. C. Hornby.....	35,000
H. H. Barstin.....	10,000
Harry Gray .....	15,000
By H. D. L.	
John T. Bill.....	5,000"

Treating this contract as giving the plaintiff the right to elect or direct to which of the two corporations referred to his subscription should be made (the "Northern" or "Northern Trust Company" referred to therein being the defendant Northern Investment Company), it was alleged in the complaint that at the time of the payment of the money plaintiff elected and directed that the same should be applied upon the purchase of stock in the Western Trust Company, and that said election and choice was agreed to and acquiesced in by said Ellis & Church, they so acknowledging in their receipt given for such money. It is further substantially alleged that Ellis & Church paid said money to the Northern Investment Company on account of a subscription by plaintiff for stock of the last-named company, said company receiving the same and sending plaintiff a certificate for 150 shares therein, which he at once returned, repudiating the action of Ellis & Church in the matter, and declining to be considered a subscriber for any stock of said corporation. Defendant Northern Investment Company has ever since retained plaintiff's money, insisting that it is entitled to retain the same as on account of a subscription for its stock. It is further alleged that Ellis & Church have steadily refused to apply said money on account of a sub-

scription for Western Trust Company's stock. We think the allegations of the complaint sufficiently show that Ellis & Church were the agents of both corporations in the matter. The answer clearly and definitely acknowledges that they were the agents of both corporations for the sale of the stock thereof, and that they were soliciting and receiving subscriptions from the public at large for the stock of both corporations, and for such subscription purposes were circulating agreements in the form set out in the complaint. It further appears from the answer and from the evidence that said corporations were formed solely to purchase and hold certain stocks and bonds of the Home Telephone Company of San Francisco, and the stock of both was of precisely equal value, share for share, and was based upon the said assets, to wit, stocks and bonds of said Home Telephone Company, and nothing else, and each share of stock of the Northern Investment Company represented the same number of stock and bonds of said telephone company, as did each share of stock of the Western Trust Company. The only differences appear from the evidence to have been that the principal place of business of the Western Trust Company was the city of Los Angeles, while that of the Northern Investment Company was San Francisco, and that the officers of the two corporations, with the exception of the president, were different, the same person being president of each corporation. The theory of plaintiff's complaint may fairly be said to be that both defendants are liable to him as for money had and received to his use. The money paid by him for a subscription for stock in one corporation to the agents of such corporation having been diverted by such agents to another corporation of which they were also agents, and attempted to be applied by such other corporation for and on account of a subscription for its own stock, he seeks to recover the amount thereof on the ground that the law implies a promise on the part of both Ellis & Church and the Northern Investment Company to refund it.

[1, 2] If there was an unauthorized diversion of this money to the Northern Investment Company by Ellis & Church, its agents, we see no reason to doubt the liability of such corporation on this theory, regardless of whether or not it had knowledge at the time it received the money of the terms on which Ellis & Church received the money from plaintiff. It cannot profit by reason of the unauthorized act of its own agents in the matter of obtaining subscriptions for its stock, and must be held to hold plaintiff's money without right and under an implied promise to repay the same. And, of course, if Ellis & Church have devoted plaintiff's money to a purpose not authorized by him, they are liable therefor upon the same the-

ory. All this is certainly true if, as the evidence shows without conflict, it is no longer possible to apply the money on account of a subscription for stock of the Western Trust Company, all of the stock of said company having been subscribed for prior to the date of plaintiff's subscription, and plaintiff's subscription clearly being solely for original stock.

[3] We think that the amended complaint sufficiently states a cause of action against both defendants on the theory we have stated, and that the demurrers thereto were properly overruled. The various counts in which plaintiff has attempted to state his case, there being four, are not materially different in their effect, the allegations of the first count being made a part of each of the others.

[4] It is obvious that it is no answer to plaintiff's claim, if in fact his contention as to an unauthorized application of his money is sustained, that there was no difference in the value of the stock of the two companies, and that the property of one corporation was the same in character and value as that of the other. Plaintiff had a perfect right to insist that this subscription, if he made one, should be for the stock of one corporation rather than the other, and that his money under no circumstances should be devoted to the purposes of a subscription for the stock of such other corporation. It may be that we can see no good reason why he should prefer one to the other, but that is no concern of the courts or of any one other than himself.

The memorandum of agreement did not clearly indicate who was to determine in which corporation, the Western Trust Company or the Northern Investment Company, plaintiff's subscription was to be placed, whether the matter was left to the discretion of Ellis & Church, or their principals, or was to be subsequently determined by plaintiff. Plaintiff's claim is that he had the right to determine this matter, and his evidence is squarely to the effect that, when he paid the \$2,250, he directed that it be applied upon the purchase of stock in the Western Trust Company, and that this election and determination was agreed to and acquiesced in by Ellis & Church. The receipt given by them to plaintiff at said time indicates by its recitals that such was the case. There can be no doubt that there was sufficient evidence to support a conclusion that there was such an election and direction on the part of plaintiff, and that Ellis & Church agreed thereto and received the money with such an understanding.

[5] The question whether the written agreement gave to plaintiff the right to elect which stock his money was to be applied on was left to the jury by the instructions. It is urged that there was no such uncertainty as to make this a question for the jury, and that the court should have determined as

matter of law what the agreement meant in this respect. We may so concede for all the purposes of this decision. The difficulty with defendants' position in this regard is that they joined in requesting instructions to the effect stated. For instance, one of their requested instructions, which was given, was in part as follows: "You must then determine from the evidence whether the subscription of Mr. Gray to the stock of the Northern Investment Company or Western Trust Company meant that he was to choose the company in which the stock was to be purchased, or whether the defendants Ellis & Church had a right to put him as a subscriber in either of said companies as they might elect." Another of defendants' requested instructions, also given, was in part as follows: "You are to determine from the evidence whether or not at the time of the issuance of said receipt, or prior thereto, it was agreed between Ellis & Church and plaintiff that stock of the Western Trust Company was to be delivered, and what the arrangement was between said parties, as to the delivery of stock, whether of the Western Trust Company or the Northern Investment Company." Another instruction requested by defendants and given by the court was to the effect that if the jury found that the right to place plaintiff's subscription in either the Northern Investment Company or the Western Trust Company was in Ellis & Church, and they elected the Northern Investment Company, the verdict should be for defendants. These requested instructions were all along the same lines as those given at the request of plaintiff on this branch of the case, and show the theory upon which all the parties proceeded on the trial of the cause. Defendants are not at liberty to complain here of action by the trial court which was entirely in accord with their own requests. The point here sought to be made in this regard is based entirely on instructions given to the jury, no objection having been made by defendants, so far as appears, to the introduction of any of the evidence bearing on the question.

[6] The evidence without conflict shows that all of the Western Trust Company stock had been subscribed for prior to the time of plaintiff's subscription, and that at no time thereafter could such company have accepted the subscription of plaintiff or delivered him any stock thereon. The company's stock had been fully subscribed for. Plaintiff's contract was simply to take stock from the company as an original subscriber. If by reason of his election his subscription was for Western Trust Company's stock, as the jury has in effect found, and the stock of that company had then been fully subscribed for by others, he could not be compelled to accept from others, in satisfaction of his rights under such contract, any stock that had been subscribed for by, and issued to, other persons, and that was then owned by



other persons. Under such circumstances, it appears to be entirely immaterial whether Mr. Ellis or the president of the Northern Investment Company, at any time tendered to plaintiff stock of the kind above described, owned by them, in lieu of the original Northern Investment Company's stock for which it was claimed that he had subscribed, and it follows that instruction H given by the court on its own motion, which is the instruction most seriously complained of by defendants, was not erroneous.

In view of what we have said, we find no prejudicial error of which defendants may here be heard to complain in the action of the trial court in regard to any other instruction.

There is no other matter requiring notice.

The judgment and order denying a new trial are affirmed.

164 Cal. 493

FITZGERALD v. MODOC COUNTY et al.  
(Sac. 1,953.)

(Supreme Court of California. Jan. 14, 1913.  
Rehearing Denied Feb. 13, 1913.)

1. DEEDS (§ 155\*)—CONDITIONS SUBSEQUENT. Conditions subsequent, tending to restrict and defeat an estate, are not favored, being construed strictly against the grantor, and can only be created by apt language, which of itself creates such conditions.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 488-495; Dec. Dig. § 155.\*]

2. DEEDS (§ 155\*)—CONDITION SUBSEQUENT. The appropriate words evidencing a condition subsequent in a deed are usually found in a provision for forfeiture and right of re-entry; but a clause of re-entry is not necessary, if a forfeiture is imported.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 488-495; Dec. Dig. § 155.\*]

3. DEEDS (§ 155\*)—CONDITION SUBSEQUENT. A provision in a deed immediately following the description, "to be used as and for a county high school ground and premises," did not create a condition subsequent, but merely declared the purpose for which the grantor expected the land to be used.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 488-495; Dec. Dig. § 155.\*]

4. DEEDS (§ 100\*)—CONSTRUCTION.

The facts and circumstances surrounding the execution of a deed cannot enlarge or restrict the estate granted, but merely aid in determining the intent of the parties.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 239; Dec. Dig. § 100.\*]

5. DEEDS (§ 93\*)—CONSTRUCTION—INTENT OF PARTIES.

The actual intent of the parties to a deed must be adequately expressed in the deed itself.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 231, 232; Dec. Dig. § 93.\*]

Department 2. Appeal from Superior Court, Modoc County; N. P. Arnot, Judge.

Action by M. L. Fitzgerald against Modoc County, T. F. Dunaway, and others. From a judgment for plaintiff, Dunaway appeals. Reversed and remanded.

Dodge & Barry, of New York City, for appellant. Charles R. Holton, of Whittier, for respondent.

HENSHAW, J. In its form, this is a simple action to quiet title, brought against the county of Modoc and T. F. Dunaway; the complaint alleging title in plaintiff to nine acres of land in the county of Modoc, and asserting that the defendants set up some claim of right or title thereto. The county of Modoc disclaimed. Defendant Dunaway answered, alleging title in himself. The findings declare plaintiff to be the owner of the land; that Dunaway's claim is without right; and judgment followed accordingly. Defendant Dunaway appeals.

By the evidence, it appears that the action is in fact one to enforce a forfeiture upon breach by the grantee, the county of Modoc, of an asserted condition subsequent, contained in a deed to the land made by plaintiff to the county of Modoc. Preliminarily appellant urges that, such being in fact the nature of the action, wherever plaintiff relies upon a forfeiture, he must plead it. We will not pause, however, to enter into a discussion of this question, since, under the circumstances, it is better for all of the litigants that the controversy should be settled upon its merits.

Plaintiff made a deed to the county of Modoc, which conveyed, by appropriate description, the land here in controversy, and contained immediately following the description the following clause: "To be used as and for a county high school ground and premises, for the county of Modoc, state of California." Evidence is lacking as to whether or not the land was ever used for the indicated purpose; but the breach of the asserted condition subsequent rests upon the fact that admittedly the county of Modoc did convey this land to the defendant Dunaway.

[1] It is fundamental that conditions subsequent, tending to restrict and defeat an estate, are not favored. They can be created only by apt and appropriate language, which ex proprio vigore establishes that only a conditional estate was conveyed; and, when such a condition is shown to have been created, the rule of construction is that of strictness against the grantor and in favor of the holder of the estate.

[2] Generally speaking, the apt and appropriate words, evidencing that the grant is on condition subsequent, are found in a provision for forfeiture and right of re-entry. "Reciting in a deed that it is in consideration of a certain sum, and that the grantee is to do certain things, is not an estate upon condition, not being in terms upon condition, nor containing a clause of re-entry or forfeiture." 2 Washburn, Real Property, 4, 8; Cullen v. Sprigg, 83 Cal. 56, 23 Pac. 222. Of course, where the language employed declares a condition and imports a forfeiture, a clause of

re-entry is not necessary. *Papst v. Hamilton*, 133 Cal. 631, 66 Pac. 10; *Behlow v. Southern Pacific R. R. Co.*, 130 Cal. 16, 62 Pac. 295; *Hawley v. Kaftitz*, 148 Cal. 393, 83 Pac. 248, 3 L. R. A. (N. S.) 741, 113 Am. St. Rep. 282; *Cleary v. Folger*, 84 Cal. 316, 24 Pac. 280, 18 Am. St. Rep. 187; *Quatman v. McCray*, 128 Cal. 285, 60 Pac. 855.

[3] Under no decision of this or any other court, within our knowledge, has language such as is here used ever been construed to create a condition subsequent. At the least, it is but a declaration of the purpose for which the grantor expected the land would be used. At the most, it is but a covenant. The cases from this court, which respondent contends support his argument that this language created a condition subsequent, are far from sustaining him. In *Parsons v. Smilie*, 97 Cal. 647, 32 Pac. 702, the language of the deed was: "This deed is given and accepted on the following conditions, which are to be binding on the party of the second part, his heirs and assigns forever, to wit, \* \* \* and a failure to comply with the same will render this conveyance null and void, and said premises shall revert to said first party." Here was a clear and complete condition subsequent. In *Papst v. Hamilton*, supra, the conveyance was "upon the conditions, however, that the premises shall be used solely," etc., "and for no other purpose whatever." The indicated purpose was for the maintenance of a college or academy. There had been a failure and abandonment of the premises, and the grantor had re-entered and taken possession of them. It was clear that the estate was created upon condition. There had been an actual re-entry, and the decision of this court was simply to the effect that, under these circumstances, plaintiff is "in a position to maintain his action for the cancellation of the deed and the quieting of his title." In *Liebrand v. Otto*, 56 Cal. 242, an action to have declared and enforced a forfeiture, the declaration of this court is that the plaintiff had granted certain lands to the Santa Cruz Railroad Company upon certain expressed conditions to be performed by the latter. The railroad company had failed to perform, and plaintiff had re-entered. It was held that his re-entry and continued possession excused his delay in resorting to equity to remove the cloud from his title. In *Quatman v. McCray*, supra, the deed declared as follows: "And this conveyance is made upon the following express condition, namely," etc. The defense was merely that there had been no breach of the condition. We have thus briefly considered the California cases upon which respondent relies. Upon the other hand, such cases as *Ecroyd v. Coggeshall*, 21 R. I. 1, 41 Atl. 260, 79 Am. St. Rep. 741; *Packard v. Ames*, 16 Gray (Mass.) 327; *Kilpatrick v. Mayor of Baltimore*, 81 Md. 179, 31 Atl. 805, 27 L. R. A. 643, 48 Am. St. Rep. 509; *Faith v. Bowles*,

86 Md. 13, 37 Atl. 711, 63 Am. St. Rep. 489; *Rawson v. School Dist.*, 7 Allen (Mass.) 125, 83 Am. Dec. 670; *Page v. Palmer*, 48 N. H. 385; *Cunningham v. Parker*, 146 N. Y. 29, 40 N. E. 635, 48 Am. St. Rep. 765; *Sumner v. Darnell*, 128 Ind. 38, 27 N. E. 162, 13 L. R. A. 173; *Clement v. Burtis*, 121 N. Y. 708, 24 N. E. 1013; *Thornton v. Trammell*, 39 Ga. 202; *Rainey v. Chambers*, 56 Tex. 17; and *Owsley v. Owsley*, 78 Ky. 257—are all cases to which many more might be added, which construe language, much more pertinent than that employed in the case at bar, as being insufficient to create a condition subsequent. Here the grantor did no more than to indicate his purpose in making the deed, and the use to which he expected the land to be put. But such language is entirely inadequate to create a condition. *Mauzy v. Mauzy*, 79 Va. 537.

[4] We are not forgetful of the principle which holds in mind the circumstances under which such a deed is made, and the fact whether or not an adequate consideration has been paid therefor by the grantor. *Ecroyd v. Coggeshall*, supra; *Faith v. Bowles*, supra. These facts and circumstances, of course, cannot tend to enlarge or restrict the estate actually granted. They are of value only as an aid in arriving at the actual intent of the parties.

[5] But, whatever that actual intent may have been, it must have found adequate expression in the deed itself before it can be given either legal or equitable efficacy.

The judgment appealed from is therefore reversed, and the cause remanded.

We concur: MELVIN, J.; LORIGAN, J.

20 Cal. App. 513

In re BECKER'S ESTATE. (Civ. 1,221.)

(District Court of Appeal, First District, California, Dec. 5, 1912.)

# 1. STATUTES (§ 77\*)—"SPECIAL LAW"—CLASS LEGISLATION.

A statute creating a class, and operating on all of the class alike, is not a special law prohibited by Const. art. 4, § 25, where there exists a natural or extrinsic reason, or some constitutional ground for the classification, but a statute creating a class not so founded is prohibited.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 79-82; Dec. Dig. § 77.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6577-6584; vol. 8, p. 7802.]

# 2. STATUTES (§ 82\*)—"SPECIAL LAWS"—CLASS LEGISLATION.

The amendment to Code Civ. Proc. § 1349, requiring the court admitting a will to probate after the same is proved and allowed to issue letters thereon, by St. 1907, p. 312, providing that in the order granting letters the court must ascertain and determine whether the estate is worth more or less than \$10,000, which determination is conclusive for the purpose of giving notice to creditors, applies only to cases of testacy, and is invalid as special legislation prohibited by Const. art. 4, § 25.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 91; Dec. Dig. § 82.\*]



Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Marie Antoinette Becker, deceased. Certiorari by the executors of deceased to procure the annulment of an order of the superior court vacating notice to creditors. Demurrer to petition sustained, and petition dismissed.

E. H. Rixford, of San Francisco, for petitioner. Gustav Gutsch, of San Francisco, for respondent.

HALL, J. Although this matter is entitled in this court as above indicated, it is really an original proceeding in certiorari, brought in this court by the executors of the last will of said decedent to procure the annulment of an order of the superior court of the city and county of San Francisco vacating and setting aside the notice to creditors given in the matter of said estate, together with the publication of said notice and the decree establishing the due publication thereof, and ordering the publication by said executors of a notice to the creditors of said deceased to present their claims within ten months from the first publication thereof.

Upon the filing of the petition for the writ of review in this court, such writ, by order of this court, was issued directing the superior court and Hon. J. V. Coffey, judge thereof, to certify to this court a transcript of the record and proceedings in the said matter. In reply to such writ the respondent presented to, and filed with, this court a demurrer to the petition as not stating facts sufficient to entitle petitioners to any relief, and also what respondent denominates an answer, which simply raises questions of law arising upon the face of the petition. As the proceedings in the lower court, which culminated in the order attacked by petitioners, are quite fully set forth in the petition, it can be very conveniently determined upon the demurrer thereto whether or not the court acted in excess of its jurisdiction in making such order.

From the petition it appears that upon the admission of the will of deceased to probate the court made an order, in accordance with section 1349 of the Code of Civil Procedure, as amended in 1907 (St. 1907, p. 312), ascertaining and determining that said estate was worth less than \$10,000. Thereupon the executors gave the usual notice to creditors to present their claims within four months, and in due time, upon proof of publication thereof, the court made the usual order or decree, establishing the due publication of notice to creditors. Subsequently and after the expiration of the four months, upon motion of certain persons claiming to be creditors of decedent, made upon the ground that the value of the estate of decedent was in excess of \$10,000, the court made the or-

der now attacked. This order was made after notice to the executors of the motion therefor and upon a hearing upon such motion.

The contention of petitioners that the order of the court vacating and setting aside the notice to creditors and the decree establishing the due publication thereof, and ordering the publication of a new notice giving 10 months to creditors to present their claims, is in excess of its jurisdiction, is predicated upon that part of section 1349 of the Code of Civil Procedure added by the amendments thereto of 1907. The section as it was amended, and as it now reads, is as follows: "If no objection is made as provided in section thirteen hundred and fifty-one, the court admitting a will to probate, after the same is proved and allowed, must issue letters thereon to the persons named therein as executors who are competent to discharge the trust, unless they or either of them have renounced their right to letters. In the order the court must ascertain and determine whether said estate is worth more or less than ten thousand dollars, which determination is conclusive for the purpose of giving notice to creditors, but for no other purpose." It is the last sentence of the section which was added by the amendment adopted in 1907.

The contention of respondent is that the added portion of the section is void and unconstitutional as not being a subject indicated by the title of the amendatory act (article 4, § 24, Const.); and also as being special legislation prohibited by both subdivisions 12 and 33 of section 25 of article 4 of the Constitution. The title of the amendatory act is, "An Act to amend sections thirteen hundred and forty-nine, thirteen hundred and fifty, and thirteen hundred and fifty one of the Code of Civil Procedure, and to add a new section thereto to be numbered thirteen hundred and fifty a, all relating to letters testamentary and of administration with the will annexed." It is claimed by respondent that the portion of section 1349 added by the amendment does not relate to letters testamentary nor to letters of administration with the will annexed, but concerns only the matter of notice to creditors, and that it is therefore a matter not embraced within the title of the amendatory act. We do not think it necessary to determine this point; for, in any event, we think the portion of section 1349 of the Code of Civil Procedure relating to fixing the value of the estate is special legislation, such as is prohibited by section 25 of article 4 of the Constitution.

It was frankly conceded by petitioners at the oral argument, and very properly so, that the provision of section 1349 of the Code of Civil Procedure, relating to the fixing of the value of the estate for the purpose of giving

notice to creditors, applies only to cases where the decedent died testate. It has no application to estates where the decedent leaves no will. A different rule is thus established by which the rights of creditors of decedents leaving a will are governed from the rule governing the rights of creditors of persons dying intestate.

[1] It is true that the creation of a class to be affected by any particular law does not necessarily make such law a special law prohibited by section 25 of article 4 of the Constitution. Such a law is a general law if it operates upon all of the class alike, and there exist some natural or intrinsic reason or some constitutional ground for the classification. *Rode v. Siebe*, 119 Cal. 518, 51 Pac. 869, 39 L. R. A. 342, and *Ruperich v. Baehr*, 142 Cal. 190, 75 Pac. 782, are cases illustrative of this principle. On the other hand, a law that creates a class, to be affected by the law, not founded upon some natural, intrinsic, or constitutional distinction, is special and prohibited by the Constitution of this state. Of this type are the classes created by the laws declared invalid in *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604, *Shaughnessy v. American Surety Co.*, 138 Cal. 543, 69 Pac. 250, 71 Pac. 701, and *Krause v. Durbrow*, 127 Cal. 681, 60 Pac. 438. In *Pasadena v. Stimson*, supra, the law requiring cities of the fifth and sixth classes to make an effort to purchase from the owner before condemning under the law of eminent domain was held to be special and invalid for that reason. *Shaughnessy v. American Surety Co.*, supra, holds a law requiring one contracting for the erection of a building to give a bond to protect mechanics and materialmen to be special, and invalid for that reason. This case overrules *Carpenter v. Furrey*, 128 Cal. 665, 61 Pac. 369, cited by petitioner, distinctly upon this ground. In *Krause v. Durbrow*, supra, it was held that a law making special requirements to entitle stockholders to vote for directors of mining corporations was special and invalid, as not founded upon any natural or intrinsic differences between mining and other corporations. This case discusses and reviews quite fully the California cases upon the subject.

[2] The amendment to the section of the Code relied upon by petitioners lays down a rule that affects the rights of creditors of persons who die testate only. As to such persons and in such estates only is the determination of the value of the estate, made by the court at the time of admitting the will to probate, conclusive for the purpose of giving notice to creditors. As to estates generally the value of the estate for the purpose of giving notice to creditors is not conclusively or at all established by the order granting letters of administration. The cred-

itors of estates other than of persons dying testate are not conclusively bound by the determination of the value of the estate made under section 1349 of the Code of Civil Procedure. We cannot conceive of any natural or intrinsic differences between creditors of persons dying testate and creditors of persons dying intestate, which will justify a different rule controlling their rights in the matter of presenting their claims.

For these reasons, we think the amendment to section 1349 of the Code of Civil Procedure, making the determination of the value of the estate made by the court when granting letters testamentary, conclusive for the purpose of giving notice to creditors, is void, and the court had jurisdiction under section 1490 of the Code of Civil Procedure to make the order complained of.

The demurrer to the petition is sustained, and the petition is dismissed.

We concur: LENNON, P. J.; KERRIGAN, J.

20 Cal. App. 531

HIBERNIA SAVINGS & LOAN SOCIETY v.  
BRITTAN. (Civ. 994.)

(District Court of Appeal, Third District, California, Dec. 5, 1912.)

1. MORTGAGES (§ 543\*) — DECREE OF FORECLOSURE — PROVISIONS FOR POSSESSION BY PURCHASER.

A provision in a mortgage foreclosure decree that the purchaser at the sale shall be let into the possession of the premises, and that any person who may be in possession thereof, or who, since the commencement of the action, has come into the possession, shall deliver possession to the purchaser on production of the deed, and that in case the purchaser is refused possession a writ of assistance shall issue without notice, merely means that the purchaser shall be entitled to and put into possession, on production of the deed, when, under the law, he is entitled to possession, and does not require surrender of possession within the time during which the premises may be redeemed.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1562; Dec. Dig. § 543.\*]

2. MORTGAGES (§ 543\*) — FORECLOSURE — RIGHTS OF PURCHASER.

A purchaser at a mortgage foreclosure sale does not acquire the right to the possession of the premises until the time for redemption has expired.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1562; Dec. Dig. § 543.\*]

3. MORTGAGES (§ 494\*) — FORECLOSURE — DECREE—REQUISITES—POSSESSION.

A decree foreclosing a mortgage and directing a sale need not direct that the possession thereof shall be delivered to the purchaser; and whether a decree contains such a direction, or is silent thereon, does not affect the jurisdiction of the court to enforce the decree and put the purchaser in possession, though there is no impropriety in inserting in the decree such a direction.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1441-1445; Dec. Dig. § 494.\*]



Appeal from Superior Court, City and County of San Francisco; W. M. Conley, Judge.

Action by the Hibernia Savings & Loan Society against Nathaniel J. Brittan. From a judgment for plaintiff, defendant appeals, Affirmed.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for appellant. Tobin & Tobin, of San Francisco, for respondent.

**HART, J.** This is an appeal, upon the judgment roll alone, from a decree foreclosing a mortgage upon certain real property of the defendant.

The decree directs the sale of the mortgaged premises by a commissioner named by the court, and further adjudges and decrees that the purchaser or purchasers of said premises at such sale be let into the possession thereof, and that any person or persons who may be in the possession of said premises or any part thereof, or "who, since the commencement of this action, has come into the possession under them, or either of them, deliver possession thereof to such purchaser or purchasers, *on production of the commissioner's deed for such premises, or any part thereof.* And it is further ordered, adjudged, and decreed that, in case the purchaser of said premises or any part thereof at said commissioner's sale shall be refused possession thereof, a writ of assistance shall forthwith issue without further notice or order of this court, requiring the sheriff \* \* \* to place and maintain said purchaser in the quiet and peaceful possession of said premises, and every part thereof."

It is objected that the foregoing provisions of the decree are erroneous, because the purchaser at the commissioner's sale could, by virtue thereof, be let into the possession of the mortgaged premises before the expiration of the time within which said premises may be redeemed.

[1, 2] We do not think the provisions of the decree to which criticism is thus directed should be subjected to the construction which the appellant here gives them. To the contrary, we think they mean, and were clearly intended to mean, that the purchaser of the mortgaged premises at the commissioner's sale should be entitled to and put into the possession thereof upon the production of the commissioner's deed, showing title in him, only when, under the law, he was rightfully entitled to possession. In other words, since it is true that a purchaser of property at a sale under the foreclosure of a mortgage does not acquire the right to the possession of such property until the time for the redemption from such sale has expired (*Purser v. Cady*, 120 Cal. 214, 52 Pac. 489; *Mau, Sadler & Co. v. Kearney*, 143 Cal. 506, 77 Pac. 411), it must be assumed that it was not intended by the decree in the case at bar that the pur-

chaser at the commissioner's sale should be put into the possession of the premises until such possession could be legally given, or that the writ of assistance therein provisionally authorized should be issued until its execution would possess legal efficacy; and certainly it would have none if attempted to be invoked in execution of the decree of foreclosure prior to the expiration of the time within which the property may, under the law, be redeemed from the sale.

[3] While, perhaps, it may be the usual practice to insert in a decree foreclosing a mortgage a direction that the possession of the mortgaged premises be delivered to the purchaser thereof at the foreclosure sale, it is not necessary to do so under our system; nor where such a clause is included in or is omitted from such a decree can it add to or detract from the jurisdiction or power of the court to enforce its decree, and so put in possession, at the proper time, the purchaser of the property at the foreclosure sale. (*Montgomery v. Tutt*, 11 Cal. 190; *Horn v. Volcano Water Co.*, 18 Cal. 141; *Montgomery v. Middlemiss*, 21 Cal. 103, 81 Am. Dec. 146; *Sichler v. Look*, 93 Cal. 600, 29 Pac. 220; *Hibernia S. & L. Socy. v. Lewis*, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; *California Mortgage & Sav. Bank v. Graves*, 129 Cal. 649, 62 Pac. 259. But there is no impropriety in making provision in the decree or judgment, in an action to foreclose a mortgage, for the issuance of the writ to compel any party concluded by such decree or judgment to deliver the possession of the premises to the purchaser at the mortgage sale, and such a provision would obviously mean, as before declared, that the writ would issue only when the exigencies of the situation required it, and the purchaser was legally entitled to possession. See footnote to *Wilson v. Polk*, 51 Am. Dec. 154.

The judgment is affirmed.

We concur: **CHIPMAN, P. J.; BURNETT, J.**

20 Cal. App. 518

**OPPENHEIMER v. RADKE & CO.**

(Civ. 1,112.)

(District Court of Appeal, First District, California. Dec. 5, 1912.)

1. **BILLS AND NOTES (§ 356\*) — BONA FIDE PURCHASERS—PAYMENT OF VALUE.**

A bank, by discounting a note and passing its amount to the credit of its indorser, does not become a purchaser for value.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 908; Dec. Dig. § 356.\*]

2. **BILLS AND NOTES (§ 356\*) — BONA FIDE PURCHASERS—PAYMENT OF VALUE.**

A bank discounting a note and placing its amount to the credit of its indorser becomes a purchaser for value if, before notice of any infirmity in the note, it pays out the amount for which credit was given to the depositor, or to his order, even though the depositor, by sub-

sequent deposits or discounts, preserves a constant balance to his credit.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 908; Dec. Dig. § 356.\*]

**3. BILLS AND NOTES (§ 525\*)—SUFFICIENCY OF EVIDENCE—GOOD FAITH AND PAYMENT OF VALUE.**

In an action on a note, evidence held to show that a bank which discounted it without notice of any defenses thereto subsequently paid out the amount of the credit on its indorser's checks before notice of any defense.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1832-1839; Dec. Dig. § 525.\*]

**4. APPEAL AND ERROR (§ 1010\*)—REVIEW—QUESTIONS OF FACT.**

Where the meaning of a witness' testimony is uncertain, its uncertainty is to be resolved by the trial court; and on appeal such reasonable interpretation as will support the trial court's finding will be accepted as correct.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.\*]

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by Leopold Oppenheimer against Radke & Co. Judgment for plaintiff, and defendants appeal. Affirmed.

Henry C. Schaertzer, of San Francisco, for appellants. Lillenthal, McKinstry & Raymond, of San Francisco, for respondent.

HALL, J. This is an appeal from a judgment rendered against defendants as the makers of two promissory notes aggregating the principal sum of \$2,206.87, for which amount and interest thereon judgment was rendered for plaintiff as the indorsee of said notes.

The two notes are in terms payable to Ciner & Seeleman, who, before maturity thereof, indorsed them to the State Bank of New York, which passed the amount of the two notes, less the discount therefor, to the credit of Ciner & Seeleman. This transfer to the bank occurred in the spring of 1910, and the bank took the notes without notice of a defense that existed against the payees of said notes and in favor of defendants, the makers; and it is conceded by defendants that plaintiff was entitled to recover, unless, as is contended by appellants, the finding made by the court that the State Bank was a purchaser for value is not supported by the evidence.

The bank received no notice of the facts constituting the defense as between the payees and appellants until after the maturity of the notes.

[1] That the mere passing of the amount of a note, by a bank discounting the same, to the credit of the payee thereof is not a purchase for value is established by the great weight of authority. Fox v. Bank of Kansas City, 30 Kan. 441, 1 Pac. 789; Central Bank v. Valentine, 18 Hun (N. Y.) 417; Manufacturers' Nat. Bank, etc., v. Newell, 71

Wis. 309, 37 N. W. 420; Thompson v. Sioux Falls Nat. Bank, 150 U. S. 231, 14 Sup. Ct. 94, 37 L. Ed. 1063.

[2] The same authorities also establish the rule that the discounting bank does become a purchaser for value if, before notice of an infirmity in the note, it pays out the amount for which credit was given to the depositor, or to his order. This rule obtains, although the depositor, by subsequent deposits or discounts, preserves a constant balance to his credit; for, in the absence of special facts demanding a different rule, payments are applied to the oldest debts. Fox v. Bank of Kansas City, supra.

[3, 4] We think there is sufficient evidence in the record to justify the conclusion that the payees checked out the amount of the notes before the bank learned of any infirmity therein. Arnold Kohn, the officer of the State Bank who represented the bank in its dealings with Ciner & Seeleman, was examined under a commission issued out of the court. In his deposition there occurs the following: "Q. Now, your procedure was, on taking this commercial paper, I presume, to simply pass the amount of the discount to the credit of Ciner & Seeleman? A. The account. Q. Then they checked against it as they pleased? A. Then they checked it out; yes."

There is some uncertainty whether or not the witness, in his answers above quoted, meant simply to speak of the general course of business in the bank's dealings with Ciner & Seeleman, or as to what occurred in respect to the particular notes sued on. Any uncertainty in this regard was a matter to be resolved by the trial court; and upon this appeal we must accept as correct such reasonable interpretation as will support the finding of the trial court. If the witness meant to say that Ciner & Seeleman had checked out the amount of the credit given for the discount of the notes in suit, there can be no doubt but that the bank gave value for the notes in suit before learning of any infirmity therein. The condition of the record is such that we cannot say that the court was not justified in believing from the evidence of Kohn that Ciner & Seeleman had checked out the credit given on the discount of the notes in suit. Especially is this true in view of the further fact that Ciner & Seeleman had, before the notes in suit fell due, failed and made a composition with their creditors, and subsequently settled and took up other notes, referred to in the testimony as the Deutsch notes, aggregating about \$1,100, that they had discounted with the State Bank, and which had gone to protest. If the credit given on the discount of the notes in suit in the spring of 1910 had not been checked out or otherwise exhausted, the bank could have applied such balance to the settlement of the Deutsch notes, and there would have been no necessity for



Ciner & Seeleman settling and taking up such notes. The fact that they did so supports an inference that at that time there was no balance to their credit to offset the claim against them on the Deutsch notes.

We think the judgment must be affirmed; and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

20 Cal. App. 508

REEVES et al. v. FIRST NAT. BANK OF OAKLAND. (Civ. 1,074.)

(District Court of Appeal, First District, California. Dec. 4, 1912.)

1. BANKS AND BANKING (§ 143\*)—PAYMENT OF CHECKS—SIGNATURE.

A bank was not justified in refusing to pay a check drawn on a deposit by a copartnership and signed by both of the persons known to the bank to comprise the partnership, even though the signature card delivered to the bank when the account was opened gave the name of the partnership and of the members, and provided that "both signatures" were required, especially where other checks signed in the same way had previously been paid.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 414, 517; Dec. Dig. § 143.\*]

2. BANKS AND BANKING (§ 143\*)—PAYMENT OF CHECKS—SIGNATURE.

Where a bank has customarily paid checks signed in a particular way, it cannot change this custom without express notice to the depositor, and refuse to pay checks so signed.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 414, 417; Dec. Dig. § 143.\*]

3. BANKS AND BANKING (§ 143\*)—REFUSAL TO PAY CHECK—DAMAGE.

The wrongful dishonor of a check drawn by a party established in business raises the presumption that the drawer has sustained substantial damage, even though the dishonor was not the result of ill will or malice.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 414, 417; Dec. Dig. § 143.\*]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by R. E. Reeves and another, copartners, doing business as R. E. Reeves & Co., against the First National Bank of Oakland. From a judgment for plaintiffs and an order denying a new trial, defendant appeals. Affirmed.

Reed, Black & Reed and E. Nusbaumer, all of Oakland, for appellant. Philip M. Walsh, of Oakland, for respondents.

KERRIGAN, J. This is an appeal by the defendant from a judgment in favor of the plaintiffs for \$300 damages, and also from an order denying defendant's motion for a new trial. The action was brought to recover damages claimed to have been sustained by the plaintiffs because of the defendant's failure to pay on presentation two certain checks, aggregating approximately \$100, there being

on deposit to the credit of plaintiffs sufficient funds to meet them.

Defendant contends that there is no evidence to support the findings of the court (1) that the checks were in form entitling them to be accepted and paid; and (2) if they were in form, that the plaintiffs had suffered any substantial damage by reason of the dishonor of the checks.

[1, 2] Upon opening the account, the plaintiffs, according to a well-established custom, made and delivered to the bank what is termed a signature card, which set forth the manner and form in which checks upon the account should be signed. It was as follows: "The First National Bank, Oakland, Cal. Below please find duly authorized signatures which you will recognize in the payment of funds or the transaction of other business on our account. Both sigs. required. R. E. Reeves Co. R. E. Reeves. J. A. Wadsworth." The checks in question were signed "R. E. Reeves" and "J. A. Wadsworth," and defendant asserts that this was not in the manner and form required by the bank in accordance with its agreement with plaintiffs, and that, therefore, the bank was warranted in refusing to pay them.

We do not agree with this contention. First of all, it is not clear what is meant by "both signatures required." It may have been intended that checks should bear the copartnership name, or perhaps the signatures of each of the two individuals composing the copartnership, or of the copartnership and the individuals. In any event, we do not see what harm could have come to the bank by paying these checks, bearing as they did the signatures known to the bank, of the persons comprising the copartnership. Moreover, every check drawn on the bank by this concern from the time the account was opened until the presentation of these checks was signed as they were, and the bank promptly paid them, as indeed it paid these when its attention was called to the circumstance of their dishonor. This shows how the parties had interpreted the contract, and this course of conduct may be regarded as having established a general usage between the bank and the plaintiffs, which the bank could not suddenly and without express notice to the plaintiffs change. *Hotchkiss v. Artisans' Bank*, 42 Barb. (N. Y.) 517.

[3] Second. As to the next question raised by the defendant, we do not agree with it that the evidence does not show that the plaintiffs were entitled to substantial damages. It is true that no special damages were sought, and that there was no claim that the refusal to pay the checks was the result of ill will or malice, but it does appear that the plaintiffs were established in business, and, where this is so, the great weight of authority is to the effect that the wrongful dishonor of a check raises the pre-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sumption that the drawer has sustained substantial damage, the amount of which it is the duty of the court or the jury to fix. Many of the adjudicated cases like this sort of suit to an action for slander of a person in business, regarding it as a slander by acts, and hold that since the improper refusal to pay the check of a depositor will invariably injure him in his business, and that, as a rule it will be impossible to prove the amount of the damage, the law must of necessity—fitting itself to conditions—presume that he is entitled to reasonable compensation for the injury. The text-writers and the decisions of nearly all the states where this question has arisen sustain this view. The author of *Morse on Banks and Banking* (volume 2, § 457), after referring to two cases in New York, which hold that where, upon a wrongful refusal of a bank to pay the check of a customer, no tangible or measurable injury is shown, only nominal damages may be recovered, says: "But the better authority seems to be that, even if such actual loss or injury is not shown, yet more than nominal damages shall be given. It can hardly be possible that a customer's check shall be wrongfully refused payment without some impeachment of his credit, which must in fact be an actual injury, though he cannot from the nature of the case furnish independent distinct proof thereof. It is as in cases of libel and slander, which description of suit it indeed closely resembles, inasmuch as it is a practical slur upon the plaintiff's credit and repute in the business world. Special damage may be shown, if the plaintiff be able; but, if he be not able, the jury may nevertheless give such temporary damages as they conceive to be a reasonable compensation for that indefinite mischief which such an act must be assumed to have inflicted, according to the ordinary course of human events."

In the case of *Schaffner v. Ehrman*, 139 Ill. 109, 28 N. E. 917, 15 L. R. A. 134, 32 Am. St. Rep. 192, in answer to the question what is the measure of a banker's liability to a person engaged in trade for a refusal to pay his check, he having sufficient funds on deposit for that purpose, in the absence of evidence of malice or special injury to the depositor, the court said: "Authorities seem to be uniformly to the effect that more than mere nominal damages are in such cases recoverable. In *Rosewater v. Hoffman*, 24 Neb. 222, 230 [38 N. W. 857, 861], is found the following expression: 'It is a well-settled rule \* \* \* that punitive, vindictive, or exemplary damages cannot be allowed. The only damages recoverable are denominated compensatory, which are a satisfaction for the injury sustained'"—citing many cases, in all of which it is held that the plaintiff's recovery is not limited to nominal damages, but he is entitled to recover gen-

eral compensatory damages. In the case of *J. M. James Co. v. Continental Nat. Bank*, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255, 80 Am. St. Rep. 857, the court, after holding that the action is one *ex delicto*, growing out of a breach of duty or an implied contract of the bank to honor plaintiff's checks as long as he had money to his credit said: "It alleged that plaintiff was a trader, and as such engaged in the mercantile or commission business in the city of Memphis, but, as may be seen, averred no special damage as the result of the defendant's wrongful conduct. The ground of demurrer referred to is that its failure to allege special damages was fatal. The authorities are uniform that the averment that plaintiff is a trader is sufficient, and he is entitled in such case to recover substantial damages, though special damage is not alleged. \* \* \* Having averred and proved that it was a trader, and that its checks were dishonored wrongfully by the bank, the law conclusively presumed that the plaintiff had sustained damages, which it was the duty of the jury, under proper instructions, to fix. \* \* \* The rejection by a bank of a check drawn upon it by a customer brings discredit to the drawer, not only with the person presenting it, but necessarily with all persons who are informed of the fact. And, if this customer is a merchant or trader, its natural effect is an injury to his business standing, as far as the knowledge of the fact extends, for which he is entitled to substantial, though temperate, damages, measured by all the facts in the case." This action was one for tort, and hence does not fall within section 2468 of the Civil Code, requiring persons doing business under a fictitious name to file a certificate with the county clerk, showing the names of the persons interested as partners in such business. *Ralph v. Lockwood*, 61 Cal. 155; *Melcher v. Beeler*, 48 Colo. 233, 110 Pac. 181, 139 Am. St. Rep. 273. Besides, this suit did not grow out of any contract made or transaction had in plaintiffs' partnership name. Section 2468, Civ. Code.

The judgment and order are affirmed.

We concur: LENNON, P. J.; HALL, J.

20 Cal. App. 538  
COOK v. SUBURBAN REALTY CO.  
(Civ. 1,011.)

(District Court of Appeal, Third District, California. Dec. 5, 1912.)

1. APPEAL AND ERROR (§ 356\*)—ENTRY OF JUDGMENT—TIME—DISMISSAL.

An appeal from a final judgment not taken within six months after entry of such judgment, as provided by Code Civ. Proc. § 939, subd. 1, and section 941b, must be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1926, 1927; Dec. Dig. § 356.\*]



## 2. APPEAL AND ERROR (§ 867\*)—REVIEW—DISMISSAL OF APPEAL—PLEADINGS.

On appeal from an order denying a motion for a new trial, the ruling on a demurrer to the complaint cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476-3486; Dec. Dig. § 867.\*]

## 3. PLEADING (§ 258\*)—DISCRETION OF COURT—AMENDMENTS.

Where the answer virtually admitted the allegation of the complaint of plaintiff's ownership of the land involved, and such admission was allowed to stand for 10 months until the day of trial before attempting to controvert it, and then only by a denial of information or belief sufficient to enable him to answer such allegation, the court's denial of a proposed amendment was not an abuse of discretion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 765-782; Dec. Dig. § 258.\*]

## 4. NEW TRIAL (§ 123\*)—GROUNDS—NOTICE—REFUSAL TO PERMIT AMENDMENT.

The refusal to allow a party to amend after issue joined can only be reviewed on a motion for a new trial, the notice of intention for which sets forth as a ground that the court has "abused its discretion by which the party was prevented from having a fair trial," under Code Civ. Proc. § 657, which specifies the four grounds on which a motion for a new trial may be made.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 276-281; Dec. Dig. § 123.\*]

## 5. APPEAL AND ERROR (§ 542\*)—REVIEW—RECORD—BILL OF EXCEPTIONS.

Affidavits charging plaintiff with misconduct as to the jury in the transcript following the certificate of the clerk to the record or the bill of exceptions, and not incorporated in a bill of exceptions as required by rule 29 (119 Pac. xiv), are not properly authenticated, and cannot be regarded as part of the record, or be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2408, 2462; Dec. Dig. § 542.\*]

## 6. APPEAL AND ERROR (§ 928\*)—RECORDS—PRESUMPTIONS—INSTRUCTIONS—EVIDENCE.

Where the record does not contain the evidence, the instructions given must be assumed to be applicable to the proof, and that those refused were properly disallowed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3740-3754; Dec. Dig. § 928.\*]

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action by Joseph Cook against the Suburban Realty Company. Judgment for plaintiff, and defendant appeals from the judgment and an order overruling a motion for new trial. Appeal from judgment dismissed, and order affirmed.

W. D. Grady and A. J. Treat, both of San Francisco, for appellant. Lee D. Windrem, of Pt. Richmond, and M. R. Jones, of Martinez, for respondent.

HART, J. This is an action to recover damages for injuries alleged to have been inflicted upon the real property of the plaintiff by the wrongful acts of the defendant. The complaint avers that at the time the plaintiff purchased the lands described in the complaint, and which, it is alleged, were damaged

by the acts of the defendant, "there was a natural drain which carried off all the waters and drained all" said lands, and that, "without the consent, and against the protest of this plaintiff, the defendant caused the said natural drain to be filled up, and failed and refused to provide ways and means by which the waters, during the rainy season, could be carried away from the premises of this plaintiff"; that, by reason of such wrongful acts on the part of the defendant, "a large portion of this plaintiff's property has on numerous occasions been submerged by the overflow of water from the higher ground, and this plaintiff has been unable to raise anything, or to derive any benefits from his said property," etc. The cause was tried by a jury, who returned a verdict in favor of plaintiff for the sum of \$800, and thereupon the court ordered judgment to be entered in said sum for the plaintiff. The defendant attempted to appeal from said judgment, and appeals from the order denying it a new trial.

[1] The judgment from which the defendant attempted to take an appeal was entered on the 5th day of April, 1910, but the notice of appeal states that the appeal is "from the judgment therein entered in said superior court on the 16th day of March, 1910, in favor of plaintiff in said action and against said defendant," etc. We presume that the judgment referred to in the notice was the one entered on the 5th day of April, 1910, and that the date of its entry as given in said notice was due to an inadvertence. However that may be, the appeal from the judgment will have to be dismissed because of not having been taken within the time prescribed by law. Section 939, subd. 1, of the Code of Civil Procedure, provides that an appeal from a final judgment must be taken, if at all, under the older method of taking such appeals within six months after the entry of such judgment. Under section 941b of the same Code, which prescribes a new method of appealing from final judgments, the appeal must be taken within 60 days after the notice of entry of judgment, or, if no notice thereof be given, not later than six months after the entry of such judgment. In the case at bar, the appeal from the judgment was not taken until the 24th day of July, 1911, some days beyond 15 months after the entry of said judgment. It therefore follows, as before stated, that the appeal from the judgment must be dismissed. *Robinson v. Eberhart*, 148 Cal. 495, 83 Pac. 452; *County Bank v. Jack*, 148 Cal. 437, 83 Pac. 705, 113 Am. St. Rep. 285; *Roney v. Reynolds*, 152 Cal. 323, 92 Pac. 847; *Allen v. Allen*, 159 Cal. 197, 113 Pac. 160.

[2] It also follows that the objections to the complaint urged under the demurrer cannot be reviewed, since such objections can be considered only upon an appeal from the judgment. *Tompkins v. Montgomery*, 123

Cal. 219, 220, 55 Pac. 997; County Bank v. Jack, 148 Cal. 438, 83 Pac. 705, 113 Am. St. Rep. 285.

[3] The defendant complains that the court erred to its prejudice by refusing it leave to amend its answer. The application for permission to amend its pleading was made by the defendant on the opening of court for the purpose of taking up the trial of the cause, and more than 10 months after the original answer was filed. Counsel had not previously given the plaintiff or his counsel notice of an intention to ask permission to amend, nor had he prepared a draft of the proposed amendment. He, however, stated to the court the nature of said amendment, the purpose of which was to tender an issue upon the plaintiff's ownership of the lands described in the complaint, and thereafter, on his request, the court adjourned the trial of the cause until the hour of 1:30 p. m. of the same day in order to enable counsel to put his proposed amendment in concrete form. The amendment as thus prepared and proposed reads as follows: "As to the allegations contained in paragraph 2 of plaintiff's complaint, defendant alleges that he has no knowledge or information upon the subject sufficient to enable him to answer the same, and, placing his denial upon that ground, denies that the plaintiff is now or that he has been ever since the 28th day of February, 1907, the owner in fee simple of all those certain lots, pieces, or parcels of land \* \* \* set out and described in the complaint." Conceding, for the present, that, under the notice of intention to move for a new trial as filed and served by the defendant, the alleged error of the court in disallowing the foregoing proposed amendment may properly or legally be reviewed by this court, and waiving the point that the denial involved in the proposed amendment is not, strictly speaking, the statutory denial in such case, since it is not based upon information and belief, or upon a want of information or belief upon the subject sufficient to enable the defendant to reply to the fact to which it is addressed (section 437, subd. 2, Code Civ. Proc.), we think the allowance or refusal of the amendment was, under the circumstances under which the privilege of so amending the answer was asked, a matter entirely within the discretion of the court.

The general rule is that, in the exercise of the discretion confided to trial courts in that regard, great liberality should be indulged by such courts in the matter of allowing amendments to pleadings. This salutary rule is fostered by the desire that in all actions at law or suits in equity the pleadings shall be in such condition with respect to all the issues which ought to be litigated and adjudicated thereby as that full and complete justice may be done between the parties. But where, as here the defendant has, by his answer, virtually admitted a material allegation of the complaint, and has allowed such

admission to stand for nearly a year and until the trial was about to proceed before attempting to controvert it, and then by a denial in its nature not positive and involving an allegation in the complaint, as to the truth or falsity of which the defendant, through the public records, had available to it means of ascertaining some positive knowledge, upon which his denial could have been put in positive terms, it cannot be held that the court's denial of a proposed amendment constitutes an abuse of discretion.

[4] But, assuming that the proposed amendment was timely and necessary and in all respects in proper form, it is clear, from an examination of the defendant's notice of intention to move for a new trial, that the alleged error of the court or the alleged abuse of its discretion in disallowing said amendment cannot be reviewed by this court. The first subdivision of section 657 of the Code of Civil Procedure specifies four separate and distinct grounds upon which a motion for a new trial may be made, viz.: (1) Irregularity in the proceedings of the court; (2) irregularity of the jury; (3) irregularity on the part of the adverse party; (4) "any order of the court or abuse of discretion by which either party was prevented from having a fair trial." The action of a trial court refusing a party leave to amend his pleading after issue joined can only be reviewed on a motion for a new trial, and in such case, in order that a review of such action may be had, the notice of intention must set forth the fourth of the several grounds, as above given, enumerated in the first subdivision of said section 657—that is, that the court has thus abused its discretion, whereby the complaining party was prevented from having a fair trial. 1 Hayne on New Trial and Appeal (2d Ed.) §§ 24, 52. In other words, the alleged error complained of here cannot be reviewed on any of the several other grounds for a new trial specified in said section.

The notice of intention in the case at bar does not set forth, among those relied upon for a new trial, the ground that the court abused its discretion by its disallowance of the proposed amendment, but merely charges, so far as are concerned the grounds embraced within the first subdivision of said section, "irregularity in the proceedings of the court," "irregularity in the proceedings and conduct of the jury," and "irregularity and misconduct upon the part of the plaintiff." It is very clear that the alleged abuse of discretion cannot be reviewed upon either of the foregoing grounds (Hayne on New Trial and Appeal [2d Ed.] §.28; Pratt v. Pratt, 141 Cal. 247, 74 Pac. 742; Gay v. Torrance, 145 Cal. 144, 78 Pac. 540), and it therefore follows, as before declared, that there is no record before us authorizing a review of the action of the court in denying the defendant's application to amend its answer.

[5] There appear in the transcript, following the certificate of the clerk to the rec-



ord or the bill of exceptions, several affidavits charging that the plaintiff was guilty of misconduct in connection with the jury while the latter, under the order of the court, were engaged in viewing the property of the plaintiff alleged to have been damaged. These affidavits were presumably designed to further the ends of the motion for a new trial on the ground of the "irregularity and misconduct of the plaintiff" and perhaps on the ground of the "irregularity in the proceedings and conduct of the jury." But the affidavits are not incorporated in a bill of exceptions, and they are not, therefore, authenticated as required by rule 29 of this court (119 Pac. xiv). Obviously, under these circumstances, they cannot be regarded as any part of the record or be considered on this appeal for any purpose. *Melde v. Reynolds*, 120 Cal. 237, 52 Pac. 491; *Herrlich v. McDonald*, 80 Cal. 472, 22 Pac. 299; *Von Glahn v. Brennan*, 81 Cal. 261, 22 Pac. 596; *Spreckels v. Spreckels*, 114 Cal. 60, 45 Pac. 1022; *Skinner v. Horn*, 144 Cal. 279, 77 Pac. 904, 1 Ann. Cas. 850; *Sutton v. Symons*, 97 Cal. 475, 32 Pac. 588; *Manuel v. Flynn*, 5 Cal. App. 319, 90 Pac. 463; *Higgins v. L. A. Ry.*, 5 Cal. App. 748, 91 Pac. 344; *Blodgett v. Scott*, 11 Cal. App. 312, 104 Pac. 842; *Fisher v. Western Fuse Co.*, 12 Cal. App. 304, 107 Pac. 332; *Willow Land Co. v. Goldschmidt*, 11 Cal. App. 297, 104 Pac. 841.

[6] The appellant contends that the court's charge to the jury was in a number of particulars pointed out in its brief not pertinent to the issues made by the pleadings and as developed by the evidence. It is further claimed that error prejudicial to the rights of the defendant was committed in the refusal by the court to allow certain instructions requested by it. The record does not contain the evidence, nor any portion thereof, and therefore we must assume that the instructions given were applicable to the proofs, and that those refused were properly disallowed. The instructions do not appear to be obnoxious to criticism in so far as they may be regarded as abstract statements of law, nor do they appear to be inapplicable to the issues made by the pleadings. There are, it is true, some references therein to an artificial drain and a few other matters which are not specifically referred to in the complaint, yet we must assume that those matters were brought out by the evidence, and that a view of the whole record, including the evidence, would disclose their relevancy to the issues and the propriety of the instructions relating to them.

We see no merit in this appeal.

For the reasons stated in the foregoing, the appeal from the judgment is dismissed, and the order appealed from is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

20 Cal. App. 555

**WINKLER v. JERRUEL. (Civ. 1,174.)**

(District Court of Appeal, Second District, California. Dec. 9, 1912.)

**1. FRAUDS, STATUTE OF (§ 129\*)—SALE OF LAND—PARTIAL PERFORMANCE.**

A partial performance of an oral contract to convey by paying part of the price and the taking of possession under the contract took the contract out of the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 287-292; Dec. Dig. § 129.\*]

**2. VENDOR AND PURCHASER (§ 75\*)—CONSTRUCTION OF CONTRACT—TIME OF PAYMENT.**

Under Civ. Code, § 1657, providing that if an act be, in its nature, capable of being done instantly, it must be immediately performed upon the thing to be done being exactly ascertained, where a contract to convey specified no time for making deferred payments, they were to be deemed payable upon delivery of the deed.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 113-118, 126; Dec. Dig. § 75.\*]

**3. VENDOR AND PURCHASER (§ 128\*)—WARRANTIES.**

Every executory contract for the sale of land contains an implied condition that the vendor's title is good, and that he will transfer an unincumbered title.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 234-237; Dec. Dig. § 128.\*]

**4. VENDOR AND PURCHASER (§ 144\*)—CORRECTING DEFECTS IN TITLE—TIME.**

A vendor who was not required, under the terms of the contract, to convey until tendered the purchase money, had until that time to acquire a good title such as he contracted to convey.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 271-275; Dec. Dig. § 144.\*]

**5. FRAUD (§ 25\*)—INJURY—NECESSITY.**

Fraud is not actionable unless injury results, so that a fraudulent misrepresentation made to the vendee that a mortgage on the land only drew 6 per cent. interest, when the mortgage on its face was in excess thereof, did not injure the vendee, when he could deduct from deferred payments the amount of excess interest.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 24; Dec. Dig. § 25.\*]

**6. FRAUD (§ 11\*)—ASSERTION OF OPINION.**

An assertion of something not true must be of a fact not warranted by the information of the person making the assertion in order to be a fraudulent representation, and not merely the opinion of such person, however positively asserted.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.\*]

**7. FRAUD (§ 11\*)—MISREPRESENTATIONS—STATEMENT OF VALUE.**

A statement of value of itself is merely a matter of opinion, but representations as to value may be representations of fact depending on the circumstances.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.\*]

**8. VENDOR AND PURCHASER (§ 36\*)—MISREPRESENTATIONS—STATEMENT OF OPINION.**

When plaintiff purchased realty from defendant, he had been in the state but a short time, and was ignorant of realty values, which defendant knew, and defendant stated the mar-

ket value of the property, and falsely stated that similar property in the vicinity had been sold for approximately the same sum. Defendant also conspired to induce another to make a pretended offer in plaintiff's presence to induce plaintiff to accept defendant's statement of values as correct, and plaintiff relied on such representations in purchasing. *Held*, that the false representations as to value were fraudulent, so as to authorize plaintiff to rescind the sale and recover the money paid.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 52, 53; Dec. Dig. § 36.\*]

#### 9. MONEY RECEIVED (§ 8\*)—RIGHT OF ACTION.

Both at common law and under the Code, money paid under fraudulent misrepresentations may be recovered on the common count for money had and received.

[Ed. Note.—For other cases, see *Money Received*, Cent. Dig. §§ 30; Dec. Dig. § 8.\*]

#### 10. VENDOR AND PURCHASER (§ 339\*)—REMEDIES OF PURCHASE—RESCISSION OF CONTRACT.

An offer by the vendee to restore everything of value received under the contract for the purchase of land, and to tender possession, made the rescission of the contract complete, so as to entitle him to sue for the purchase price paid.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 994-1002; Dec. Dig. § 339.\*]

#### 11. VENDOR AND PURCHASER (§ 116\*)—RESCISSION—TENDER OF RENT—WAIVER.

Under Civ. Code, § 1501, providing that all objections to the mode of an offer of performance which the creditor had an opportunity to state at the time to offerer, and which then could have been obviated are waived by the creditor, if not stated where a vendor made no demand for rent for the time the premises were occupied by the vendee when the latter tendered back the premises as a condition to rescinding the contract and did not question the amount of the tender, a tender of rent was waived.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 205-208; Dec. Dig. § 116.\*]

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by O. E. Winkler against Frank Jerrue. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Hatch, Lloyd & Hunt, of Los Angeles (Harvey D. Cheney, of Los Angeles, of counsel), for appellant. Amend & Amend, of Los Angeles, for respondent.

ALLEN, P. J. This action is for money had and received by defendant for the use and benefit of plaintiff. The answer is a denial of the allegations of the complaint, and, further alleging that the money so paid was on account of a cash installment of the purchase price of certain real property, alleged to have been sold by defendant to plaintiff; and, further that in such purchase plaintiff assumed a certain mortgage lien and agreed to make further and additional payments at a specified time, aggregating the sum of \$5,300; that pursuant to such agree-

ment plaintiff took and retained possession of said premises; further, that defendant is ready, willing, and able to convey good title upon payment of the balance due upon the purchase price.

The court finds that the money sought to be recovered was in fact paid on account of said purchase, but that the contract of purchase was procured through fraudulent representations in this: that defendant misrepresented the value of the property, of which value plaintiff was ignorant; that the representations made by defendant were that the property was of the value of \$5,500; that, in fact, at the time of the making of such representations said property had no value in excess of \$4,400; that, in addition, defendant represented to plaintiff that certain other residence property in the vicinity had been sold for \$4,800 in cash, whereas in truth the same had been sold for \$3,800, all of which defendant well knew, and which representations were made for the purpose of inducing plaintiff to buy said premises at the price of \$5,300; that defendant falsely stated that he had been offered \$5,300 for the property by other persons, and that defendant falsely represented that the mortgage lien upon said premises drew but 6 per cent. interest, when, in fact, the rate of interest was 8 per cent.; that defendant was not the owner of the premises and never had any title thereto, but, on the contrary, the same was the separate property of the wife of defendant; that defendant was never offered \$5,300 for said premises, as by him represented to plaintiff; that, while such offer was made to defendant in the presence of plaintiff, it was made by a person procured by defendant to make such offer for the purpose of inducing plaintiff to pay said price therefor; that plaintiff, by reason of these misrepresentations and relying thereon, was induced to make said purchase. The court further finds that the contract of purchase was oral and that no time was agreed upon between the parties for making deferred payments, other than the assumption of the mortgage; that plaintiff took possession of said premises under said agreement, but on the 21st day of June, 1910, after learning of the false representations, plaintiff refused to complete said transaction and tendered to defendant the possession of the house and lot and all things which he had received under said oral agreement, and demanded the return of the cash payment. Judgment was accordingly rendered in plaintiff's favor for \$1,050, with interest thereon from June 21, 1910. From this judgment, and from an order denying a new trial, defendant appeals upon a bill of exceptions.

[1-3] It is contended by appellant that the fact that defendant was not the owner of the premises at the time when he made the contract, and that the rate of interest specified



in the mortgage assumed was in excess of the rate represented, do not of themselves constitute such fraudulent representations as would entitle plaintiff to rescind or to avoid the contract upon the grounds of fraud. With reference to these two representations we are inclined to agree with appellant. There being a partial performance of the oral contract to the extent of the payment of part of the purchase price and the taking of possession thereunder takes the case out of the statute of frauds (*Hill v. Den*, 121 Cal. 44, 53 Pac. 642); and, no time having been agreed upon for making deferred payments, such money is to be deemed payable upon delivery of the deed. Civ. Code, § 1657; *Tutt v. Davis*, 13 Cal. App. 715, 110 Pac. 690. The rule in this state is that in every executory contract for the sale of land there is an implied condition that the title of the vendor is good and that he will transfer to the purchaser by his deed of conveyance a title unincumbered and without defect, but the vendor sufficiently complies with this obligation if he is able to give good title at the time when by the terms of his contract of sale he is required to make a conveyance.

[4] Under this rule the defendant, while not the owner of the premises, was not required under the terms of the contract to make a conveyance until tendered the amount of the purchase money, until which time he possessed the right to acquire a good title such as he contracted to convey. *Backman v. Park*, 157 Cal. 611, 108 Pac. 686, 137 Am. St. Rep. 153, and cases cited.

[5] As to the misrepresentations with relation to the rate of interest specified in the mortgage, we think it sufficient to say that fraud is never actionable except there be a resultant injury. It is obvious that, if a misrepresentation were made with reference to this rate of interest, plaintiff only assumed and agreed to pay \$2,300 with interest at 6 per cent. as shown by the mortgage, and that if the mortgage upon its face was in excess of this amount, in principal or interest, he possessed the right to deduct from the deferred payments the amount of such excess, and we can conceive of no injury which would result.

[6] This leaves, then, for consideration solely the effect which should be given the other misrepresentations as found by the court. It is a rule that "the assertion of that which is not true must be of some fact not warranted by the information of the person making it, and cannot be held to include an opinion of the person, however erroneous such opinion may be, or with what degree of positiveness it may be asserted." *Estate of Johnson*, 134 Cal. 663, 66 Pac. 848.

[7] Standing alone, we are not inclined to the opinion that a mere statement of value can be accepted otherwise than as an opinion. However, representations as to value may be representations of fact or represen-

tations of opinion, depending largely upon the manner in which the representations are made. If, as a matter of fact, they are made by one assuming to have knowledge of the value based upon other declared statements of fact, to one ignorant thereof, it may be said that the representations under such circumstances become representations of fact.

[8] In the case at bar plaintiff is shown to have been but a short time within this state, entirely ignorant as to values of which defendant had knowledge; that defendant stated the market value of the property and supported the same by a false statement that other property of like character in the vicinity had been sold for approximately the same sum, and, in addition, had entered into a fraudulent conspiracy with another through which this third party was to make, and did make, a pretended offer of \$5,300 for the premises, which offer, made in the presence of plaintiff, was not one in good faith, but was made solely for the purpose of inducing plaintiff to accept defendant's statement of value to be correct. Plaintiff relied upon these statements, representations, and inducements and accepted them as statements of fact, and we are of opinion that such statements under such circumstances amounted to a positive fraud. As said in *Bank of Woodland v. Hiatt*, 58 Cal. 237: "Appellant had a right to rely upon Strong's representations as to facts that were not within his (appellant's) knowledge, and Strong cannot escape responsibility by showing that appellant might have ascertained that such representations were untrue."

[9] Appellant further contends that, assuming the fraud, no action of the character here sought could be maintained; that the common count for money had and received can be used to recover money by pleading fraudulent representations, was recognized at common law (1 Chitty on Pleadings, § 364); that such practice is permissible under our Code is declared in *Minor v. Baldrige*, 123 Cal. 190, 55 Pac. 783.

[10] The finding of the court that plaintiff offered to restore everything of value received under the contract and tendered possession made the rescission complete, and entitles plaintiff to the aid of a court of competent jurisdiction in securing the results and fruits of the rescission. *Loaiza v. Superior Court*, 85 Cal. 31, 24 Pac. 707, 9 L. R. A. 376, 20 Am. St. Rep. 197.

[11] It is insisted by appellant that the record disclosing that plaintiff had been in possession of the premises for more than a month under the contract, the rental of which was \$35 per month, such tender to be effectual should have included also a tender of the amount of rent. Assuming this to be true, defendant had full opportunity at the time to state his objections to the tender and made no demand for rent, nor did he question the amount of the tender when made,

and we think that under section 1501 of the Civil Code he waived the same. Kofoed v. Gordon, 122 Cal. 320, 54 Pac. 1115.

Reviewing the record, then, we are of opinion that the judgment is supported by the findings, and that there is evidence in the record in support of the material findings, and the judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

20 Cal. App. 534

SHEA-BOCQUERAZ CO. v. HARTMAN.  
(Civ. 1,004.)

(District Court of Appeal, Third District, California. Dec. 5, 1912.)

1. NEW TRIAL (§ 71\*)—GROUNDS—INSUFFICIENCY OF EVIDENCE.

Where there is a conflict in the evidence, it is within the discretion of the court to grant a new trial on the ground of the insufficiency of the evidence to support the findings.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 144, 145; Dec. Dig. § 71.\*]

2. APPEAL AND ERROR (§ 854\*)—REVIEW—REASONS FOR DECISION—NEW TRIAL.

Where the notice of motion for new trial, in an action on a note, stated that the motion would be made on the grounds of the insufficiency of the evidence, that the decision was against law, and for errors of law occurring at the trial, an order granting a new trial in general language, without qualifying the scope thereof, would not be disturbed on the ground that there was no necessity for a new trial, granted for the single reason that the court had failed to allow interest on the note for a specified period.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3430; Dec. Dig. § 854.\*]

3. APPEAL AND ERROR (§ 854\*)—REVIEW—REASONS FOR DECISION—NEW TRIAL.

Where the court granting a new trial does not limit the order in any way, the court, on appeal, must uphold it if it can be sustained on any ground embodied in the notice of intention.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3430; Dec. Dig. § 854.\*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Shea-Bocqueraz Company against Ferris Hartman. From an order granting a motion for new trial after judgment for defendant, he appeals. Affirmed.

J. W. Cochrane, of San Francisco, for appellant. J. C. Meyerstein and J. V. Filipini, both of San Francisco, for respondent.

HART, J. This is an action by the plaintiff against the defendant on a promissory note for the sum of \$3,000.

The court awarded judgment to the defendant, and thereafter granted the plaintiff's motion for a new trial. This appeal is by the defendant from the order granting a new trial.

It appears from the testimony that the

plaintiff was a creditor of the Schroeder-Hartman Company, of which corporation Hartman is a member. It likewise appears that the defendant and John D. Schroeder, also a member of the Schroeder-Hartman Company, made and delivered the note involved here jointly and severally as a personal obligation; that is to say, that said note constituted their individual obligation, and not that of the corporation bearing their names, and of which they were members. The note, which was dated July 25, 1906, and made payable "one day after date," was, as shown, for the sum of \$3,000, and the defendant had paid thereon the sum of \$1,000. On the 19th day of March, 1910, a payment of \$2,000 was made to the plaintiff by John D. Schroeder. The plaintiff claims that the understanding was that the sum so paid was to be applied to and credited on its book account against the Schroeder-Hartman Company, and not to be applied toward the extinguishment of said promissory note. Schroeder insists that he made said payment with the specific request and understanding that it be credited on the note, and not on the book account of the plaintiff against the Schroeder-Hartman Company; and that, having expressed such desire to the plaintiff when making such payment, he was entitled to have the money so paid applied accordingly. Section 1479, subd. 1, Civ. Code.

It is not thought to be necessary to examine or reproduce here the testimony in detail, it being regarded as sufficient to say that Schroeder's testimony, as is true of the testimony of some other witnesses testifying in behalf of the defendant, harmonizes with and would sustain, if accepted by the trial court or a jury, his contention as to the circumstances of the transaction as above indicated; while, on the other hand, the testimony of the witness O. E. Bozio, assistant secretary of the plaintiff, and by whom the transaction was conducted in behalf of the latter, was in direct contradiction to that presented by the defendant and, if believed, sufficient to support a finding in favor of the plaintiff's contention as to the circumstances of the transaction. In brief, this witness testified that, prior to the time at which the payment was made, he had a conversation with Schroeder, in which the latter spoke of the proposed payment of the \$2,000, and expressed the desire that it be applied on the note in preference to applying it to the book account against his corporation; that he (Bozio) then said that he preferred to place the money to the credit of the book or merchandise account. "I said," proceeded Bozio, "I didn't care to take the note up first and wanted the merchandise account settled first, on account of the fact that the note was a personal matter between him and Mr. Hartman, and I considered it much better security than the open account of the corporation that was virtually out of business. He said



'All right;' if that was the way I felt about it, it was all right; and after that he paid me the \$2,000. He didn't ask me for the note. I have it still."

[1] There is, as will, of course, be noted, a conflict in the evidence; and therefore, under the well-settled rule, it was within the discretion of the court to grant a new trial upon the ground of the insufficiency of the evidence to support the decision. *Domico v. Cassassa*, 101 Cal. 413, 35 Pac. 1024; *Mills v. Oregon Ry. & Navigation Co.*, 102 Cal. 357, 36 Pac. 772; *Warner v. Thomas Dyeing & Cleaning Works*, 105 Cal. 409, 38 Pac. 960; *In re Martin*, 113 Cal. 480, 45 Pac. 813; *Cutten v. Pearsall*, 146 Cal. 690, 81 Pac. 25; *McCarthy v. Morris*, 17 Cal. App. 723, 121 Pac. 696.

[2] But the point upon which the appellant solely relies for a reversal of the order is founded upon the claim that there was no necessity for a new trial, since, as is the contention, the motion for a new trial was granted for the single reason that the court, in and by its judgment, failed to take into account and allow interest, which the evidence indisputably discloses had accrued upon the note at the rate of 6 per cent. per annum from the 1st day of January, 1910, to the 19th day of March, 1910, the date of the payment of the \$2,000. Whether, were it true that the motion was granted merely to adjudicate the question as to the interest referred to, the condition of the findings is such as that that omission could have been supplied by a mere modification of the judgment, or without a new trial upon said question, we need not express any opinion. It is very clear, however, that there is nothing in the record which will justify us in adopting the appellant's conception of the scope of the order from which this appeal is prosecuted.

The notice of motion for a new trial stated that the motion would be made upon the following grounds: (1) Insufficiency of the evidence to justify the decision; (2) that the decision is against law; (3) errors in law occurring at the trial and excepted to by said plaintiff.

In the specification of the particulars in which the plaintiff claimed that the evidence was insufficient to support the findings, it is charged that "the evidence is insufficient to sustain finding No. 3, to wit: 'That it is not true that no part of said note has been paid, except the sum of \$1,000';" that "the evidence is insufficient to sustain finding 4, which is as follows: 'That it is not true that the sum of \$2,000, with interest thereon from the 1st day of January, 1910, is wholly unpaid; but, on the contrary, that said defendant has paid to plaintiff therein all the money due upon said promissory note, and all the money demanded in the complaint herein.'"

[3] Thus the plaintiff challenged all the

findings of the court essential to the support of the judgment, and upon the exceptions thus registered against the findings and supported by the statement the court made the order granting the new trial in general language, or without in any manner or degree qualifying or restricting the scope thereof. In other words, it does not appear from the record that the order was based upon any one particular ground, or because of any particular reason. And in this connection it may be remarked that, had it been the intention of the trial court to limit the new trial to the single issue as to the interest which had accrued upon the note during the period mentioned, it would undoubtedly have made it to clearly so appear in its order granting the motion. The court not having limited in any way the effect of the order, this court is compelled to view it by the light of the settled rule in this state and hold that, if it can be upheld upon any ground embodied in the notice of intention, it is the duty of an appellate court to sustain it. *Kaufman v. Maier*, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; *Newman v. Lassing*, 141 Cal. 175, 74 Pac. 761; *Bouchard v. Abrahamsen*, 4 Cal. App. 430, 88 Pac. 383; *Briggs v. Hall*, 129 Pac. 288.

The order is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(20 Cal. App. 561)

ZIERATH v. McCANN et al. (Civ. 1,176.)

(District Court of Appeal, Second District, California. Dec. 9, 1912.)

1. INJUNCTION (§ 46\*)—IMPOSSIBILITY OF ESTIMATING DAMAGES.

Injunction will lie against closing the gates and otherwise obstructing the right of way to plaintiff's dwelling, and cutting and otherwise obstructing the water pipes thereto, the character of the damages making it impossible to estimate their amount, so that an action at law was not an adequate remedy.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 98, 99, 107; Dec. Dig. § 46.\*]

2. INJUNCTION (§ 35\*)—OBSTRUCTING WAY—OWNERSHIP.

Plaintiff being in the peaceable possession, as occupant, of a house in the rear of one fronting on a street, reached by a walk extending from the street, it is immaterial, as regards his right to injunction against obstruction of his way of ingress and egress and the water pipes leading to his house, whether, as alleged in the complaint, his lessor, not a party to the suit, is the owner of both properties.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 77; Dec. Dig. § 35.\*]

3. INJUNCTION (§ 18\*) — SOLVENCY OF DEFENDANTS.

As regards right to injunction, where the injury is irreparable and the damages of such a character that it is impossible to estimate them, it is immaterial whether defendants are solvent.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 17; Dec. Dig. § 18.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by A. C. Zierath against Mary McCann and others. Judgment for plaintiff; defendants appeal. Affirmed.

J. F. Conroy and M. K. Young, both of Los Angeles, for appellants. H. H. Appel, of Los Angeles, for respondent.

SHAW J. As shown by the complaint, plaintiff with his family occupied, as a residence, a house located in the rear of one fronting upon a street in Los Angeles, both of which were inclosed by a fence, through which, by gates and over a walk extending from the street, plaintiff and his family had means of egress and ingress to said dwelling. The means of obtaining a supply of water for use by the occupants of the house and land connected therewith was by pipes and hydrants, through which it was conveyed. Plaintiff's use of the house and appurtenances thereto was under and by virtue of a lease whereby one William F. McCann, alleged to be the owner of the entire property, demised the same to him for a term of one year. Defendants nailed up and closed the gates, obstructed the right of way extending from the street to the house, and cut and obstructed the pipe line through which the supply of water was furnished plaintiff for domestic use. Upon these facts, all of which, except the alleged ownership of McCann, were found by the court, judgment was entered, restraining defendants from a further commission of the alleged acts.

[1] Defendants appeal from the judgment, claiming that the complaint fails to state facts entitling plaintiff to equitable relief, in that he had an adequate remedy at law in an action for damages; and, further, that an injunction will not be granted to prevent merely threatened or repeated naked trespasses. Conceding the other positions, there is no merit in the contention that an action at law would constitute an adequate remedy. Closing the gates and otherwise obstructing the right of way, thus depriving plaintiff of the right of ingress and egress to the dwelling, and cutting and otherwise obstructing the water pipes, thus depriving him of a supply of water for domestic use, are allegations of facts from which damages, the amount of which cannot be ascertained, must necessarily follow.

[2, 3] Other errors assigned are that the court failed to find upon the issue of ownership, alleged in the complaint, to have been in McCann, plaintiff's lessor, and likewise failed to find upon the question of defendants' solvency, put in issue by the pleadings. Since plaintiff was shown to have been in the peaceable possession, as occupant, of the property, it was immaterial in whom the title was vested. Moreover, McCann was not a party to the suit, and the title was not a

subject to be litigated therein. Since the injury was irreparable and the damages, as found by the court, of such a character that it was impossible to estimate the same, it was likewise immaterial whether or not defendants were solvent. In no case could the findings have affected the judgment given; and hence the failure to find thereon, even if error, was harmless.

Judgment affirmed.

We concur: ALLEN, P. J.; JAMES, J.

20 Cal. App. 549

DUTCHER v. SANDERS et al. (Civ. 1,183.)  
(District Court of Appeal, Second District, California. Dec. 9, 1912.)

1. FORCIBLE ENTRY AND DETAINER (§ 9\*)—  
"OCCUPANT" OF LAND.

One who, being in peaceable possession of land, leased it is, on the rights of his tenant terminating by expiration of the lease, "occupant" of it, though not residing on it, within Code Civ. Proc. § 1160, subd. 2, declaring guilty of forcible detainer one who, during the absence of the occupant, unlawfully enters on land, and, after demand, refuses to surrender it to such former occupant.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 37-51; Dec. Dig. § 9.\*

For other definitions, see Words and Phrases, vol. 6, pp. 4904-4906.]

2. FORCIBLE ENTRY AND DETAINER (§ 4\*)—  
"UNLAWFUL ENTRY."

Entry without consent of the occupant is "unlawful," within Code Civ. Proc. § 1160, subd. 2, declaring guilty of forcible detainer one who, during the absence of the occupant, unlawfully enters on land, and, after demand, refuses to surrender to such former occupant.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 5-22; Dec. Dig. § 4.\*

For other definitions, see Words and Phrases, vol. 8, pp. 7189, 7190.]

3. FORCIBLE ENTRY AND DETAINER (§ 12\*)—  
ISSUES — DEFENDANT'S RIGHT OF POSSESSION.

Defendant's right of possession, where his entry is based on an alleged right obtained from another than the occupant, and not on consent of the occupant, is not involved, and so is immaterial, in an action based on Code Civ. Proc. § 1160, subd. 2, declaring guilty of forcible detainer one who, during the absence of the occupant, unlawfully enters on land, and, after demand, refuses to surrender to such former occupant.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 57-63; Dec. Dig. § 12.\*]

Appeal from Superior Court, Imperial County; F. J. Cole, Judge.

Action by Gordon L. Dutcher against Louis N. Sanders and another. From an adverse order, said defendant appeals. Affirmed.

Trask, Norton & Brown, of Los Angeles, Frank E. Dunlap, of Stockton, and Dan V. Noland, of El Centro, for appellant. Conkling & Brown, of El Centro, for respondent.



SHAW, J. Action of forcible detainer. Judgment for plaintiff. Defendant moved for a new trial, and from an order denying his motion, prosecutes this appeal.

The action grows out of the following facts: The land, consisting of 160 acres in Imperial county, was in 1903 unoccupied government land. In February of said year, one Johnson made a desert land entry thereon, and in July, 1905, made final proof of occupation and reclamation thereof. In June of said year she assigned and transferred her title and interest therein to plaintiff, who, on June 28, 1907, after doing considerable work in improving the same, leased it to one Williams, at an annual rental of \$4 per acre, for a term of three years, and he in turn sublet to other tenants, who cropped the same or a portion thereof. In January, 1908, defendant Sanders attacked the entry of Johnson and that of plaintiff, as her assignee, by filing in the United States Land Office at Los Angeles a contest based upon alleged fraud in the making of the entry. Upon trial, this contest was decided against plaintiff, and defendant Sanders was awarded the preferential right of entry upon the land, which decision was upon appeal affirmed by the Secretary of the Interior. Thereafter, within 30 days of the notice granting to him the right of entry upon the land, defendant Sanders filed in the United States Land Office his application for entry of the same as a homestead, which application was duly allowed, and about September 1, 1910, he, without consent or knowledge of plaintiff, entered upon the land. At the time when Sanders took possession, the term for which plaintiff had leased the land to Williams, and that of the subtenants, had expired, though the crops grown the last year had not been removed therefrom by the tenants. These tenants, considering that their lease had expired, made no objection to Sanders' entry, and plaintiff, who was not present at the time, did not know of the entry until some time thereafter, when, upon learning of it, he brought this suit.

[1, 2] The action was brought under subdivision 2 of section 1160 of the Code of Civil Procedure, which provides that "every person is guilty of a forcible detainer \* \* \* who, \* \* \* during the absence of the occupant of any lands, unlawfully enters upon real property, and who, after demand made for the surrender thereof, for the period of five days, refuses to surrender the same to such former occupant." The answer admitted the demand for possession and defendant's refusal to comply therewith, and the court found "that on the 1st day of September, 1910, and for more than three years previous thereto, plaintiff was in the peaceable and actual possession and occupation" of the land; "that on or about the 1st day of September, 1910, during the absence of plaintiff therefrom, Louis N. Sanders unlawfully entered upon said land and took

possession thereof;" "that said Louis N. Sanders unlawfully holds and continues in possession of the said premises." That at the time of defendant's entry plaintiff was, and for several years had been, subject to the rights of his tenants, in the peaceable possession of the land, and that he had during such period fenced, leveled, and prepared it for irrigation and caused annual crops to be grown thereon, admits of no controversy. While plaintiff did not reside upon the land, nevertheless, since admittedly the rights of the tenant had terminated with the expiration of the lease, he was the occupant in the peaceable and actual possession thereof, and exercised exclusive control and dominion over it. *McCormick v. Sheridan*, 77 Cal. 253, 19 Pac. 419. Nor, in our opinion, is there any doubt as to the evidence showing the entry to have been unlawful. Plaintiff being the occupant and in the peaceable possession of the property, defendant's entry thereon during his absence and without his consent, followed by refusal to make restoration thereof for a period of five days after service upon him of a demand in writing that he do so, was as to plaintiff unlawful, within the meaning of the term as used in the statute. The entry being unlawful, the act of withholding was likewise unlawful. *Treat v. Forsyth*, 40 Cal. 484.

[3] Conceding all this to be true, appellant's contention is that the effect of these findings was nullified by the court finding, in accordance with an allegation of the answer, "that on or about the 16th day of May, 1910, the Commissioner of the General Land Office, Department of the Interior of United States, in the case of Louis N. Sanders v. Orpha C. Johnson and Gordon L. Dutcher, Assignee, canceled a previously existing desert land entry upon said land, under which desert land entry the said Gordon L. Dutcher was claiming said land, and awarded a preference right of entry to said Louis N. Sanders; that on or about the 1st day of August, 1910, the defendant Louis N. Sanders made homestead entry of said land at the United States Land Office at Los Angeles, Cal., and paid the required fees thereon, and was given homestead receipt therefor." The allegation had no proper place in the answer; and evidence in support thereof should have been excluded. Had the court given the finding the effect contended for by appellant the error would have been ground for reversal upon an appeal prosecuted by plaintiff. Such facts, so found, did not warrant the action of defendant in retaining possession of the land; and, by its conclusion of law based upon the findings, the trial court so held. We are in full accord with this ruling. Appellant's claim finds apparent support in the case of *Goldstein v. Webster*, 7 Cal. App. 705, 95 Pac. 677, where the court, speaking through Justice Hall, says: "The owner, with a right of entry, of lands unlawfully in the possession

of another may, during the absence of such occupant, peaceably and without force or violence, take possession thereof, and his subsequent refusal to deliver possession to such occupant does not make him guilty of either a forcible entry or forcible detainer." In support of the proposition, the learned writer of that opinion cites *Potter v. Mercer*, 53 Cal. 667, and *Powell v. Lane*, 45 Cal. 677. The language used was not necessary to a determination of the facts in that case, as it was there held that the plaintiff, who claimed to have been ousted, was not the occupant, and never had been in possession of the property. It appears from the facts of this case, and those in the cases cited in the opinion, that the questions there presented involved alleged contractual relations between the parties with respect to the entry made. Not so, however, in the case at bar.

Under the provisions of the Code heretofore cited, where entry is made upon the actual possession of another without his consent, the retaining of possession for a period of five days after demand therefor is unlawful (*Voll v. Hollis*, 60 Cal. 569); and, in an action brought upon such provision, defendant's right to possession, unless based upon a claim that the entry was made with consent of plaintiff, is not in issue, and hence immaterial. In the case last cited, the court quotes with approval the language used in *McCauley v. Weller*, 12 Cal. 500, wherein it is said: "Questions of title or right of possession cannot arise; a forcible entry upon the actual possession of plaintiff being proven, he would be entitled to restitution, though the fee-simple title and present right of possession are shown to be in the defendant. The authorities on this point are numerous." In *Voll v. Hollis*, supra, counsel insisted that "in an action for statutory forcible detainer, when the question of actual force is not in issue, but the only question to be determined is whether the entry was unlawful, if made during the absence of the occupant, the defendant should be permitted to show his right of entry. If he has the right of entry, it cannot be unlawful; and, if he enters in good faith under the belief that he has the right of entry, such entry is not unlawful within the meaning of the statute;" in response to which the court there said: "Whether the cases in which it was held that a defendant, charged with an unlawful entry and forcible detainer, might introduce a conveyance to him of the premises as evidence that his entry was in good faith, and therefore not unlawful within the peculiar meaning given to that word by the decisions referred to by counsel for respondents, be correct or not, under the statute as it then was, such conveyance is not admissible under the provisions of the Code of Civil Procedure, which treats only of forcible and peaceable entries.

Under the Code, all entries on the actual possession of another are unlawful, and the question of good or bad faith, on the part of the defendant, no longer affects the right of the recovery in this form of action." In line with *Voll v. Hollis* is *Giddings v. Land & Water Co.*, 83 Cal. 96, 23 Pac. 196, *Bank of California v. Taaffe*, 76 Cal. 630, 18 Pac. 781, and *Carteri v. Roberts*, 140 Cal. 166, 73 Pac. 819, where it is said: "There can be no doubt as to the correctness of the doctrine established by those cases." From all of which we conclude that, where a defendant in an action of forcible detainer, brought under the provisions of subdivision 2 of section 1160 of the Code of Civil Procedure, claims that his entry was made with the consent of the occupant of the land, he may prove such fact as tending to show that his entry was lawful; but, where the entry is based upon an alleged right obtained from another than such occupant, such fact is not a proper issue in the trial of the case. The word "unlawful," as used in the section, means unlawful with respect to the relations between plaintiff and defendant. *Carteri v. Roberts*, supra.

If A. procure from B. a contract whereby the latter agrees to convey to the former a tract of land, and B. place him in possession thereof, and thereafter B., claiming the contract to have been obtained by fraud, conveys the land to C., who, in the absence of A., enters upon the land without A.'s consent, he cannot, in an action of forcible detainer, justify the refusal to surrender to A. by a showing of the alleged fraud and subsequent grant by B. to him. We do not understand the position of the government, in such cases to be different from that of the individual. Plaintiff's entry and continued peaceable possession of the land in question for a period of more than three years was with the consent of the government. The fact that a department of the government, having power to ascertain the facts constituting the alleged fraud, decided that such consent was procured by fraud, and gave defendant a homestead entry thereof, did not warrant him in taking possession against the will of plaintiff, thus depriving plaintiff of the property without according to him a day in court, where the legality of the departmental decision could be determined.

The order is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

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20 Cal. App. 651

GEORGE J. BIRKEL CO. v. NAST.  
(Civ. 1,186.)

(District Court of Appeal, Second District, California. Dec. 17, 1912. Rehearing Denied by Supreme Court Feb. 15, 1913.)

1. SALES (§ 477\*)—CONDITIONAL SALES—  
WAIVER OF CONDITION.

Where a contract for sale on installments provided that the title should not pass until full payment, the condition was for the sole benefit of the seller, who might waive it.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1411-1417; Dec. Dig. § 477.\*]

2. ELECTION OF REMEDIES (§ 3\*)—ELECTION—  
ACTS CONSTITUTING.

Where a contract for the sale of a piano upon installments provided that, until full payment, title should remain in the seller, who might, upon failure to pay any of the installments, retake the instrument without legal process and terminate the contract, or enforce payment of all sums then unpaid, the bringing of an action for the unpaid purchase money was an election to enforce payment, and a waiver of the seller's right to retake possession upon default; such waiver vesting complete title in the buyer, so that the piano might be taken upon attachment in such action.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. §§ 3, 4; Dec. Dig. § 3.\*]

Appeal from Superior Court, Los Angeles County; M. T. Dooling, Judge.

Action by the George J. Birkel Company against Mrs. H. H. Nast. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Judgment and order reversed.

E. S. Williams, of Los Angeles, for appellant. Geo. M. Harker, of Los Angeles, for respondent.

**SHAW, J.** Action to recover upon a contract for the conditional sale of a piano made by plaintiff to defendant. Judgment went for defendant. Plaintiff moved for a new trial, which was denied, and it appeals from the order denying its motion, as well as from the judgment.

At the time of the delivery of the piano to defendant, she executed a contract whereby she agreed to pay therefor to plaintiff the sum of \$600, as follows: Ten dollars upon the signing of the contract, and at least \$10 on the 8th day of each month thereafter, together with interest, until the whole sum was paid, and that, until said sum and interest should be fully paid, the piano should remain the property of plaintiff, but, upon full payment, title thereto should vest in defendant; in addition to which, the contract contained the following clause: "I also hereby agree that if I fail to pay any of said monthly installments when due, or to fulfill and keep any other of the aforesaid conditions, thereupon George J. Birkel Company may enforce payment of all of said sum of \$600 then unpaid and interest thereon; or, at its option, George J. Birkel Company may retake possession of said piano without legal process, and for that purpose may enter any premises

where the same may be, and thereupon without further notice terminate this contract." Defendant made default in the monthly payments which, by the terms of the contract, she was required to pay, whereupon plaintiff brought this action for the unpaid balance of principal and interest, and caused to be issued, in said suit, a writ of attachment, under and by virtue of which the sheriff levied upon and took into his possession the piano, which he stored in a warehouse owned and controlled by plaintiff.

[1] Upon these facts, the court found that title to the piano did not vest in the defendant by reason of the action brought by plaintiff, in the exercise of its option, to recover the purchase money which defendant had agreed to pay; that the taking of the piano by the sheriff under the writ of attachment and storing it in plaintiff's warehouse was a recaption thereof by plaintiff; that, under the terms of the contract, title could not vest in defendant without her consent, and that she never assented thereto. These findings, consisting of a jumble of both law and fact, cannot be sustained. The provision of the contract, to the effect that the title to the piano should remain in plaintiff until payment of the full purchase price thereof, was inserted for the purpose of securing such payment, and therefore was for the benefit alone of the vendor. Being for its sole benefit, it had the right to waive the same. *Shepard v. Mills*, 173 Ill. 223, 50 N. E. 709.

[2] Plaintiff could not retake the piano and also sue for the price thereof. *Muncy v. Brain*, 158 Cal. 300, 110 Pac. 945. Therefore, when it brought this action for the purchase money, it waived its right to retake possession, and elected to enforce payment. Having exercised its option to sue, it was debarred from all right to recover the property under a claim that title had not passed to defendant. *Holt Mfg. Co. v. Ewing*, 109 Cal. 353, 42 Pac. 435; *Parke, etc., Co. v. Lumber Co. et al.*, 101 Cal. 37, 35 Pac. 442. The legal effect of such election was, immediately upon the filing of the complaint, to transfer to and vest in defendant title to the piano as completely as though defendant had made full payment therefor. *Elsom v. Moore*, 11 Cal. App. 377, 105 Pac. 271; *Shepard v. Mills*, supra. The title having passed to and become vested in defendant by reason of plaintiff's election to exercise its option to enforce payment, it was not only subject to an execution which might be issued upon a judgment obtained in the action, but likewise, and for the same reason, subject to levy under a writ of attachment issued in the suit. The act of the sheriff in taking possession of the piano was in no sense a recaption by plaintiff under the terms of the contract, which authorized the taking without legal process. Until a sale thereof under execution, issued upon a judgment obtained in the action, the property be-



longed to defendant, subject to the levy of the writ, possession of which she might obtain, either upon payment or the giving of a bond for the release thereof. The act of the sheriff in storing it in plaintiff's warehouse was immaterial, so far as it affected plaintiff's rights in the matter.

Defendant, in her answer, set up certain facts as a separate defense. No findings, however, were made by the court upon the issues so tendered.

The judgment and order are reversed.

We concur: ALLEN, P. J.; JAMES, J.

(20 Cal. App. 638)

**JACKSON v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY.** (Civ. 1,244.)

(District Court of Appeal, Second District, California. Dec. 14, 1912.)

**APPEAL AND ERROR (§ 415\*)—NOTICE OF APPEAL—PARTIES TO BE SERVED—CODEFENDANTS.**

Where petitioner brought action in the justices' court against two defendants to recover for labor of an agreed value, and had judgment against one of them only, who appealed, it was not necessary that the appellant should serve his notice of appeal upon the codefendant, since a judgment on appeal changing the liability of appellant would not in any way affect the other defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2139; Dec. Dig. § 415.\*]

Original proceeding in certiorari by J. H. Jackson against the Superior Court of the State of California in and for the County of Los Angeles (Hon. Curtis D. Wilbur, Judge) to review an order of the court refusing to dismiss an appeal taken from a justices' court. Order affirmed.

George E. Cryer, of Los Angeles, for petitioner. B. M. Marble, of Los Angeles, for respondent.

**JAMES, J.** Petitioner here was the plaintiff in an action commenced in the justices' court against Lewis Rees and the Kline Invalid Bed Company, which action was for labor done at the alleged request of defendants of the alleged agreed value of \$67.50. The defendants therein answered separately, and after trial had the justice rendered judgment in favor of plaintiff against the defendant Rees only. Rees gave notice of appeal and filed an undertaking on appeal. His notice of appeal he served upon the plaintiff only, and, because such notice was not also served upon Rees' codefendant, petitioner here moved in the superior court to dismiss Rees' appeal on the ground that he had not served all of the adverse parties. This the superior court declined to do. If, after judgment had been rendered in its favor, the codefendant with Rees continued to be an adverse party, then, of course,

in order to make his appeal effectual, Rees should have served his notice of appeal upon his codefendant. It is said in *Bell v. San Francisco Savings Union*, 153 Cal. 64, 94 Pac. 225, that "an 'adverse party,' within the meaning of section 940 of the Code of Civil Procedure, is one 'whose interest in the subject-matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken.' Senter v. De Bernal, 38 Cal. 637. If a judgment may be modified in any manner favorable to appellant without injuriously affecting the interest of the party not served, the appeal will not be dismissed." It is correct to say in a general way that in all of those cases where it has been held that a codefendant must be served by the party appealing the subject-matter of the action was such that any change worked by the appeal would affect the interest of such codefendant, such as in actions of partition, foreclosure of mortgages, etc. In the matter here considered the justices' court determined by its judgment that there was no liability against the Kline Invalid Bed Company for any part of the amount of money claimed by plaintiff, this petitioner, but that defendant Rees was there liable for the full amount. Upon a retrial of the action in the superior court, if a judgment was there rendered as affecting Rees different from that made by the justice, the liability or interest of the Kline Invalid Bed Company would be in no wise affected. On the other hand, if the plaintiff in the justice court action was dissatisfied because he had not secured judgment against Rees' codefendant, he possessed the same right to appeal as did Rees. Clearly the Kline Invalid Bed Company was not an adverse party such as to require that notice of appeal be served upon it.

For the reasons stated, it is made to appear that the superior court has not exceeded its jurisdiction in refusing to make the order dismissing the appeal as asked for, and its order denying the motion is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(20 Cal. App. 643)

**DE MITCHELL v. CROAKE.** (Civ. 1,168.)  
(District Court of Appeal, Second District, California. Dec. 16, 1912.)

**1. APPEAL AND ERROR (§ 430\*)—RIGHT OF REVIEW—NECESSITY OF APPEAL.**

Where defendant gives no notice of appeal, either from an order striking his unsettled statement from the files or dismissing his motion for a new trial, such orders cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2173, 2174, 3126; Dec. Dig. § 430.\*]

**2. APPEAL AND ERROR (§ 302\*)—MOTION FOR NEW TRIAL—STATEMENT OF GROUNDS.**

A proposed unsettled statement of the case, incorporated in a bill of exceptions to be

used on an appeal never taken from an order striking it from the files, does not entitle it to consideration as a statement in support of the motion for a new trial, and hence, for want of a sufficient statement, the motion must be denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744-1752; Dec. Dig. § 302.\*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by A. B. De Mitchell against P. W. Croake. Judgment for plaintiff, and defendant appeals. Affirmed.

H. C. Dillon and A. S. Goldflam, both of Los Angeles, for appellant. Lucius M. Fall and Webster Davis, both of Los Angeles, for respondent.

SHAW, J. Action to quiet title. Judgment, entered August 23, 1910, went for plaintiff, from which, and an order denying his motion for a new trial, defendant appeals.

Pursuant to his notice of intention to move for a new trial, defendant prepared, served, and filed his proposed unsettled statement of the case to be used in support of his motion. Thereafter, on October 17, 1910, plaintiff moved to strike from the files and records defendant's proposed statement upon the ground that the same had not been served within the time prescribed by law, and also moved to dismiss the motion for a new trial. The court granted both motions, and made its orders striking from the files and records in the case the defendant's proposed statement of the case, and dismissed defendant's motion for a new trial. Thereupon defendant prepared and, on January 5, 1911, caused to be settled a bill of exceptions, wherein was set out and exhibited the alleged erroneous rulings of the court in the making of said orders.

[1] Defendant, however, gave no notice of appeal, either from the order striking the statement from the files or dismissing the motion; hence, conceding the orders to have been the subject of appeal, in the absence of any appeal therefrom, the action of the court in making them cannot be reviewed.

[2] After the making of these orders, from which no appeal was taken, defendant gave a second notice that he would, on November 7, 1910, move the court for a new trial, which motion, it was stated in the notice, would be made upon a "statement upon appeal, which is herewith served upon you, attached to the bill of exceptions in said case." This motion was made at the time specified in the notice, and by the court denied. Defendant appeals from this order. Not only was there a failure to give notice of the motion within the time prescribed by law, but no statement in support of the motion was ever settled. In the absence of a statement on motion for a new trial, the motion

is properly denied, and the order denying the motion must be affirmed. *Symons v. Bunnell*, 101 Cal. 223, 35 Pac. 770. For the purpose of showing error in the making of the order of November 7, 1910, denying his motion for a new trial, appellant has printed in his transcript the statement by order of court stricken from the files, and which is embodied in the bill of exceptions allowed January 5, 1911, upon the making of said last-mentioned order. Since this proposed statement was never settled, it could not be used upon the hearing of the motion. Incorporating it in a bill of exceptions to be used on an appeal never taken from an order striking it from the files does not entitle it to consideration as a statement in support of the motion for a new trial. Moreover, the bill of exceptions was not settled and filed until long after the court had denied the motion for a new trial. *Mills v. Dearborn*, 82 Cal. 52, 22 Pac. 1114.

The only ground urged in support of a reversal of the judgment is that the court erred in admitting certain evidence. There is no record before us upon which these alleged errors may be reviewed.

Judgment and order affirmed.

We concur: ALLEN, P. J.; JAMES, J.

(20 Cal. App. 647)

CHANNEL COMMERCIAL CO. v. HOURIHAN. (Civ. 1,201.)

(District Court of Appeal, Second District, California. Dec. 16, 1912. Rehearing Denied by Supreme Court Feb. 14, 1913.)

1. APPEAL AND ERROR (§ 1010\*)—FINDINGS—CONCLUSIVENESS.

If there is any evidence in the record to sustain findings, they cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.\*]

2. SALES (§ 417\*)—CONDITIONAL SALES—EVIDENCE.

In an action for damages for breach of contract for the sale of beans, evidence held to show that the sale was conditional on the seller being able to procure beans at the agreed price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1173; Dec. Dig. § 417.\*]

3. EVIDENCE (§ 408\*)—VARYING CONTRACT—SALE.

A memorandum of an agreement to sell beans in the following form: "Sep. 30, '10, Rec'd. C. C. Co., \$160.45 to apply on 1 M. sk lot pink beans as per sample at 4½¢"—signed by the seller, was not a sufficient memorandum of a contract of sale, but a mere receipt.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1829-1842; Dec. Dig. § 408.\*]

4. EVIDENCE (§ 384\*)—PAROL EVIDENCE—VARYING CONTRACTS.

Where a writing purports upon its face to completely express the whole agreement, it is presumed that the parties embodied every material term therein.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 384.\*]



# 5. EVIDENCE (§ 408\*)—PAROL EVIDENCE—VARYING RECEIPT.

The terms of a written receipt may be varied by parol evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1829-1842; Dec. Dig. § 408.\*]

# 6. APPEAL AND ERROR (§ 995\*)—FINDINGS—CONCLUSIVENESS.

The appellate court cannot determine where the preponderance of the evidence lies.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3907; Dec. Dig. § 995.\*]

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by the Channel Commercial Company against M. P. Hourihan. From an order denying a motion for a new trial after judgment for defendant, plaintiff appeals. Affirmed.

B. F. Thomas, of Santa Barbara, for appellant. H. C. Booth, of San Francisco, for respondent.

JAMES, J. This is an action for damages alleged to have been suffered by plaintiff through breach of contract committed by defendant. Plaintiff alleged in its complaint that on the 30th day of September, 1910, in the county of Santa Barbara, it purchased of defendant 1,000 sacks of beans at the rate of  $4\frac{1}{2}$  cents per pound, to be delivered at once, and that defendant failed and refused to deliver the same. As evidencing the alleged contract of sale, plaintiff set out in its complaint that a memorandum of the agreement had been made in the following form: "Sep. 30, '10, Rec'd. C. C. Co., \$160.45 to apply on 1 M. sk lot pink beans as per sample at  $4\frac{1}{2}$ c. M. P. Hourihan." Plaintiff alleged that it had been damaged in the sum of \$720, plus the sum of \$160.45, which amount was alleged to have been paid to defendant at the time of the making of the agreement. The complaint was unverified. The defendant, by answer, made general denial thereto, and alleged further that plaintiff had executed to him a voluntary acquittance of an indebtedness in the sum of \$160.45, which sum of \$160.45 defendant alleged that he had tendered to plaintiff before answering, together with interest at 7 per cent. per annum, which tender had been refused. The trial judge made his findings of fact wherein he determined that there had been no contract for the sale of the beans entered into between plaintiff and defendant, and that the memorandum was not intended by either plaintiff or defendant to evidence a contract of sale, but that the amount of \$160.45 was to be held by defendant to bind the bargain on 1,000 sacks or less of beans, if the defendant could purchase the same for the account of plaintiff at  $4\frac{1}{2}$  cents per pound. There is a further finding that, at the time the alleged agreement was made, plaintiff's agent promised to notify defendant within two days, whether plaintiff would desire defendant to endeavor to purchase beans for it, and that

plaintiff did not so notify defendant, but that several days later made the claim that the memorandum amounted to a contract, and demanded the delivery of the beans therein described, and that the defendant then tendered to plaintiff the sum of \$160.45. Upon these findings, judgment was entered in favor of defendant. A motion for a new trial having been subsequently made on the part of plaintiff and denied, this appeal followed.

[1] So far as the findings of fact made by the trial court are to be considered, if there is any evidence in the record to sustain them they must, upon this review, be held to be fully supported. In the testimony of the defendant are to be found direct statements sufficient to warrant all of the findings of fact, as made. Defendant testified that he was a storekeeper in the Santa Ynez Valley; that he had had various dealings with the plaintiff; that the representative of plaintiff, according to his usual custom, called upon him on the day when the alleged agreement respecting the sale of beans was made; that he proceeded to adjust his accounts with this representative; that as he was about to draw a check in settlement of the amount of \$160.45, which he then owed to plaintiff, the representative of plaintiff told him to keep that and use it as a deposit on the beans. According to defendant's testimony, there had been some conversation, respecting the purchase of the beans, before the settlement of accounts was made; that plaintiff's agent had asked him if he could get beans, and he told him that he would see, and that he might be able to buy them at  $4\frac{1}{2}$  cents; that plaintiff's agent took a sample of the beans and said, "I will let you know to-morrow evening if the sample is satisfactory, and you buy the beans;" that he told the agent that it was all right, but to be sure and let him know, and he would try and get them, and that there the matter rested. Regarding the signing of the receipt, he said that, after the accounts had been adjusted, the agent told him that he wished some paper to show his employers how the account had been adjusted, and said, "I will just make a note that there is so much to your credit;" and that he (defendant) had said, "All right," and had signed the receipt in that way. Taking this evidence as true, it would appear that defendant was to act rather in the capacity of agent for plaintiff than otherwise, in the matter of the purchase of the beans, though it seems to have been shown, by all of the testimony, that defendant was to reap no profit in the transaction, but was to purchase the beans from the growers at the price which the plaintiff agreed to pay.

[2] Assuming that a different legal relation arose between the parties, and that they dealt with each other as distinct principals in the transaction, then the evidence estab-

lishes the fact that the sale was conditional upon defendant being able to procure the beans at the price agreed upon. Other evidence in the record shows that he was unable to procure them at that price, and that he promptly notified plaintiff of the fact.

[3] The vital question in the case, however, depends upon what construction shall be given to the receipt as signed by defendant and as set out in plaintiff's complaint. If that instrument contains sufficient terms to evidence a complete contract of sale and purchase, then all of the testimony introduced, which tended to vary or limit the effect of that agreement, would be irrelevant and incompetent. Code Civ. Proc. § 1856. By the section last referred to, it is provided that, where an agreement is reduced to writing, it must be considered as containing all of the terms agreed upon, except that evidence may be introduced of the circumstances under which the agreement was made, or to explain an extrinsic ambiguity, or to establish illegality or fraud. We do not think that the receipt, so called, of itself evidenced a contract of sale. Plaintiff only treated it as a mere memorandum, which required explanation by oral testimony, and there seems not to have been any special objection made on the part of plaintiff to the introduction of any of the testimony of defendant, wherein he gave his version of the transaction.

[4] The rule is that, where a writing imports upon its face to be a complete expression of the whole agreement, it is then presumed that the parties have introduced into it every material item and term. *Harrison v. McCormick*, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469. In the case of *Gardiner v. McDonogh*, 147 Cal. 313, 81 Pac. 964, relied upon by appellant, the memorandum stated, in express terms, that the parties had that day "bought" a certain quantity of beans, stating the name of the beans, but not otherwise designating them as beans. Here no words are contained in the written receipt appropriate to convey the meaning of sale or purchase and undoubtedly oral testimony was admissible to explain just what the obligations of the parties were in the entire transaction.

[5] The instrument was in the nature of a receipt only, in the consideration of which it has been often held that the terms of such documents are not conclusive, but that they may be explained or varied by parol proof. *Snodgrass v. Parks*, 79 Cal. 55, 21 Pac. 429. As we have before noted, it appears from the record that both parties at the trial considered that the true transaction was to be established in the main by oral proof, for both sides offered such proof, and that offered on the part of defendant to this point was not objected to.

[6] We can, on this review, have no concern as to whether the preponderance of evi-

dence tended to sustain the plaintiff's contentions, or those of the defendant. That was a matter solely for the determination of the trial court, and its conclusions thereon must be treated as final.

The order denying a new trial is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(20 Cal. App. 570)

TEALE et ux. v. SOUTHERN PAC. CO.  
(Civ. 1,007.)

(District Court of Appeal, Third District, California, Dec. 12, 1912. Rehearing Denied by Supreme Court Feb. 10, 1913.)

1. CARRIERS (§ 318\*)—INJURY TO PASSENGER  
—SUFFICIENT LIGHT—EVIDENCE.

In an action by a passenger for personal injuries received by a fall while descending from defendant's coach, evidence held to warrant a finding that the accident was due to defendant's negligent failure to maintain sufficient lights at its depot.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318.\*]

2. CARRIERS (§ 286\*)—INJURY TO PASSENGER  
—DUTY TO FURNISH STATION LIGHTS.

Common carriers must furnish sufficient light at night at their stations to enable passengers boarding or leaving their trains to do so with safety, a failure to do so being culpable negligence, and it makes no difference if the light was shut off from the alighting place by a row of box cars.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1142-1148, 1150-1152; Dec. Dig. § 286.\*]

3. CARRIERS (§ 286\*)—INJURY TO PASSENGER  
—PROXIMATE CAUSE.

Where a plaintiff while alighting from defendant's train in the dark fell to the ground, and was seriously hurt, it will be held an accident which may be "reasonably anticipated" will occur from a railroad's omission to sufficiently light its station.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1142-1148, 1150-1152; Dec. Dig. § 286.\*]

4. CARRIERS (§ 333\*)—INJURY TO PASSENGER  
—CONTRIBUTORY NEGLIGENCE—ALIGHTING FROM TRAIN.

A woman well along in years, but who was robust, and did all her household duties, was not guilty of contributory negligence in getting off of defendant's train without assistance at her destination, carrying a small valise and a suit case, in the dark, there being nobody to help her off; it being her duty to alight when she reached her destination.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1385, 1386, 1388-1397; Dec. Dig. § 333.\*]

5. CARRIERS (§ 333\*)—INJURY TO PASSENGER  
—CONTRIBUTORY NEGLIGENCE.

Where a woman of advanced years, but in robust health, was injured by falling from the steps of a passenger car while attempting to alight without assistance at her station, the place being very dark and there being no one to assist her, the mere fact that she realized the risk of doing so did not make her act the voluntary assumption of the risk; she not being responsible for the situation in which she was placed.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1385, 1386, 1388-1397; Dec. Dig. § 333.\*]



# 6. TRIAL (§ 243\*)—CONTRADICTORY INSTRUCTIONS—CARRIERS—LIGHTS.

Where the court instructed that defendant carrier must furnish such a light at its depot as an ordinarily careful person would have furnished under the circumstances, the fact that other parts of the charge required that plaintiff must furnish "sufficient light" and "proper light" did not give the jury a double standard of defendant's duty in lighting its station, since the jury will be assumed to have understood such terms to mean such light as an ordinarily careful person would have furnished.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 564, 565; Dec. Dig. § 243.\*]

# 7. TRIAL (§ 260\*)—HARMLESS ERROR—INSTRUCTIONS—SUFFICIENCY.

Where the principle declared in a rejected instruction was in substance given in the court's charge, its refusal was not prejudicial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Charles L. Teale and wife against the Southern Pacific Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

F. E. & L. E. Johnston, of Napa, for appellant. E. S. Bell, of Napa, for respondents.

**HART, J.** This is an action to recover damages for personal injuries which the complaint alleges that the plaintiff, Annie E. Teale, suffered through the negligence of the defendant. The jury by whom the issues of fact were tried found in favor of the plaintiff, awarding her damages in the sum of \$2,500, for which amount judgment was entered in her favor. The defendant has brought the case to this court by appeals from the judgment and order denying it a new trial.

The complaint, which is in four counts, alleges (in the third count) that the plaintiff on the evening of January 21, 1908, at the hour of 7 p. m., having been on that day a passenger on one of the defendant's railway trains running between the city of Oakland and the town of Calistoga, in Napa county, in attempting to alight from said train at the depot in the last-mentioned place fell to the ground, and thereby sustained serious injuries to one of her lower limbs; that the accident thus happening was due to the culpable fault of the defendant because of its failure to maintain on said evening at said depot sufficient light to enable the plaintiff to see her way down the steps from the platform of the passenger coach in which she was a passenger to the ground. The defendant, by its answer, besides specifically denying the material facts of the complaint, makes the charge that the accident whereby the plaintiff was injured was the direct consequence of her own inexcusable fault, and, furthermore, that the circumstances disclose that she assumed the risk incident to the act resulting in the accident and its consequences. At the close of the plaintiff's case, the fourth

cause of action was, by stipulation, stricken from the complaint, and thereupon the defendant moved for a nonsuit as to the remaining causes of action on a number of specific grounds, the general effect of all which was that the evidence presented by the plaintiff in support of her complaint showed that the injuries sustained by her were not proximately caused either by the negligence of the defendant's servants and employes or by that of the defendant itself, but that, to the contrary, it thus appeared that the injuries so received were the direct result of the plaintiff's own negligence. The court granted the motion as to the first and second causes of action, but denied it as to the third cause of action, which counts on the negligence of the defendant as the proximate cause of the alleged damage.

The principal point relied upon here by the defendant is that the evidence does not support the verdict, or, as the motion for the nonsuit necessarily implies, that plaintiff's own proofs disclose that the accident and consequent injuries to her would not have occurred but for her own inexcusable negligence or palpable want of ordinary care in attempting to leave the passenger coach. It is further objected that the court committed error, seriously affecting the rights of the defendant, in certain portions of its charge to the jury, and also in rejecting certain instructions which the latter requested it to read to the jury.

The evidence discloses these facts: That the plaintiff, who is a woman of advanced years and who had resided in Calistoga and vicinity for 40 years, left Oakland, as the complaint alleges, on the afternoon of the 21st day of January, 1908, on one of the defendant's railway trains, for the purpose of returning to her home at Calistoga. From Vallejo Junction, to which point she was transported by said train, she was taken by one of the defendant's ferryboats across the straits of Carquinez to the city of Vallejo, where she boarded one of the defendant's trains of cars directly plying between the said city of Vallejo and the town of Calistoga. This train consisted of four cars—a mail car, a baggage car, a smoking car, and a passenger coach, the latter being the rear car of the train. The train reached Calistoga at 7:10 o'clock p. m., the schedule time. The day was stormy, a wind, and rain prevailing at the time of the arrival of the train at Calistoga. The train stopped at the usual point on its arrival at the depot. Between the depot building and the track on which the passenger train went into Calistoga there were, at the time, some box cars standing on a track; that is, on the track nearest the depot. When the passenger train came to a standstill, Mrs. Teale arose from her seat, and, taking in her left hand a small valise or satchel and by the other carrying a suit

case of the ordinary size, started toward the front end of the passenger coach. Although there were some lights in the car and some in and about the depot building, when she opened the door of the coach to make her exit, she found it to be, as she described it, "pitch dark"—so dark, in fact, that, as she testified: "I couldn't see my hand before my face. It couldn't have been darker. I couldn't see the platform or the steps of the car." She stepped out on the platform, however, and, taking hold of one of the guard rails maintained on either side of the steps, thus started to descend from the platform, and, in doing so, fell to the ground, whether from missing the lower step or miscalculating the distance of the latter to the ground she was unable to say. The injury consisted of a sprain of the right knee, and from the effects thereof she testified she was still suffering at the time of the trial—nearly three years after the injury was received.

We shall not give a synopsis of all the evidence in this opinion. It is thought to be sufficient to say that from the evidence the jury were perfectly justified in finding that it was exceedingly dark at the point at which Mrs. Teale alighted or fell from the passenger coach. There can be no doubt that the night was naturally intensely dark, it being very cloudy and a drizzling rain falling; but there is some little doubt as to whether there were any electric lights operating at the time on the outside of and connected with the depot building. One of the employes of the defendant testified that early that evening he lighted a coal-oil lamp which was maintained at and on the outside of the building. It is quite clear from the testimony, however, that it was so dark at the point where Mrs. Teale attempted to alight from the passenger coach that a person standing a distance of 20 or 25 feet from said point could not recognize an acquaintance at the steps of the car. This was shown by the testimony of Hawley Smith, a runner for a local hotel, who always met the incoming trains for the purpose of soliciting patrons. He stated that he was standing at about the distance above indicated from the steps by means of which Mrs. Teale attempted to reach the ground. He said there was no light at that point. He saw an object fall to the ground, but while, perhaps, he realized it was some person, he did not know who it was until he assisted Mrs. Teale to her feet. This witness could not say that there were any lights at the time on the outside of and connected with the depot building. He, in effect, stated, however, that, had there been such lights, reflection therefrom to the point where the accident occurred would have been obstructed by the box cars referred to. From this testimony, as well as from other testimony in the case, the jury could have found that the condition as to darkness of the place where Mrs. Teale received her injuries might have been due either to one or both of two causes,

viz.: (1) That there were no lights in operation on the occasion of the accident on the outside of and connected with the depot building; (2) that, if the usual lights were maintained by the defendant on the outside of said building on that evening, reflection therefrom to the point where passengers would naturally alight by means of the steps leading from the exit of the passenger coach in question was entirely obstructed by the box cars standing on the track nearest the depot building or between the latter and the track on which the passenger train went into the depot that evening.

[1] At all events, the jury were justified in finding, and their verdict implies that they did so find, that the accident occurred by reason of the negligent failure of the defendant to maintain, at said time, sufficient light in and about its depot at Calistoga to enable passengers carried by it in its trains to said point to alight therefrom, in the nighttime, with safety. As to the evidence upon this point, therefore, this court is concluded by the verdict.

[2] And it will not be disputed that the defendant, in omitting, without just or legal excuse, to provide sufficient light to aid the passengers transported by it on its trains to alight therefrom at night with safety, was guilty of a violation of a plain legal duty it owes to passengers thus carried by it. "The law imposes on a railroad company engaged in carrying persons for hire the duty of exercising reasonable care in keeping its platform, approaches thereto, and station grounds, as far as passengers would naturally resort to them, properly lighted at night, for a reasonable time next prior to and immediately following the departure of trains, which its time cards specify will stop at night to take on or put off passengers." *Abbott v. Oregon R. R. & Nav. Co.*, 46 Or. 549, 80 Pac. 1012, 114 Am. St. Rep. 885, 1 L. R. A. (N. S.) 851; 7 Ann. Cas. 961, 969; 3 Thompson on Negligence, § 2691; *Louisville & C. Ry. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; 4 Ellis on Railways, § 1641; *Hutchinson on Carriers* (2d Ed.) § 516.

The rule, as thus stated, is expressly indorsed by counsel for the defendant, as setting forth abstractly a correct statement of the duty in the respect indicated which a railway company owes to passengers going on or leaving its trains; but it is contended that this rule is to be applied according to the conditions or circumstances of the particular case in hand, and that the station at Calistoga, on the occasion of the accident, when consideration is given to the conditions with respect to the character and extent of the business or traffic generally transacted and handled at said station, was sufficiently lighted to satisfy the law or to operate as a full compliance by the defendant with its duty, as prescribed by said rule, to the traveling public engaging its means of transport-



tation. *St. Louis, etc., Railroad Co. v. Marshall*, 71 Kan. 866, 81 Pac. 169; *Falls v. San Francisco, etc., R. R. Co.*, 97 Cal. 120, 31 Pac. 901. Those cases hold, as is obviously true, that whether the railroad company, in the discharge of such duty as is involved here, has exercised that care with respect thereto, a reasonable degree of care, which the law imposes upon it, "depends upon the circumstances of the case—the nature of the road, and the character of the traffic and place where the accident occurred." *Falls v. S. F., etc., R. R. Co.*, supra. Or, as the Kansas case, above cited, puts the proposition: "It is true, as the court said, that the proper character of the lights furnished at any particular station will depend upon the character and extent of business transacted at the station. If many passengers are to be taken on the trains, and many others are to be discharged, if much baggage, mail, and express is to be handled by many employes, if the station grounds must be used at the time of the arrival of the trains by many persons having business there with the company, or with incoming or outgoing passengers, confusion and accident at night can be prevented only by the aid of a lighting system much more extensive than would be required under other circumstances." In other words and in brief it is, of course, true that light which might be insufficient at one station might be adequate at a station surrounded by different conditions. But in the cases cited, and some others similarly expounding the rule under consideration, it will be found that the injuries complained of were mostly received in going to or leaving the station, and not in going on or leaving the passenger coaches. No one, however, can dispute the soundness or justness of the rule as thus declared by the cases here referred to as well as other cases not cited, where, as is manifestly so in those cases, the rule is properly applied; but, although it is true, as counsel for the defendant say, that the evidence here shows that the business, particularly the passenger traffic, transacted at the Calistoga station was generally very light (there was but one other passenger in the coach with Mrs. Teale when the train reached Calistoga the evening of the accident), still we see nothing in the rule as it is stated by the cases cited which in any way conflicts with the rule as first above stated in general terms, or, in other words, with the proposition, of the soundness of which there can be no doubt, that it is a duty legally incumbent upon common carriers to furnish sufficient light at night at their stations, whatever may be the extent and character of the traffic or business generally transacted by them thereat, to enable the passengers going on or leaving their passenger trains in the nighttime to do so with safety, and that, where they fail in that duty through causes over which they can exercise control, they are guilty of culpable negli-

gence. In the case at bar, as we understand the description given by the plaintiff, Mrs. Teale, of the condition of the immediate surroundings of the point where she attempted to alight, there was at that time total darkness. Of course, she was entitled to sufficient light to enable her, by the exercise of proper care, to descend the steps from the platform of the coach to the ground. Such light she was clearly not furnished with. The defendant was negligent in not providing her with the requisite light, and it can make no difference, so far as is concerned the matter of tracing to its negligence in that regard responsibility for the accident and liability for the consequent damage, whether the condition as to light or darkness was due to its failure to maintain the requisite lights on the outside of the depot building at all, or, thus maintaining sufficient light under ordinary circumstances at that station, the reflection thereof was so obstructed by the line of box cars standing on the track nearest to the depot as that the light therefrom was prevented from reaching the point where the plaintiff attempted to descend from the car to the ground, and that, by reason thereof, it was too dark at said point to enable her to see the steps.

[3] Nor do we think, as counsel for the defendant contend, that the rule applied in *Holt v. Southeast Mo. E. R. Co.*, 84 Mo. App. 443, and approved in *Cary v. Los Angeles Ry. Co.*, 157 Cal. 599, 605, 108 Pac. 682, 684 (27 L. R. A. [N. S.] 764, 21 Ann. Cas. 1329), is applicable to this case. The rule referred to is thus stated in the Missouri case mentioned: "A carrier of passengers is not obliged to proceed to provide against casualties which have not been known to occur before and which may not reasonably be anticipated. \* \* \* That which never happened before, and which in its character is such as not naturally to occur to prudent men to guard against its happening at all, cannot, when, in the course of years, it does happen, furnish good ground for charge of negligence in not foreseeing its happening and guarding against that remote contingency." In both the Missouri and California cases adverted to and which apply the rule as thus declared the torts complained of were committed under most unusual circumstances. In each case the accident happened on a crowded street car. In the Missouri case, as the plaintiff was in the act of stepping upon the front platform, where an unusually large number of persons had crowded themselves, the brake on the car became unfastened, and, revolving rapidly around, struck her in the face, producing painful and serious injury. The motorman was at his post, and no one knew how the brake became loosened, whether by the act of the plaintiff herself in taking hold of the brake when she was stepping upon the platform, as was one of the claims of the defendant, or by some one of the other pas-

sengers striking with his foot the mechanical appliance by which the motorman, with his foot, manipulated or operated the brake. In the California case, while the plaintiff was in the act of alighting from the car, another passenger, without the knowledge of the conductor, gave a signal to the motorman to start the car. The motorman, in obedience to such signal, started the car, with the result that the plaintiff was thrown violently to the ground and sustained serious injuries. Thus it is readily to be understood that the accident producing the injuries in those cases were of so unusual a character that of them it cannot be said that they could reasonably be anticipated. In other words, accidents from such causes might not happen more than once in the allotted lifetime of man. They are causes against the occurrence of which the highest prudence or care could not uniformly operate as a guard, and it would indeed be an unjust rule which, in such a case, would authorize the presumption of negligence on the part of a common carrier from acts of that character. Whether such acts are traceable to the negligence of the defendant would depend upon whether the proof affirmatively disclosed that they were brought about directly through the carelessness or negligence of the defendant's employés, servants, or agents, and in the cases referred to no such showing was made.

But no such situation as is found in those cases is present in the case at bar. In the first place, it may well be noted and borne in mind that the rule under consideration, as it is stated in the Missouri case, obviously does not mean that it is true under all circumstances that, because a particular accident has not been known to happen before, such accident is not of the character of those casualties which may "reasonably be anticipated" in the sense that it is a duty to exercise reasonable care in guarding against their occurrence. Particular accidents, under whatever circumstances they may occur, cannot, of course, be foreseen; but the character of a business may be such (and that of transportation companies is peculiarly so) that it may reasonably be expected that, in its prosecution under certain conditions or circumstances, accidents may happen at any time and personal injuries follow, and it is in such cases that the law imposes upon those carrying on such business the duty of furnishing, as far as it can reasonably be done, safeguards against accidents. As applied to railroad companies as common carriers, in the conduct of whose business, in the very nature of the case, accidents by which personal injuries are received are likely to happen even where such business, generally speaking, is carefully carried on, the rule simply means that they must use such reasonable means or adopt such reasonable precautionary measures as will properly safeguard those who do business with them at

their stations and upon their trains. In brief, the rule may be stated to be that where, in the conduct of a certain business, it must be known that unusual or uncommon danger must necessarily coexist with certain conditions, which are capable of being controlled to a large extent by the use of reasonable and available means, the law will hold casualties resulting from an omission to so control such conditions as among those which could "reasonably be anticipated" and against the happening of which therefore it was the duty of the person conducting such business to adopt and enforce precautionary measures.

Of course, everybody knows the increased danger to life and limb at railroad stations when such places are enveloped in darkness or not equipped with sufficient artificial light after the light of day has disappeared to enable persons having business there to guide their footsteps over the ways provided there for that purpose. And everybody knows that the safety of passengers in going to and from such stations in the nighttime or in entering and getting off trains stopping there at night can be preserved largely by means of sufficient light to enable them to find the proper means of ingress and egress therein and therefrom. The accident whereby Mrs. Teale received the injuries complained of here was one of that class which must reasonably be anticipated will occur as the result of omission on the part of a railroad company to provide the requisite or sufficient light at its station to permit passengers leaving its trains at night to do so with safety, and the failure of the defendant in this case to do so reasonable and at the same time so manifestly a necessary act as furnishing the plaintiff with light sufficient to enable her, by the exercise of due care, to guide her feet down the steps from the coach to the ground constituted negligence.

[4] The next, and, so far as it concerned the claim that the evidence does not support the verdict, the last, question to be determined is whether the plaintiff in alighting from the train was herself guilty of negligence which constituted the proximate cause of her injuries, and, furthermore, whether she assumed the risk incident to her attempt to reach the ground from the platform of the coach under the circumstances as described by her. The evidence, as before shown, does not disclose the exact or particular cause of the plaintiff's fall to the ground, and therefore, unless it can be said, as the argument of the appellant goes, that from the fact that the plaintiff attempted to leave the coach in the intense darkness of that night while she was engaged in carrying a small valise in one hand and a suit case of ordinary size in the other, and, under those circumstances, undertook to guide herself down the steps from the coach to the ground by taking hold of the guard rail with her left instead of her



right hand, she was guilty of contributory negligence, then it is very clear that that question was one for the decision of the jury, and that the verdict forecloses the review thereof by this court.

But it cannot be held that the circumstances referred to show contributory negligence. The plaintiff had reached her destination, and obviously she had the right to leave the train with her valise and suit case by the usual means of egress in such case, and she adopted those means for making her exit. Although she was a woman well advanced in years, she was nevertheless in robust health, active, capable of performing and did perform, prior to the accident, the household duties for her family, and possessed excellent eyesight; and from these facts it is reasonable to infer that, under ordinary circumstances, she was capable of handling the small baggage she carried with her without any great inconvenience or trouble. She was thoroughly familiar with the ground about the depot and particularly in the immediate vicinity of the point where the coach in which she rode to Calistoga stopped on the occasion of the accident. She testified, as seen, that, before starting down the steps, she took hold of the guard rail, thus "carefully feeling her way down." But it is suggested that she could have remained in the car until some one came to her assistance. There is no merit in that suggestion. She not only had a right to leave the coach at the time that she did leave it, but it was her duty to do so, since her contract with the defendant ended when the train on which she was riding arrived at Calistoga, her point of destination. Besides, there was, when she left the coach, no other person in said coach. Calistoga was the terminus of the road and the train crew had left the train—the conductor by means of the steps located between the front end of the smoking car and the rear end of the baggage car. It is however, further suggested that, having found it very dark on the front platform of the car in which she was riding, she should have passed on and through the smoking car to the front platform thereof, and there made her descent to the ground. But there is nothing in this record indicating that the front platform of the smoking car was any better circumstanced as to light than the platform from which she descended. Everything about the track on which the train stopped, she said, was in total darkness, and, as stated, there is absolutely no evidence in the record that there was any light at the front end or platform of the smoking car or that she could have gotten off the train there more conveniently or with more safety than at the point where she did alight with the disastrous result as described. What more the plaintiff could have done to reach the ground carefully and with safety under the circumstances by which she was surrounded we are unable to apprehend or to suggest, and that she did not suc-

ceed in reaching the ground with safety or without sustaining injury to her body was manifestly not occasioned by the want of due or proper care on her part, but entirely to the untoward circumstances of the defendant's own negligent creation, under which she endeavored to reach the ground—an act which she was not only entitled to do but which it was necessary for her to do.

[5] Much of what has been said in the foregoing applies to the claim that the plaintiff, knowing and realizing the increased peril of attempting to descend the steps by reason of the intense darkness thereabouts, in doing so under such circumstances herself assumed the risk. It cannot, of course, be doubted that the plaintiff, upon reaching the platform of the coach in which she was riding, fully realized and knew that, to attempt to go down the steps under the conditions which then surrounded her, would involve unusual peril. This is clearly evidenced by the care with which she undertook to do so. But this is by no means to say that she assumed the risk, and must, therefore, bear the consequences of her act. It is true as a general rule that where a person injured, although the relation of master and servant does not at the time subsist between him and the party through whose negligence the injury is claimed to have been inflicted, knows and appreciates the danger of doing the act in which he received his injury, and, with such knowledge and appreciation of such danger, voluntarily puts himself in the way of it, must be deemed to have assumed the risk. 1 Thomp. on Negligence, § 184. But in this case it cannot justly be said that the plaintiff voluntarily put herself in the way of the danger. The situation of danger in which she was put was caused by the negligence of the defendant, and the circumstances of her surroundings were then such as that she was compelled either to leave the coach or remain therein until, perchance, assistance might come to her. The case here is not, in principle, unlike that of an inmate of a burning building who has sustained injuries while in the act of escaping therefrom. In such a case, in an action for personal injuries, although the plaintiff full well knew the great peril that would attend his effort to so escape, the defendant, charged with negligently or purposely firing the building, would not for a moment be heard on a plea of assumption of risk.

As before stated, it was not only the duty of plaintiff, but her right, to leave the coach upon the arrival of the train to which it was attached at her point of destination, and it was equally her right and duty to do so by the usual means provided for that purpose. Of course, it is always the duty of a passenger, when alighting from a train, to exercise that care which an ordinarily careful and prudent person, having due regard to his safety, would exercise. The plaintiff in this

case was required to exercise that degree of care which the unusual circumstances under which she was compelled to leave the train required, and this the evidence showed that she did. As has been shown, the evidence does not disclose that there was any other safer or more convenient way by which she could have left the train. There was no one at hand to assist her and she simply was forced to do the best thing that the circumstances would permit her to do. In short, our conclusion is that the whole case, as it is presented by the record, upon the question of the alleged negligence of the defendant and that of contributory negligence and the assumption of risk imputed to the plaintiff, was one entirely for the jury.

A careful examination has been given the authorities cited by counsel for the defendant. It is not regarded as necessary, further than has already been done, to analyze or otherwise consider them in this opinion. They will be found, upon examination, to represent conclusions from facts very materially different from those here, and that they are, therefore, not in conflict with anything said or the result reached by this court in this opinion. The complaint regarding the instructions given and refused is untenable. The charge of the court was brief, but it involved a statement in clear language of all the rules essential to a proper and just consideration of the evidence by the jury.

[6] It is said, however, that the instructions with regard to the duty of the defendant to furnish at its station such light as might be necessary for the protection of persons having business with the company there against accidents are contradictory. This criticism has its foundation in the fact that in one part of its charge the court in effect declared it to be the duty of the company to maintain sufficient light at its stations, while in another part thereof it said that the company was required to keep its stations properly lighted. It is the contention that the court thus gave to the jury two different standards of the duty which the company was required to observe in that particular. But we think the criticism is devoid of merit. The court, among other things, instructed the jury that it was the duty of the defendant to "furnish such a light at its depot as an ordinarily careful and prudent person in the same relation and under the same conditions and circumstances would have furnished," and, again, that it was its duty, on the occasion of the accident, to have furnished such lights at its depot at Calistoga as to have enabled plaintiff to safely alight from its train. The jury, as men of intelligence, and keeping in mind and considering the charge of the court in its entirety, must be assumed to have understood the terms, "properly lighted," "sufficiently lighted," and "insufficient light," as used in the court's charge, to mean such light or a want thereof "as an ordinarily careful and

prudent person in the same relation and under the same conditions and circumstances would have furnished." Although the words "properly" and "sufficient" cannot be said to be strictly synonymous, or so to a degree that they may be uniformly used interchangeably, it is plainly manifest that in the connection in which they were used in the instructions of the court, the terms "properly lighted" and "sufficient light" meant precisely the same thing and could not as thus used be reasonably interpreted to mean anything more or less than what the court had elsewhere in its charge in effect said, that the company was required to furnish such light as it was necessary to keep under the conditions generally existing at and about its station at Calistoga for the due protection of its patrons having business at night at said station. In other words and briefly, a "proper light" or a "sufficient light," within the evident meaning of those terms as they were used in the court's charge, was that degree of light which the court had correctly told the jury it was the duty of the defendant to furnish, in view of and considering all the conditions surrounding the station at Calistoga, in point of the character and extent of its traffic there.

The instruction, numbered 8 in the record, which the defendant requested, but the court rejected, was properly disallowed. It would have told the jury, if read to them, that if they should find "that the plaintiff knew that it was dangerous for her to attempt to get off the train in the extreme darkness, and would not have attempted to do so but for the fact that she was perfectly familiar with the station, its platform and surroundings, and believed, on account of such knowledge, that she could alight in safety" then they should find that she assumed the risk of so attempting to alight, and "your verdict should be for the defendant even though you should find that the defendant was negligent in providing lights at its station." What we have heretofore said concerning the application of the doctrine of the assumption of risk to the facts of this case constitutes a reply to the claim that the court erred by its refusal to give the foregoing instruction. Under our conception of the situation here as presented by the evidence, the instruction would have been misleading, and, indeed, erroneous.

[7] The principle declared in the rejected instruction, numbered 9, was in substance given in the court's charge, and the refusal to allow said instruction was, therefore, not prejudicial.

We have now examined the principal assignments of alleged error presented on these appeals, and have therein found no occasion for remanding the cause.

The judgment and order are accordingly affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.



20 Cal. App. 595

**LIPPITT & LIPPITT v. SMALLMAN et al.**  
(Civ. 1,108.)

(District Court of Appeal, First District,  
California, Dec. 12, 1912. Rehear-  
ing Denied Jan. 10, 1913.)

**INJUNCTION (§ 235\*)—BOND—LIABILITY.**

Where plaintiff applied to the judge for a temporary injunction, and the judge issued an order which, by its terms, became operative as a temporary injunction on plaintiff giving bond in a specified sum, and on the same day, and to secure the benefit of the injunction, a bond in the specified sum, and referring to the temporary injunction, was approved and filed, and the temporary injunction was served on defendant and remained in force until a future date, when, on a hearing, it was dissolved, on order to show cause whether it should be continued or not, the bond was the instrument required by the order of the court, and the sureties thereon were liable to defendant.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 529-537; Dec. Dig. § 235.\*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Lippitt & Lippitt against Amelia H. Smallman and others. From a judgment for plaintiff, certain of the defendants appeal. Affirmed.

Frank V. Bell, of San Francisco, for appellants. Reuben G. Hunt, of San Francisco, for respondent.

**KERRIGAN, J.** This is an appeal in an action brought to recover upon an undertaking given for the issuance of an injunction in a case entitled, "Amelia H. Smallman et al. v. Lippitt & Lippitt," in which action the undertaking in question was given by the plaintiffs therein, with appellants Frank V. Bell and Michael Kraker as sureties. The prayer in that action was for a judgment enjoining and restraining Lippitt & Lippitt from procuring, in a prior action, a writ of assistance pending the determination and judgment of the court in the action. The judge before whom the suit was pending, in response to an application by the plaintiff therein for a temporary injunction, issued on the 19th day of July, 1909 (the day the suit was filed), an order entitled, "Order to show cause and restraining order," which cited the defendant to appear at a time and place specified, and show cause why it should not be "enjoined and restrained, pending the determination of the above-entitled action," from committing certain acts. The order further provided: "It is further ordered that, pending the determination and judgment of the court in this action, said defendant Lippitt & Lippitt be enjoined and restrained" from doing certain acts "upon the plaintiff giving a bond in the sum of \$500." In the present action judgment went for plaintiff in the sum of \$300 and costs against defendants Bell and Kraker, who have appealed from the judgment, and also from an

order denying their motion for a new trial.

It is claimed by appellants that the prayer of the complaint in the action above referred to, and in which they filed the undertaking here sued upon, simply asks for a judgment for an injunction and for an order to show cause why a temporary injunction should not issue, but does not ask for a temporary restraining order pending the hearing of the order to show cause; and in view of the fact that no injunction was ever issued in that action, as asked for in the complaint, and that no such injunction or restraining order, as was mentioned and referred to in the undertaking upon which this action is brought, was ever issued, the plaintiff is entitled to no relief. In other words, they invoke the old doctrine of *strictissimi juris*, claiming that sureties on statutory bonds, having no personal interest in the litigation, can stand upon the express terms of their undertaking, and cannot have their liability extended beyond those terms. We think the facts of this case do not bring appellants within the rule by them invoked. For a clear understanding of the case, a further recital of facts, as alleged in the complaint and found by the court, is necessary.

As before stated, on July 19th the plaintiffs in the action heretofore referred to applied to the judge for a temporary injunction, whereupon the judge issued an order which, by its terms, became operative as a temporary injunction upon the plaintiffs giving a bond in the sum of \$500. On the same day, and for the purpose of securing to the plaintiffs the benefit of this temporary injunction, the sureties executed the bond in question. On the next day, in order to have this order become operative as a temporary injunction, the plaintiffs filed the order and bond. The bond was intended to, and did refer to, this particular temporary injunction, and was for the amount named in the order, and was approved by the judge. The temporary injunction was served upon Lippitt & Lippitt, and remained in force until the 31st day of August, 1909, when upon a hearing it was dissolved.

The claim of appellants that the order made by the court was a "restraining order," and not the one contemplated by the bond, cannot be maintained. No restraining order was ever granted. It is the substance of the order and not its title that determines its legal effect and significance. Whatever distinction may exist between a restraining order and a temporary injunction is not material to the issues in this case, for here there was no "restraining order." The order provided, not for a restraining order that should be, upon the giving the bond, in force only until the hearing upon the order to show cause why a temporary injunction should not issue, but that a temporary injunction should issue upon the giving of the bond. If

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the order had been that defendant be enjoined and restrained until the hearing of the order to show cause, there might be, under the authorities cited, some merit to the contention of appellants.

Under these conditions, the only question to be considered upon the order to show cause was whether the temporary injunction then in force should be continued or not, and not whether such an injunction should issue, for such injunction had already issued and was in full force and effect by reason of the giving of the bond. The defendant in the action wherein the injunction was issued was in no wise enjoined or restrained, and there was nothing in force until the bond was given, and no other injunction or restraining order had ever been issued in the case. The order provided for a temporary injunction in the first instance, and the bond that was given complied exactly with the terms of the order, was executed on the same day as the order, and was the very instrument required by the court to give its order vitality. Without it, by the terms of the order, it was to have no force or effect. There can therefore, under these circumstances, be no doubt that the parties had in mind, when they executed the bond, the particular injunction granted by the court. Had there been two orders restraining defendants, and some confusion as to which order the bond referred to, the cases cited by appellants would have some force.

The judgment and order are affirmed.

We concur: LENNON, P. J.; HALL, J.

20 Cal. App. 641

Ex parte MACDONALD. (Cr. 273.)

(District Court of Appeal, Second District, California. Dec. 16, 1912.)

**1. JURY (§ 33\*)—CRIMINAL PROSECUTION—RIGHT TO JURY—"VICINAGE."**

Pen. Code, § 785, providing that where bigamy or incest is committed in one county, and accused is apprehended in another, the jurisdiction is in either county, is a legislative declaration of the place of trial in such cases, and is not invalid as in derogation of the right to trial by jury, which, by the Constitution, remains inviolate; the word "vicinage" in the rule requiring a jury of the "vicinage" or county applying to a jury of the county wherein trial is had.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 226-232; Dec. Dig. § 33.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7316, 7317.]

**2. JURY (§ 33\*)—CRIMINAL PROSECUTION—RIGHT TO JURY.**

A statute, guaranteeing to accused the right to trial by jury in the place by law designated as the place for trial, confers on him the right contemplated by the Constitution under which the right to trial by jury shall remain inviolate.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 226-232; Dec. Dig. § 33.\*]

**3. CRIMINAL LAW (§ 106\*)—VENUE.**

The rule that the trial of an offense must be in the county where committed does not apply where, under the Constitution, the place of trial is subject to legislative determination.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 106.\*]

Application for a writ of habeas corpus by John A. MacDonald for his discharge from custody under sentence for bigamy. Denied.

G. M. Spicer, of Long Beach, for petitioner. J. W. Joos, of Los Angeles, and W. T. Helms, for respondent.

PER CURIAM. Petitioner alleges that he was apprehended and informed against in the county of Los Angeles, being charged with the crime of bigamy, alleged to have been committed in the county of San Diego; that, upon the calling of the cause for trial, he entered a plea of guilty, and was sentenced to state prison for a term of four years. It is his contention that his imprisonment is unlawful because of a want of jurisdiction in the superior court of Los Angeles county, and that the respondent sheriff has no warrant for depriving him of his liberty, because of the void character of the judgment.

[1] Section 785 of our Penal Code provides: "When the offense, either of bigamy or incest, is committed in one county and the defendant is apprehended in another, the jurisdiction is in either county." This section is a legislative declaration that the venue in cases of this character may be in the county where the defendant is apprehended. We find no constitutional restriction upon the legislative power to determine the "venue," which is synonymous with "place of trial." The place of trial in offenses of this character has been determined to be either in the county where the offense was committed or where the accused is apprehended. It is claimed by petitioner that the section above referred to is unconstitutional as in derogation of the right to trial by jury, which by the Constitution remains inviolate; that this right of trial by jury guarantees a common-law jury, which is by a jury of his peers of the vicinage or county where the crime is alleged to have been committed. The position taken by petitioner as to his right to a trial by a jury of his peers in the county or vicinage is unassailable. The word "vicinage" is subject to various definitions, mainly depending upon the sense in which it is used. The Standard Dictionary defines it as the neighborhood, or, as applied to juries, "in modern use, a jury of the county wherein trial is had."

[2] We are of opinion, therefore, that, if the statute guarantees to the accused the right of trial by jury in the place by law designated as the place for trial, it confers upon him the right contemplated by the Constitution.

[3] The authorities cited, to the effect that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes Cal.Rep. 127-130 P.—39



the trial must be in the county where the offense was committed, have no application in this state, where, under the Constitution, the place of trial is subject to legislative determination.

Writ denied.

20 Cal. App. 633

**BICKEL v. MUNGER et al.** (Civ. 1,178.)  
(District Court of Appeal, Second District,  
California. Dec. 13, 1912.)

**1. EXCHANGE OF PROPERTY (§ 3\*)—FRAUD—REPRESENTATIONS OF EXISTING FACTS—MATTERS OF OPINION.**

Representations as to what a ranch will produce in the future are not representations of existing facts, but are merely speculative surmises, and are not ground for rescission of an exchange of lands.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 3, 5, 7; Dec. Dig. § 3.\*]

**2. EXCHANGE OF PROPERTY (§ 3\*)—FRAUD—REPRESENTATIONS OF EXISTING FACTS—QUALITY OF SOIL.**

Representations by an owner of a fruit ranch as to the quality of the soil and like matters while exhibiting the property to a prospective purchaser, made with knowledge that the prospective purchaser is ignorant and inexperienced in such matters, and with knowledge that he will rely thereon are, if false, ground for rescission of a contract of exchange.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 3, 5, 7; Dec. Dig. § 3.\*]

**3. EXCHANGE OF PROPERTY (§ 3\*)—FRAUD—REPRESENTATIONS OF EXISTING FACTS—AGE AND PRODUCTIVENESS OF ORANGE TREES.**

Representations by an owner of a fruit ranch that orange trees were young, while, as a matter of fact, they are old, made after concealing the age of the trees by piling earth about their trunks, and false representations that the trees had produced a specified number of boxes of oranges in a season, are material representations of existing facts on which a prospective purchaser may rely, and are ground for rescission of a contract of exchange.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 3, 5, 7; Dec. Dig. § 3.\*]

Appeal from Superior Court, Los Angeles County; Benjamin F. Bledsoe, Judge.

Action by Elizabeth Bickel against Bertha Munger and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Gray, Barker, Bowen, Allen, Van Dyke & Jutten, of Los Angeles, for appellants. Robert A. Todd, Williams, Goudge & Chandler, and Harry L. Dearing, all of Los Angeles, for respondent.

**JAMES, J.** Appeal from a judgment entered in favor of plaintiff, and from an order denying the motion of defendants for a new trial.

This action was brought to enforce rescission of an agreement for the exchange of real properties. Defendants Munger were the owners of a ranch, which was located near Baldwin Park, in the county of Los

Angeles, and plaintiff was the owner of a lot located in the city of Los Angeles, upon which was erected a building containing several flats. Plaintiff's attention was attracted by an advertisement inserted by a real estate broker, which represented defendants' property to consist of 15 acres, highly improved, with buildings, tankhouse, windmill, grove of 5 acres full-bearing oranges of the finest varieties together with lemons, peaches, apricots, and other fruits, which would net, with proper care, \$4,000 per year. Negotiations were entered into through the agent, which resulted in the exchange of the properties being made. Prior to the conclusion of the deal, plaintiff visited the ranch of defendants with her two sons, a daughter, and son-in-law, and was shown over it by defendant E. M. Munger. In her complaint it was alleged, and the court found the facts to be, that defendants, for the purpose of influencing and inducing plaintiff to make the exchange of properties, represented to plaintiff that the 15-acre ranch was highly improved; that 5 acres thereof was in young orange trees of the finest varieties in full bearing; that 10 acres thereof was in assorted table grapes, six or seven years old; that the vineyard would yield from 15 to 20 tons of grapes to the acre, and that the grapes would bring about \$20 per ton; that a packing house in the neighborhood would pick and haul the grapes, and plaintiff would have nothing to do in marketing the grapes, except to count the boxes as they were hauled away; that the orange trees had produced 450 boxes of oranges during the year 1908; that the soil was nice sandy loam, all similar to that shown to plaintiff; that the ranch was worth more than \$1,000 an acre, and was a bargain at \$15,000; that it was a very profitable place, and would net \$4,000 a year on the investment; that there was a good pumping plant on the ranch, for which the defendants Munger had paid \$2,500. These representations the court found to be untrue, and particularly that the Munger property was not at the time of the exchange, nor at any other time, worth more than \$7,500; that the orange trees were not young trees, nor of the finest varieties; that a large part of the orange trees mentioned were seedlings, and the balance were trees budded to the old stumps of a lemon orchard, which had been cut down nearly level with the ground and earth heaped around the base of each tree so as to hide the stumps from view, and that the trees were budded in the year 1900 or 1901, and many of them subsequently rebudded; that the vineyard had never produced crops in a quantity which would anywhere near equal the quantity that Munger represented the vineyard would produce, and that the vineyard could not, on account of the nature of the soil, produce the quantity of grapes rep-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

resented; that there was no grape-packing house in the neighborhood of the ranch, or anywhere in that vicinity; that the orange trees were not in full bearing, and that in the year 1908 they produced less than 200 boxes of oranges; that the soil of the larger part of the ranch was inferior to that shown to plaintiff; that a wash, or old river bed, ran diagonally through the rear part of the ranch and constituted a large portion of the ranch; that such portion contained very little soil and consisted almost wholly of sand and rock; that a large portion of the remainder of the ranch was rocky and of poor quality; that it would be impossible to realize a net sum of \$4,000 a year out of said ranch, or a net amount anywhere near that sum; that defendants Munger did not pay \$2,500 for the pumping plant on said ranch, but only about the sum of \$1,200. The court further found that the plaintiff, at the time of making the exchange of properties, was 52 years of age, and had been a widow only a short time; that she had never followed any occupation or business other than that of housewife; that her two boys, of the age of 23 and 19 years, respectively, and the daughter and son-in-law had never owned or lived upon a fruit ranch, and had no experience or knowledge concerning fruit farming or fruit raising; that plaintiff was of a credulous disposition, and did not have ordinary business experience, and was lacking in ordinary business intelligence; further, that at the time plaintiff inspected the ranch of defendants she only went over a portion of it, and made only a superficial examination of the orchard and vineyard and soil; that she did not make a more particular examination because of the representations made to her by Munger as to the superior character of the orange trees and vines, and their large producing qualities and the uniform quality of the soil. There was ample evidence to sustain all of these findings. And it was shown by the testimony that plaintiff gave notice of rescission as soon as she had discovered, by actual experience and observation upon the property, that the representations made to her by Munger as to the condition, value, and productive qualities of the ranch were untrue.

[1] The contention is made on behalf of appellants that, conceding, as it must be conceded, because there was evidence to sustain the findings of the court, that the representations as found were made, and that they were untrue, they were not such representations as plaintiff was authorized to rely upon. It is insisted that the false statements all belong to a class to be denominated as simplex commendatio, or those commonly and customarily used by a person in praise of his own property. In so far as the representations expressed a prophecy as to what the ranch would produce in the future, no doubt those matters were matters of opin-

ion, which a person must accept as speculative surmises merely, and not as a representation of existing facts. *Lee v. McClelland*, 120 Cal. 147, 52 Pac. 300; *Rendell v. Scott*, 70 Cal. 514, 11 Pac. 779; *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58. In the case of *Rendell v. Scott* it is asserted that representations that a ranch was very rich and productive and would produce 50 bushels of wheat to the acre, and that a portion was good alfalfa land and another portion rich in mineral deposits, were to be considered as matters of opinion, rather than as false representation of facts, where there was no averment excluding the idea that personal inspection had been had by the purchaser.

[2] We do not doubt, however, but that a cause of action might be predicated upon representations made as to condition and quality of soil and like matters, even though the same was exhibited to the party complaining, where such party was ignorant and inexperienced in such matters, and the party making the representations knew this, and knew that the person with whom he was dealing relied upon him to express the truth as to such things. The court here found that plaintiff and her sons, son-in-law, and daughter were inexperienced in the business of ranching, and that plaintiff relied upon the representations made to her by Munger, and that the representations were made for the purpose of inducing plaintiff to make the exchange, and with the intention on the part of Munger that she should act in reliance upon such representations.

[3] Excluding from consideration the finding as to the representations regarding the future bearing capabilities of the trees and ranch, there remain several statements as to material acts, respecting which false representations are found to have been made by Munger, which must be considered actionable. The five acres of young orange trees represented by Munger to be of the finest varieties in full bearing were not, in fact, young orange trees, but trees which were the result of budding upon old lemon roots. Moreover, deceit had been practiced by Munger in order to make it appear that the orange orchard was as represented; for earth had been piled about the trunks of the trees so as to conceal the old stumps, which were discovered by plaintiff after the exchange had been made. The representation that the orange trees had produced 450 boxes of oranges in the year 1908 was a material representation, and a representation as to an existing fact, upon which plaintiff was entitled to rely. In determining the then bearing quality of the trees, the amount of fruit produced in the past would be a material fact to be taken into consideration. The representation that the pumping plant had cost \$2,500, when it had only cost one-half that amount, was also a representation of a material fact. And if the plaintiff had



only relied upon these representations which we have last referred to, excluding all of those which expressed the opinion of defendant Munger, sufficient facts are made to appear to support the judgment of the court. We think that under the findings of the court the judgment as entered was not erroneous, and that the evidence sustains such findings.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(20 Cal. App. 611)

CENTER v. KELTON, Sheriff. (Civ. 1,025.)

(District Court of Appeal, Third District, California. Dec. 12, 1912.)

**1. FRAUDULENT CONVEYANCES (§ 146\*)—PERSONAL PROPERTY—TRANSFER OF POSSESSION.**

A judgment debtor, F., having married plaintiff's daughter, rented from plaintiff a small farm and house, where they all lived together. He fed certain domestic animals while using them, but sold to plaintiff certain cows which had been kept on the place for about a week before that date, and soon after took them to pasture. Plaintiff never saw the animals after they left her place, and said nothing about their being her property until they were attached as the property of F. He also purchased certain grain, and had it hauled to the farm and kept there for sale. This he sold to plaintiff and a few days prior to its attachment, plaintiff had it moved out of the barn into the yard, where it was when it was levied on. None of the grain was marked, and all of it was found by the sheriff on the place where F. was living when he attached it. *Held*, that the alleged sale of the property to plaintiff was invalid as against the levy under Civ. Code, § 3440, providing that a sale of personal property, unaccompanied by immediate delivery and actual and continued change of possession, shall be void as to creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 454-456, 471, 472, 482-484; Dec. Dig. § 146.\*]

**2. TRIAL (§ 367\*)—TRIAL BY COURT—ARGUMENT OF COUNSEL—RIGHT TO ARGUE.**

Code Civ. Proc. § 631 et seq., providing for trials by the court, does not expressly provide that a party may argue a case, as a matter of right, though, if there is any room for argument, it is the better practice to permit it.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 879, 886; Dec. Dig. § 367.\*]

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Action by Mary Center against E. A. Kelton, as sheriff of Napa County. Judgment for plaintiff, and defendant appeals. Reversed.

Clarence N. Riggins, of Napa, for appellant. Edw. S. Bell, of Napa, for respondent.

**BURNETT, J.** The action was in replevin for one mare, one stallion, two cows, two yearlings, three calves, fifty sacks of wheat, eight sacks of barley, five sacks of oats, and eight sacks of bran. Defendant denied the ownership of plaintiff, and justified the taking, under a writ of attachment, against the

property of one Richard Fealy, and he alleged in his answer that plaintiff had replevined the property from him in this action, and he therefore demanded its return or its value in money. The value of the property is shown by the pleadings to be the sum of \$500. Plaintiff claimed to have acquired it from Fealy in several lots at intervals covering about 17 months, and there is nothing to indicate the separate value of the several portions. The dates of the alleged sales are as follows: January 20, 1910, two calves; May 28, 1910, mare and stallion; September 26, 1910, wheat and barley; January 23, 1911, two calves; June 5, 1911, two cows. It does not appear clearly just when the oats and bran were purchased but it is a fair inference that it was about the same time as the wheat and barley.

The defense is based on section 3440 of the Civil Code, and it is insisted by appellant that there was no "immediate delivery" or "actual and continued change of possession," which the law exacts to protect the property from the reach of the creditors of the vendor.

[1] Richard Fealy married the plaintiff's daughter June 12, 1910. Mrs. Center had a small farm and house in St. Helena, where she and her daughter had been living since April, 1909, and after his marriage Fealy came to the place, took charge of the work, and has lived there ever since. He leased the property from plaintiff, and she has continued to occupy the dwelling house with him and his wife and Mrs. Fealy's two boys and plaintiff's brother, a helpless old man. The plaintiff has had nothing to do with the farming or with the management of the place. Fealy fed the animals that he used, and paid for their feed, if he was using them. Plaintiff does not know what cows he milked; but those that could not be milked were put in pasture. The two cows plaintiff claims to have purchased on June 5th had been bought by Fealy and kept on this place for about a week before this date. They were soon after taken by him to pasture. Fealy drove the stock to pasture and made all the arrangements. Mrs. Center never saw the animals after they left her place. The two cows were driven to the Moses Stice place, and Fealy said nothing about them being the property of Mrs. Center, and they remained there until attached. There is no evidence of public notice that plaintiff claimed any interest in the cows until after the attachment. As is apparent from the foregoing recital of facts, they were cared for and treated by Fealy as his own property, and there was no "open, visible change, manifested by such outward signs as render it evident that the possession of the vendor had wholly ceased." *Caboon v. Marshall*, 25 Cal. 201. Fealy bought the wheat and barley, had it hauled to the farm, and kept it there for sale. Plaintiff purchased it from him, moved it from the lower to the upper floor in the barn.

and fed some to her poultry. A few days before the attachment, the man who was moving the barn took the grain out and piled it in the yard, where it was when levied upon. The evidence is meager as to the bran and oats; but the manner in which plaintiff testified concerning them, in connection with the wheat, gives rise to the inference that she purchased said bran and oats from Fealy. None of the grain or feed was marked or designated in any way, and all of it was found by the sheriff on the place where Fealy was living, and which he held under lease.

Applying the doctrine of the decisions to the foregoing facts, there would seem to be no escape from the conclusion that we have a case for the application of said section 3440 of the Civil Code. The question involved has been many times the subject of careful consideration from the appellate courts. It is sufficient to refer to the following decisions: *Stevens v. Irwin*, 15 Cal. 503, 76 Am. Dec. 500; *Woods v. Bugbey*, 29 Cal. 473; *Callender v. McLeod*, 74 Cal. 376, 16 Pac. 194; *Ruddle v. Givens*, 76 Cal. 457, 18 Pac. 421; *Murphy v. Mulgrew*, 102 Cal. 547, 36 Pac. 857, 41 Am. St. Rep. 200; *George v. Pierce*, 123 Cal. 172, 55 Pac. 775, 56 Pac. 53; *Sequeira v. Collins*, 153 Cal. 426, 95 Pac. 876; and *Guthrie v. Carney*, 124 Pac. 1045.

There is no dissent from the principles stated in one of the opinions that: "The vendor cannot be allowed to remain in the apparent sole and exclusive possession of the goods after the sale, for that would be inconsistent with such an open and notorious delivery and actual change as the statute exacts in order to exclude from the transfer the idea of fraud. Care should be taken, in such cases, to keep in view the object of the statute, and to exact nothing less than a substantial observance of its salutary provisions." Of course, the object of the statute is to require notice to the world of the transfer of personal property in order that creditors may be justly protected. It is easy enough, as it is, for designing debtors to place their property beyond the reach of honest debts, and the rule prescribed by the statute should not be relaxed by judicial interpretation. It may be said, also, that the statute does not impose any great hardship upon the parties in case of a transfer made in good faith. Ordinarily there should be little difficulty in effecting an "immediate delivery" and an "actual and continuous change of possession." But, however honest the sale may be, and whatever hardship may be inflicted upon the vendee, this furnishes no sufficient reason for disregarding the plain provisions of the statute or setting at naught a wholesome and salutary rule for the promotion of personal honesty and commercial security. *Brown v. O'Neal*, 95 Cal. 267, 30 Pac. 538, 29 Am. St. Rep. 111.

As suggested by appellant, the circumstances attending the sale of the cows can be apt-

ly compared with the facts revealed in *Ruddle v. Givens*, *Murphy v. Mulgrew*, and *George v. Pierce*, supra, while the facts in *Callender v. McLeod*, supra, are somewhat analogous to those here in reference to the grain. It may be said, indeed, that, in several of the cases wherein the court held that the attempted transfer was void, the evidence in favor of the vendee was stronger and more persuasive than in the case at bar as to the particulars aforesaid. The other alleged purchases stand upon a somewhat different footing; and, while they present a debatable question, we are not prepared to say that the evidence compels the conclusion that they were fraudulent.

[2] Appellant complains because he was not permitted to argue the case at the conclusion of the testimony. The record shows the following indorsement made by the learned trial judge: "At the close of the case, counsel for defendant asked leave to argue the case; but the court, believing plaintiff had made out a complete case against defendant, denied the request." It is admitted by appellant that the extent to which a trial court may go in declining to hear arguments is undefined; but it is insisted that: "Where a conflict in evidence presents itself on which his decision will be final, it would seem to be his duty, not only to the litigants, but to that high sense of his responsibility, as the exponent and representative of justice, which should animate the breast of every judge, to hear and consider with unbiased mind whatever may be fairly presented by each of the parties, and to obey the spirit of that admonition to trial juries in like position, neither to express nor form an opinion in the case, until it is finally submitted." There is manifestly a distinction between a case where an issue is submitted to a jury and where it is to be determined by the trial judge. In the former, if the question is debatable, argument is a matter of right. Section 607, Code Civ. Proc.; *Douglass v. Hill*, 29 Kan. 527. In the *Douglass Case*, Mr. Justice Brewer, speaking for the court said: "This is no matter of discretion on the part of the court, but an absolute right of the party. Courts doubtless may prevent their time from being unnecessarily occupied by prolix arguments, and so may limit the time which counsel shall occupy. And if the restriction is a reasonable one, in view of the questions involved and the testimony presented, there will be no error. But limiting the time of an argument and refusing to permit any argument at all are entirely different matters. The one is the exercise of a discretion; the other is a denial of a right." The statute does not expressly provide for argument in the case of a trial by the court (section 631 et seq., Code Civ. Proc.), and there would seem to be reason for leaving it to the wise discretion of the judge; but, where there is room for argument, it would certainly be the better practice to permit it. If the trial judge, at the



close of the evidence, is entirely satisfied as to his decision, argument would generally be of no avail; but even then counsel might be able to make suggestions that would influence the judicial mind.

However, this point need not be considered further, as we think, upon the other ground, the judgment must be reversed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

20 Cal. App. 616

**LIST v. MOORE et al. (Civ. 1,027.)**

(District Court of Appeal, Third District, California. Dec. 12, 1912.)

**1. VENDOR AND PURCHASER (§ 334\*)—CONTRACT OF SALE—FORFEITURE—RESCISSION.**

Where a contract for the sale of real estate provided that time was of the essence thereof, and that the expiration of the time specified for payment of the balance of the price as limited by the contract, with the fact that no deed was of record from the vendor to the vendee, should conclusively establish default without suit to extinguish the contract or declare a forfeiture, the vendee being in default, a letter written to him notifying him that he was in default, and had forfeited any right or claim to proceed to purchase the property constituted a notice of forfeiture and not a rescission, and hence the vendor was under no obligation to return any part of the purchase price paid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959-980; Dec. Dig. § 334.\*]

**2. VENDOR AND PURCHASER (§ 335\*)—FORFEITURE—RETENTION OF PRICE PAID.**

The right of a vendor to retain the part of the purchase price paid, after the vendee's default, is independent of any clause in the contract for forfeiture or right to retain part of the purchase money as liquidated damages, and hence the validity of such clause is immaterial.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 981-983; Dec. Dig. § 335.\*]

**3. VENDOR AND PURCHASER (§ 335\*)—VENDOR'S DEFAULT—RESCISSION—VENDOR'S LIABILITY—RETURN PAYMENTS.**

It is only where the vendor after the vendee's default agrees to a mutual rescission that the vendee is entitled to a return of the purchase money paid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 981-983; Dec. Dig. § 335.\*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by R. D. List against A. A. Moore, Jr., and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Chas. W. Slack, of San Francisco, and D. P. Hatch, of Los Angeles, for appellant. Goodfellow & Eells, of San Francisco, for respondents.

**BURNETT, J.** The action is to recover from the vendor moneys paid by the vendee under contracts of sale of real estate, in which the vendee only was in default, not being willing or able to make the other

payments within the time limited or at all. There were two contracts. The first is dated June 30, 1902, executed by the defendant Florence B. Moore and others, and conditioned for the sale of the property to one J. W. McCauley. This contract provided for a purchase price of \$125,000, of which \$5,000 should be paid when the instrument was executed, \$55,000 on or before October 28, 1902, and the remaining \$65,000 on or before the 1st day of March, 1903, all deferred payments to bear interest at the rate of 5 per cent. per annum. It was further provided that "time is of the essence of this contract, and, in the event of a failure to comply with the terms hereof by the party of the second part, the party of the first part shall be released from all obligation in law or equity to convey said property, and the party of the second part shall forfeit all right thereto." The initial payment of \$5,000 was made, but not the second payment of \$55,000. As to the latter, however, an extension of time was granted to March 30, 1903, with a proviso that the original document held by McCauley should be deposited with H. W. O'Melveny, of Los Angeles, "with instructions to him to return said contract to Florence B. Moore, on March 30, 1903, if the terms of said contract were not lawfully carried out by McCauley on or before that time, and, in that event, the said H. W. O'Melveny shall thereupon surrender said contract as above specified to said Florence B. Moore. Thereupon, the same shall be of no further effect or force, but shall be considered canceled and terminated, and the moneys heretofore paid, and the moneys hereinabove specified, shall be considered as liquidated damages accruing to said Florence B. Moore et al. Upon the surrender of said contract to said Florence B. Moore et al., as above stated, the same is to be null and void, and of no further effect, and the said McCauley is to have no claim, directly or indirectly, to any part of the moneys heretofore paid, or hereinabove specified." On the 30th of March, 1903, McCauley was again in default and unable or unwilling to make any payments, and thereupon the original document was surrendered to Mrs. Moore. On the 7th day of April, 1903, McCauley's contract having expired, Mrs. Moore, through her attorneys, entered into a new contract with Nathan Cole by which she agreed to sell to him the property for the sum of \$115,000, payable on or before October 1, 1903, and she acknowledged the receipt of two drafts aggregating \$5,000. Time was of the essence of this contract, also, and it was provided that "the expiration of the time herein limited, with the fact that no deed is of record from the said Florence B. Moore to the said Nathan Cole, Jr., shall conclusively establish default, and no suit, at law or in equity, shall be necessary to be maintained to avoid or extinguish this contract, or de-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

clare any forfeiture." Some extensions were made, and according to the last one the time would expire on December 1, 1903, but, on account of Mr. Cole's illness, the parties treated his right to purchase as continuing until January 1, 1904. Plaintiff brought the action as assignee of McCauley and Cole.

The court found that the contract with McCauley became canceled and terminated for the reason that he "was at all times unable or unwilling to carry out or perform the same on his part, although the defendants were at all times ready and willing to perform the same on their part; that the said J. W. McCauley did not pay or offer to pay prior to the 30th day of March, 1903, or at all, the moneys, or any portion thereof, required to be paid by him by the terms of the said contract, and by reason thereof the same became of no force or effect on and after the 31st day of March, 1903." There are similar findings as to the contract with Cole. Indeed, it is not contested that there was default on the part of McCauley and Cole as found by the court, but the defense is that the contract in each instance was rescinded and abandoned, and therefore the claim is made that the vendee was entitled to a return of the part of the purchase price paid. The court found that there was no rescission and no abandonment, and this finding presents the controverted question.

The asserted rescission was attempted to be shown by Mr. Cole. In the transcript we have the following record of his testimony and the proceedings in connection therewith: "My recollection is that about the 1st of January, 1904, my contract with Mr. Moore was annulled or rescinded by Mr. Moore in a letter to me. It was rescinded. Mr. Goodfellow: Q. You don't mean to say that he said it was rescinded, do you? A. Well, I don't know what the language was, but that was the purpose of the letter. Mr. Slack: The letter which was introduced in evidence, Mr. Goodfellow, was this: It was received about the 4th of January, 1904, and informed Mr. Cole that his contract was rescinded, and had been— Mr. Goodfellow: Do you mean to say that the word 'rescinded' was used? Mr. Slack: No; but that the contract was at an end—I think that was it—and had been for some weeks or some time. The witness: I remember that the purport of the letter was that, that the contract was ended. That is the idea that I had, that it was terminated. Mr. Slack: We will accept Mr. Moore's recollection of that as a fact that a letter written to Mr. Cole about this time, January 3, 1904, stated that his contract was at an end, and had been for some time. Mr. Moore: For the reason that he had been unable to make the remaining payments. Mr. Slack: And we will ask also that that be considered as being a statement of the letter. The witness: That is correct." In explanation of the reference to the contents of the letter, it may be stated that

this case was partly tried before April 18, 1906, and the letter and the record of what it contained were destroyed in the great catastrophe of that date. The witness further testified that he "was not able to raise the money by the end of December, 1903, or the 1st of January, 1904. Mr. Moore, so far as I know, and Mrs. Moore, were perfectly willing at all times to sell me that property if I could pay the money according to the contract up to the termination of the arrangements which were terminated by letter." Then the following questions and answers appear in the transcript: "Q. Then your contract ran out because you were unable to pay the money within the time specified in the contract? A. That is right. Q. And afterwards Mr. Moore wrote to you and told you that the contract had run out, and had been run out for some time? A. Yes, sir. Q. And that is the end of the transaction? A. Yes, sir; that is the end of the transaction."

[1] From the foregoing it is clear that the asserted rescission consisted in the notification of the vendee by the vendor that his contract was at an end, and this, after the vendee was in default according to the terms of his contract, and had forfeited any right or claim to proceed to the purchase of the property and had expressly agreed that "the expiration of the time herein limited, with the fact that no deed is of record from the said Florence B. Moore to the said Nathan Cole, Jr., shall conclusively establish default, and no suit, at law or in equity, shall be necessary to be maintained to avoid or extinguish this contract, or declare any forfeiture." It would be rather singular if under the circumstances the mere notice given to the contemplated purchaser by the owner of the land of a fact that was expressly provided in the agreement and of which each had knowledge would operate to change the legal effect of said fact to the detriment of the said owner. The contract was at an end either with or without any formal notice. The purpose of the letter was undoubtedly to inform Mr. Cole that no further extension of time would be granted, but, to say that it established rescission grows out of a misconception, it is submitted, of the significance of that term, and can find support only in the inept application of certain decisions of the courts. Rescission implies, of course, the restoration of the parties to the same situation, and the same terms as existed when the contract was made. It requires the surrender of any consideration or advantage secured by either party. But the only fair interpretation of the notice here, considered in connection with the terms of the contract, is that no further affirmative action should be taken by either party to execute said contract, and that the status of each should remain as provided without further change. It is true that rescission as well as an abandonment of a



contract may be shown by circumstantial or direct evidence or both, but the facts, fairly considered, do not compel the conclusion, in opposition to the finding of the court, that the owner of the land was so gratuitously generous as to voluntarily surrender the valuable right secured to her by the terms of the contract. And it may be said that there is nothing illegal or unconscionable disclosed in her conduct. Adopting the language of respondents: "As the contract had a limit and as time was of the essence of the contract, she was not obliged to keep her property off the market forever, or, in the alternative, to pay them back what they had paid for an extension of time to enable them to speculate with the property and avail themselves of it if the market went up, otherwise turn it back to Mrs. Moore."

It must be admitted that some obscurity is found in certain decisions as to the correlative rights of the parties to contracts analogous to the one before us and appellant's position is not without apparent support in some of the cases. Two of these, upon which he relies, we proceed to notice. In *Drew v. Pedlar*, 87 Cal. 443, 25 Pac. 749, 22 Am. St. Rep. 257, it is held that "where a contract for the sale of land provided for a forfeiture of all right to a conveyance, and that the purchase money paid should be as liquidated damages, in case of nonfulfillment of the terms of future payments by the purchaser, and it appears that full payment of the residue of the purchase money was tendered and a deed demanded ten months after maturity, and that the vendors refused to accept the tender, or to return the purchase money paid, and elected to rescind the agreement, the purchaser may maintain an action to recover from the vendors the installment of purchase money paid." Of course, if the vendors elected "to rescind the agreement," they should restore the money. The decision was really groundless, though, upon the proposition that the stipulation as to liquidated damages was void under the provisions of sections 1670 and 1671 of the Civil Code, and it followed the general rule stated in *Field on Damages*, § 508, holding that the vendor is entitled to recover "the difference between the actual contract price and the actual value of the land at the time of the breach, if the property shall have declined in value." But this case, with others, is reviewed in *Glock v. Howard & Wilson*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, and it is declared that "the misleading feature in *Drew v. Pedlar*, supra, comes from the lengthy statement of facts, from which it appears that all the plaintiff vendee did was to make tender long after his default, which tender the vendor refused to accept. But the vendee likewise pleaded a mutual abandonment and rescission, and it appears from the opinion the pleading as to these matters was not denied." It is furthermore said, in reference to the *Drew* de-

cision, that "what is there said as to the covenant for liquidated damages being void is, as we have seen, of no consequence in contracts such as that and the one at bar, where the liquidated damages are expressed as the moneys paid by the vendee, for in all such cases, as has been shown, the vendor is entitled to retain these moneys, whether designated liquidated damages or not." The case of *Pierce v. Staub*, 78 Conn. 459, 62 Atl. 760, 3 L. R. A. (N. S.) 785, 112 Am. St. Rep. 163, rather favors the view taken by appellant, that a rescission was effected by said notice, but it is to be observed that the court in that case attached much importance to the fact that there was no express or implied contract that the money paid by the vendee should be forfeited. The case was one also involving peculiar features and the decision brought to the vendor a just retribution for his inordinate greed in claiming as a forfeit the large sum of \$60,000 without any showing made that he had lost a dollar by reason of his promise or of the default by the vendee.

But there could seem to be no controversy as to what are the controlling principles of law here in view of the decision in the *Glock* Case, supra. Therein it is clearly held that: "Under a contract for the sale of real estate in which time is made of the essence of the contract and performance by the purchaser is made a condition precedent to a conveyance, and upon his breach of the contract he is declared to forfeit all rights thereunder, and all moneys paid thereon, the purchaser cannot, after his default without excuse shown therefor, by a tender of the amount due, acquire either an equitable or a legal right to maintain an action to recover back the moneys paid under the contract." Furthermore, that, "where time is expressly made of the essence of the contract for the purchase of land, equity will not ignore such provision, but follows the law, and will neither make a contract for the parties, nor violate that which they have entered into; nor will it relieve a purchaser who has made unexcused default under such a provision, and has not fulfilled conditions precedent to the vesting of his right of action."

[2] It is declared, also, that the right of the vendor to retain the part of the purchase price paid after the default of the vendee is independent of any express clause in the contract for forfeiture of rights or for retention of the purchase money as liquidated damages, that such clauses are merely declarations in express terms of the legal rights of the parties under such a contract without them, and that the validity of such express clauses is immaterial.

[3] It is furthermore held that in such case it is only where the vendor, after default of the vendee, agrees to a mutual abandonment and rescission that the vendee is entitled to receive the purchase money paid.

This case is followed and approved in *Our-*

slor v. Thacher, 152 Cal. 739, 93 Pac. 1007, and Poheim v. Meyers, 9 Cal. App. 31, 98 Pac. 65. Furthermore, it is held in the Oursler Case that "upon the default of the vendee, without excuse, to perform the conditions of the bond, the mere service of a notice on him by the vendor, calling his attention to the particulars in which the default consisted and declaring the bond to be forfeited and all the interest of the vendee in the property to be terminated and demanding possession of the property, and the subsequent peaceable taking possession of the property by the vendor and his bringing an action to quiet the title thereto, did not constitute a rescission of the contract by the mutual consent of the parties so as to give the vendee a right of action against the vendor for the recovery of the portion of the purchase price paid under the contract or for disbursements made in the performance of other conditions thereof." The foregoing, we think, is sufficient to demonstrate the legal soundness of the trial court's conclusion.

As to the McCauley contract, with more reason it may be said that the court was justified in holding that the vendor was entitled to retain what had been paid. In reference to that it will be remembered the parties expressly agreed for the surrender of the contract by Mr. O'Melveny, and that in such event Mr. McCauley should have no right to repayment of the money.

The order denying the motion for a new trial is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(20 Cal. App. 567)

McCANN v. McCANN et al. (Civ. 1,181.)

(District Court of Appeal, Second District, California. Dec. 11, 1912.)

#### 1. NEW TRIAL (§ 79\*)—GROUNDS.

Where the trial judge, after weighing the evidence and making his determination of facts, concludes that he has decided erroneously, he should, on proper presentation of the matter, grant a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 165½; Dec. Dig. § 79.\*]

#### 2. APPEAL AND ERROR (§ 1015\*) — ORDER GRANTING A NEW TRIAL—CONFLICTING EVIDENCE.

An order granting a new trial, because the trial judge concludes that he has reached an erroneous determination from the evidence, will not be disturbed on appeal, where the evidence is conflicting, and there is no error of law rendering the order improper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876; Dec. Dig. § 1015.\*]

#### 3. NEW TRIAL (§ 123\*)—NOTICE OF INTENTION —DATE OF FILING.

A notice of intention to move for a new trial should be regarded as filed on the date tendered and received by the clerk and marked "Filed," though the clerk erases his filing mark for nonpayment of the filing fee and subse-

quently places upon the notice a filing mark of the date when the fee is paid.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 276-281; Dec. Dig. § 123.\*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by William F. McCann against Mary McCann and another. From an order granting plaintiff's motion for a new trial, defendants appeal. Affirmed.

J. F. Conroy and M. K. Young, both of Los Angeles, for appellants. H. H. Appel and J. L. Fleming, both of Los Angeles, for respondent.

**JAMES, J.** This is an appeal from an order of the superior court granting the motion of plaintiff for a new trial. The action was originally brought in the justice's court, the cause of action in form being that for the unlawful detainer of real property; it being alleged in the complaint that the rental value thereof was less than the sum of \$25 per month, which allegation was sufficient to give jurisdiction to the justice's court, unless upon the trial the evidence disclosed the fact to be that the rental value of such premises was in excess of \$25 per month. The justice of the peace determined the action upon the merits in favor of plaintiff, and an appeal followed, which was taken by the defendants to the superior court on questions of both law and fact. The superior court thereupon proceeded to try the action anew, and rendered judgment in favor of defendants. Thereafter, motion for a new trial being presented by plaintiff, an order was made granting the same. One of the grounds assigned in the notice of intention to move for a new trial was the insufficiency of the evidence to justify the decision of the court.

[1, 2] The trial judge, at the conclusion of all the testimony, weighs the evidence and makes his determination of the facts, and if he afterwards concludes that he has made an erroneous decision it is his duty, where proper proceedings are had calling the matter to his attention, to grant a motion for a new trial; and where there has been heard conflicting testimony an appellate court cannot, in reviewing the ruling made upon such motion, disturb the order. It is only where the evidence heard establishes an uncontradicted state of facts in favor of one or the other of the parties to an action that a question of law is presented which an appellate court may consider. The record of the testimony heard at the trial of this action does not disclose that the material facts were uncontradicted or undisputed, and that being true the appellants must rest content with the order made granting a new trial, unless they can present some question of law upon which we would be impelled for other reasons to conclude that the order was irregularly or improperly made.



[3] They do advance the contention that the superior court was without jurisdiction to rule on the motion for a new trial, for the reason that the notice of intention given as to such motion was filed after the time limited by law had expired. It is shown by the statement that plaintiff served his notice of motion for a new trial in due time, and that he presented it to the clerk for filing clearly within the time allowed by law. At the time he so presented it, he presented a like notice affecting another cause, and paid to the clerk, upon demand of the latter, the sum of \$2, and the clerk thereafter, on the same day, placed his file mark upon the notices, but later notified plaintiff that an additional \$2 was required to be paid as a fee for the filing of the notice given in this cause, which was promptly paid by respondent. Meanwhile the clerk had erased his file mark as first made upon the notice, and when the second fee of \$2 was paid stamped upon the document a new date of filing; that being as of the date of the latter payment. If this notice should be considered as having been filed only as of the day when the second \$2 fee was paid, then it would have been, as appellants contend, filed too late, and after the time fixed by law for the filing thereof had expired. Under the facts shown we think that the trial court was right in concluding, as it evidently did, that the notice was filed when first tendered to the clerk, and when the first file mark was placed thereon. If the clerk saw fit to receive the notice and file it without requiring the payment of the fee, then, no doubt, the omission to require such payment would be a matter which would result in the clerk being held accountable to the county for the payment of that money. We do not think that, under the circumstances shown, the clerk possessed the right to erase the first file mark placed on the notice of intention to move for a new trial, and that the document should be considered as having been regularly filed on the day it was tendered and received by the clerk of the superior court. If the court had jurisdiction to rule upon the motion for a new trial, then, for the reasons we have hereinbefore expressed, no question is left to be reviewed on an appeal from the order granting to plaintiff a new trial in the cause. The order as made by the trial judge was a general one, and not limited to any special or particular ground assigned in the notice of intention; therefore, if the order can be sustained upon any ground assigned in such notice, the ruling may not here be disturbed, and, as the court might well have made the order because of the insufficiency of the evidence to sustain the judgment, our inquiry on this appeal is ended. *Tibbetts v. Bower*, 121 Cal. 8, 53 Pac. 359.

The order is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

20 Cal. App. 564

McCANN v. McCANN et al. (Civ. 1,180.)  
(District Court of Appeal, Second District, California. Dec. 11, 1912.)

1. STIPULATIONS (§ 14\*)—USE OF EVIDENCE IN OTHER ACTION.

Where the parties to an action to quiet title stipulated that the evidence adduced in an unlawful detainer case between them should, so far as the court deemed it pertinent and applicable, constitute the evidence in the action to quiet title, the defendant could not object, on the ground that it was irrelevant and immaterial, to such evidence being incorporated in the statement filed by plaintiff in support of his motion for new trial.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24-37; Dec. Dig. § 14.\*]

2. APPEAL AND ERROR (§ 933\*)—STATEMENT ON MOTION FOR NEW TRIAL—PRESUMPTION.

Where defendant offered no amendments to the proposed statement in support of plaintiff's motion for a new trial, it will be presumed, on appeal from an order granting a new trial, that such statement correctly stated the evidence considered by the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3426, 3772-3776; Dec. Dig. § 933.\*]

3. STIPULATIONS (§ 14\*)—USE OF EVIDENCE IN OTHER CASE—STATEMENT ON MOTION FOR NEW TRIAL.

Where, in two actions tried separately between the same parties, one for unlawful detainer, the other to quiet title, the parties stipulated that the evidence taken in the unlawful detainer case should constitute the evidence in the other case, so far as the court deemed it applicable, a statement in support of a motion for a new trial in the quiet title case was not objectionable because it also constituted the statement on a like motion in the other case.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24-37; Dec. Dig. § 14.\*]

4. NEW TRIAL (§ 131\*)—STATEMENT—"FILING."

The placing of a statement in support of a motion for new trial in the official custody of the clerk, accompanied by a payment of the fee therefor, constitutes a sufficient "filing," within Code Civ. Proc. § 659, providing that when a statement is settled it shall be filed with the clerk.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 263-269; Dec. Dig. § 131.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2764-2770.]

5. NEW TRIAL (§ 131\*)—STATEMENT—FILING.

The file mark indorsed by the clerk on the statement filed in support of the motion for a new trial is mere prima facie proof thereof, and not the filing; and hence failure of the clerk to indorse thereon the word "Filed," with the day and date of such indorsement, will not deprive a party of his right to use such statement.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 263-269; Dec. Dig. § 131.\*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Wm. F. McCann against Mary McCann and others. From an order granting plaintiff a new trial, defendants appeal. Affirmed.

J. F. Conroy and M. K. Young, both of Los Angeles, for appellants. H. H. Appel and J. L. Fleming, both of Los Angeles, for respondent.

SHAW, J. Action to quiet title. Judgment went for defendants. Thereafter the court made an order granting plaintiff a new trial. Defendant appeals from this order.

The grounds upon which a reversal is urged relate to alleged erroneous rulings in the proceedings for the allowance and settlement of the statement used in support of the motion.

It appears that two actions were pending in the trial court, one of which, numbered 72,113, entitled William F. McCann v. Mary McCann, 129 Pac. 965 (an opinion in which an appeal to this court was this day filed, Civil No. 1,181), was for unlawful detainer; the other, numbered 70,875, being likewise entitled, was an action to quiet title. While the cases were tried separately, it was by the parties stipulated that the evidence taken in the unlawful detainer case should, in so far as the court deemed it applicable, be considered as evidence in the suit to quiet title, which is the case at bar now under consideration. Judgment was rendered in both cases for defendants. Thereafter plaintiff gave notices in both cases of his intention to move for a new trial upon a statement of the case. In due time he presented to the court for settlement as a statement in both cases a document wherein it was stated: "This bill of exceptions and the statement of facts herein is made a part of the foregoing statements on motion for a new trial in both cases, having the same title and numbered, respectively, Nos. 72,113 and 70,875." Defendant objected to the settlement of the proposed statement for use in support of plaintiff's motion for a new trial in the case to quiet title, No. 70,875, upon the ground that it also purported to be a statement on motion for a new trial in the action numbered 72,113 for unlawful detainer; and further, that the testimony and proceedings had in the unlawful detainer case, No. 72,113, as disclosed by the statement, were not relevant or material to the action, brought to quiet title. These objections were by the court overruled, and the document allowed and settled as a statement on motion for a new trial, to be used in support of the motions made in both cases, to all of which defendant excepted.

[1-3] We think the stipulation is a sufficient answer to the objection urged against the settlement. Since defendant agreed that the evidence adduced in the trial of the un-

lawful detainer case should, in so far as the court deemed it pertinent and applicable, constitute the evidence in the case to quiet title, she is in no position now to object to the evidence being incorporated in the statement, upon the ground that it is irrelevant and immaterial. Defendant offered no amendments to the proposed statement in support of the motion; hence, upon being settled and allowed by the trial judge, we must assume that it constitutes a correct statement of the evidence upon which the court, in the first instance, rendered its decision, and upon which it subsequently made the order granting a new trial herein. The fact that it also constituted a statement on motion for a new trial in the other case did not affect its validity or use as a statement in the case at bar.

[4, 5] The statement is indorsed: "Filed September 14, 1910, C. G. Keyes, Clerk." Appellant now, for the first time, makes the point that the statement, notwithstanding the indorsement thereon, was not filed with the clerk. This contention is based upon the fact that the successor in office of C. G. Keyes certifies that no statement on motion for a new trial was ever filed herein. Section 659, Code of Civil Procedure, provides that when a statement is settled it shall be filed with the clerk. To file a paper on the part of a party is to place it in the official custody of the clerk, to be by him permanently kept among the papers of the cause, subject to the inspection of parties entitled to inspect the same. Such act, accompanied by payment of any fee due therefor, constitutes a sufficient filing of papers. The file mark indorsed thereon by the clerk, while prima facie proof of the filing, is not the filing, but evidence thereof. There can be no doubt that the statement settled for use in both cases was, within the time prescribed therefor, deposited in the custody of the clerk for use at the hearing in support of plaintiff's motion for a new trial, and that it was so used upon the hearing of said motion. Having so deposited it with the clerk, plaintiff cannot be deprived of the use thereof in support of his motion on account of the failure of the clerk to indorse thereon the word "Filed," with the day and date of such indorsement.

The order is affirmed.

We concur: ALLEN, P. J.; JAMES, J.



20 Cal. App. 645

**ROBINSON v. FOUR METALS SMELTING & MINING CO.** (Civ. 1,192.)

(District Court of Appeal, Second District, California. Dec. 16, 1912.)

**APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

Any error in an action against a corporation for the price of property sold in admitting written admissions of the amount due, afterwards executed by defendant's manager, was immaterial, where the nonpayment of the amount due was clearly established by other competent evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 4153-4157, 4166; Dec. Dig. § 1050.\*]

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by Charles W. Robinson against the Four Metals Smelting & Mining Company. From an order denying a motion for a new trial, defendant appeals. Affirmed.

P. W. Forbes, of Bishop, for appellant.  
Wm. J. Clark, of Independence, for respondent.

ALLEN, P. J. Plaintiff declared upon two causes of action: First, for the services and use of 11 certain pack mules for a period of 77 days at an agreed price of \$1 per day for the service of each, the complaint averring an obvious aggregate amount of \$847, and alleging an unpaid balance thereon of \$697. The second cause of action was on account of the sale and delivery by one Gunn to defendant of certain ore at an agreed price of \$861.03, and the assignment of the cause of action on account thereof to plaintiff. The answer denied the hiring of the pack mules and the agreement to pay therefor any indebtedness on account thereof. As to the second cause of action, the only denial related to the assignment and the amount remaining unpaid. The court found the allegations of the complaint to be true, that the denials of the answer were untrue, and rendered judgment for plaintiff. Motion for new trial was denied, and from the order denying such motion defendant appeals.

The only matters involved upon this appeal relate to the sufficiency of the evidence to support the findings and certain exceptions to the admission of evidence. The record discloses ample evidence in support of the findings with reference to the first cause of action. The objections to the introduction of evidence the subject of exception were highly technical and involved no prejudicial error; neither was there any variance between the allegations of the complaint and the proof. The fair and reasonable construction which the court placed upon the evidence offered to support the first cause of action established an agreement as set forth in the complaint, between the agent of plaintiff and defendant for the services of the

mules at an agreed price. Whether the written admissions of the amount due afterwards executed by a manager or superintendent of defendant were binding upon defendant is of little consequence, in face of the fact that the liability and nonpayment of the amount due was clearly established by other competent evidence. We are of opinion, however, that this written statement involving such admissions of indebtedness was properly received in evidence.

As to the second cause of action, the only issue was as to the assignment and nonpayment. Such assignment and nonpayment were established, and all findings of the court have support from the evidence and admissions.

We see no prejudicial error in the record, and the order denying a new trial is affirmed.

We concur: JAMES, J.; SHAW, J.

20 Cal. App. 536

**PEOPLE v. ANTHONY.** (Cr. 410.)

(District Court of Appeal, First District, California. Dec. 12, 1912.)

**1. INDICTMENT AND INFORMATION (§ 159\*)—AMENDMENTS—STATUTORY PROVISIONS.**

Pen. Code, § 1008, as amended by St. 1911, p. 436, providing that an indictment may be amended by the district attorney without leave of court at any time before defendant pleads, but an indictment cannot be amended so as to change the offense charged, empowers the district attorney to amend an indictment only in matters of form not affecting matters of substance.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 505-514; Dec. Dig. § 159.\*]

**2. INDICTMENT AND INFORMATION (§ 156\*)—OFFENSES PROSECUTED BY INDICTMENT—CONSTITUTIONAL PROVISIONS.**

Const. art. 1, § 8, providing for the prosecution of offenses by indictment with or without examination and commitment contemplates that an indictment shall be found and presented by a grand jury, and the district attorney may not amend an indictment in matters of substance, but a statute which permits an indictment to be amended as to mere matters of form is not violative of the rights of accused to be prosecuted by indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 503; Dec. Dig. § 156.\*]

**3. INDICTMENT AND INFORMATION (§ 159\*)—AMENDMENTS—DATE OF OFFENSE.**

An indictment charging lewdness punishable by Pen. Code, § 288, may be amended by the district attorney without leave of court by changing the date of the offense, for such an amendment relates to a mere matter of form within section 1008, as amended by St. 1911, p. 436, authorizing amendments not changing the offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 505-514; Dec. Dig. § 159.\*]

**4. INDICTMENT AND INFORMATION (§ 87\*)—LEWDNESS—TIME OF COMMISSION.**

The precise date on which the offense of lewdness punishable by Pen. Code, § 288, was committed, is not a material element of the

offense, and an indictment charging generally that the crime was committed within the period of limitations and prior to the finding of the indictment is sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 244-255; Dec. Dig. § 87.\*]

#### 5. LEWDNESS (§ 5\*) — INDICTMENT — SUFFICIENCY.

An indictment charging that accused committed a certain lewd and lascivious act with and on the body and private parts of a female child under the age of 14 years by accused placing the hand of the female on his private parts with felonious intent to arouse the sexual desires of the child sufficiently charges the offense denounced by Pen. Code, § 288, punishing any person committing any lewd act on the body of a child under the age of 14 years.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. §§ 7-12; Dec. Dig. § 5.\*]

#### 6. CRIMINAL LAW (§ 696\*)—EVIDENCE—MOTION TO STRIKE—TIME TO MAKE—PREVIOUS OBJECTION.

A motion to strike out the testimony of a witness not preceded by an objection to the question eliciting the testimony is properly denied on that ground.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1639-1644; Dec. Dig. § 696.\*]

#### 7. CRIMINAL LAW (§ 1153\*)—WITNESSES (§ 240\*)—EXAMINATION—LEADING QUESTIONS—DISCRETION OF TRIAL COURT.

The allowance of leading questions rests largely in the discretion of the trial court, and, unless the discretion has been abused, the court on appeal will not interfere therewith.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066; Dec. Dig. § 1153.\* Witnesses, Cent. Dig. §§ 795, 837-839, 841-845; Dec. Dig. § 240.\*]

#### 8. CRIMINAL LAW (§ 825\*)—INSTRUCTIONS—REQUESTS—NECESSITY.

Where the court fully and fairly charged on the law applicable to the facts, a failure to instruct on any particular matter deemed essential by accused was not error, in the absence of a requested instruction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2005; Dec. Dig. § 825.\*]

#### 9. CRIMINAL LAW (§ 864\*) — INSTRUCTIONS AFTER SUBMISSION—SUFFICIENCY.

Where the jury, after deliberating on the verdict, returned to the courtroom for information, and for the removal of a doubt as to what a witness had testified to, and the court gave them the information sought and the doubt was removed by agreement of counsel made in the presence of the jury, the action of the court sufficiently protected the rights of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2068; Dec. Dig. § 864.\*]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

David Anthony was convicted of crime, and he appeals. Affirmed.

T. J. Crowley, of San Francisco, for appellant. Attorney General Webb, for the People.

LENNON, P. J. In this case the defendant was indicted by the grand jury of the city and county of San Francisco for the commission of the felony defined in section 288 of the Penal Code, which provides that;

"Any person who shall willfully and lewdly commit any lewd or lascivious act other than the acts constituting other crimes provided for in part II of this Code, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony and shall be imprisoned in the state prison not less than one year." Upon his trial defendant was convicted, and he appeals from the judgment and from an order denying him a new trial.

In the lower court the defendant interposed a demurrer to the indictment as it was originally returned by the grand jury, but, before the demurrer could be heard and disposed of, the district attorney, of his own motion, amended the indictment in minor matters of dates. This was done under the authority of a recent amendment to section 1008 of the Penal Code (St. 1911, p. 436), which in part reads as follows: "An indictment or an information may be amended by the district attorney without leave of court, at any time before the defendant pleads. Such amendment may be made at any time thereafter in the discretion of the court where it can be done without prejudice to the substantial rights of the defendant. An indictment cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination."

[1] It is the defendant's contention that the Code section just quoted is unconstitutional, in this: that it does not limit the character or extent of the amendment which the district attorney is permitted to make to an indictment or an information. In support of this contention, counsel for defendant cites to us only that portion of the Code section which reads that "An indictment or information may be amended by the district attorney without leave of court, at any time before the defendant pleads." The Code section, however, must be read and construed in its entirety; and, when so read and construed, it is manifest that the district attorney is not empowered thereby to amend an indictment or an information in matters of substance. If the Code section under discussion purported to permit an amendment to anything but the mere formal allegations of an indictment, we would have no hesitation in holding such a procedure unconstitutional.

[2] The Constitution contemplates that an indictment shall be found and presented by a grand jury (Const. art 1, § 8); and to permit the district attorney to amend an indictment in matters of substance would in effect render the indictment no longer the finding of the grand jury. It is evident,



however, that the Code section in question contemplates and permits an amendment to an indictment or information by a district attorney only in so far as such amendment relates merely to matters affecting the formal parts of an indictment or information. That this is so is manifest from the language of the section itself, which plainly provides that an indictment cannot be amended by the district attorney "so as to change the offense charged." It will thus be seen that the district attorney is not empowered to amend an indictment in any matter or thing which would affect the substantial rights of the defendant. Plainly the purpose of the Code section is to expedite the administration of justice by rendering of no avail purely technical objections to inadvertent informalities; and it is well settled that a statute which permits an indictment to be amended as to mere matters of form is not violative of the constitutional rights of a defendant. 1 Bishop's New Crim. Proc. § 97; *State v. Startup*, 39 N. J. Law, 423; *State v. Hanks*, 39 La. Ann. 234, 1 South. 458; *MackGuire v. State*, 91 Miss. 151, 44 South. 802; *State v. Gibson*, 120 La. 343, 45 South. 271; *Baker v. State*, 88 Wis. 140, 59 N. W. 570; *People v. Johnson*, 104 N. Y. 213, 10 N. E. 690; *Schultz v. State*, 135 Wis. 644, 114 N. W. 505, 116 N. W. 259, 571; *State v. Minford*, 64 N. J. Law, 518, 45 Atl. 817; *Sharp v. State*, 6 Tex. App. 650.

[3] The only amendment which the district attorney made to the indictment in the present case consisted in changing the date upon which the offense was charged to have been committed from the 30th to the 11th day of April, 1912. Such amendment did not change the character of the crime charged against the defendant, and in no aspect of the case could it have operated to the prejudice of the defendant.

[4] The precise date upon which the offense was committed was not in this instance a material ingredient of the offense charged; and it would have been sufficient if the indictment had charged generally that the crime was committed at a time within the period of the statute of limitations, which was prior to the finding of the indictment. *People v. Littlefield*, 5 Cal. 355; *People v. Lafuente*, 6 Cal. 202; *People v. Sheldon*, 68 Cal. 434, 9 Pac. 457; *People v. Rice*, 73 Cal. 220, 14 Pac. 851; *People v. Williams*, 133 Cal. 165, 65 Pac. 323.

We do not wish to be understood as saying that the allegations of an indictment or information as to the date upon which a crime is charged to have been committed may be in every case omitted or amended without injury to the substantial rights of the defendant. Cases may be supposed where the date of an alleged offense might be a material ingredient of the crime charged; and, of course, in such cases to change the date of its alleged commission would be to change, in part at least, the character of the offense.

Where, however, as here, the date designated in the indictment was not material to the offense charged, its amendment cannot be said to affect the substantial rights of the defendant.

[5] To the indictment as amended the defendant demurred upon the grounds (1) that the facts stated did not constitute a public offense; (2) that the indictment did not substantially conform to the requirements of sections 950, 951 and 952 of the Penal Code. The information charges that the defendant, David Anthony, did "willfully, unlawfully, feloniously, and lewdly commit a certain lewd and lascivious act with and upon the body, limbs, and private parts of one Agnes Richardson, a female minor child then and there under the age of fourteen years, \* \* \* by said David Anthony then and there placing the hand of her, the said Agnes Richardson, upon said David Anthony's private parts, \* \* \* with the felonious intent then and there and thereby of arousing, appealing to and gratifying the lust, passions and sexual desires \* \* \* of her, said Agnes Richardson." In support of the demurrer counsel for defendant contends that the indictment does not state facts sufficient to constitute the offense contemplated by section 288 of the Penal Code, in this: that it affirmatively appears from the indictment that the act charged was a mere licentious act which was not committed upon the body of the child. It is further insisted that the charging part of the indictment is so contradictory and uncertain that it is impossible for a person of common understanding to know what particular act constitutes the offense charged against the defendant. It may be conceded, as counsel for the defendant contends, that the indictment would have been faulty to the extent of being uncertain, as against a demurrer, if the charging part thereof had concluded solely with the allegation that the defendant did commit "a certain lewd and lascivious act with and upon the body, limbs, and private parts of one Agnes Richardson," without specifying the particular act. The charging part of the indictment, however, did not stop there. It proceeded to and did with sufficient certainty and clearness limit the meaning and application of the preceding general and indefinite allegations by specifically alleging and relying upon a particular act of the defendant to constitute the offense charged against him.

Section 288 of the Penal Code not only makes it a crime to commit any lewd or lascivious act "upon or with the body \* \* \* of a child under the age of fourteen years \* \* \*," but that section also makes it a crime to "commit any lewd or lascivious act \* \* \* upon or with the body, or any part or member thereof, of a child under the age of fourteen years." In short, it is clear that said section makes it a crime to commit any lascivious act

with any part of a child's body with the intent therein stated. Obviously the hand of a child is a "part" and a "member" of its body; and when the defendant committed the particular act of placing the child's hand upon his private parts, with the intent of arousing her passions, he violated the terms, and we think the spirit, of the law.

We confess that the language of the indictment might with advantage have been directed more specifically to the act charged against defendant, but we are satisfied that the indictment is not so ambiguous but that the defendant and his counsel might upon slight reflection apprehend with reasonable certainty that the only lascivious act charged against the defendant and upon which the people would rely for a conviction was the placing of "the hand of the said Agnes Richardson upon the said David Anthony's private parts," with the intent alleged in the indictment.

Several rulings of the trial court in admitting evidence, and in denying defendant's motion to strike out certain evidence, are assigned as prejudicial error. Upon an examination of the record we are satisfied that none of the points made in this behalf are well taken.

[6] The motion to strike out the testimony of the witness Meehan was not preceded by an objection to the question which elicited the testimony, and for this reason, if for no other, the motion to strike out was properly denied. Moreover, the testimony of this witness was not only competent, but it was a relevant and material part of the *res gestæ* of the offense, and could not therefore have been successfully objected to.

For the reasons just stated, the defendant's motion to strike out parts of the testimony of the witness Agnes Richardson was also properly denied.

[7] Complaint is made that the trial court permitted a leading question to be put to the witness McDermott over the objection of the defendant. Leading questions are largely in the discretion of the trial court; and, before error can be claimed or allowed for the asking of such questions, it must be shown that the trial court abused its discretion. No such showing is made here; and, furthermore, it does not appear from the record before us that the particular question complained of was answered by the witness.

The remaining rulings of the court complained of concern objections to questions which plainly called for evidence relating to the *res gestæ*, and, this being so, the objection in each instance was properly overruled.

After the jury had retired to deliberate upon their verdict they returned to the courtroom, and through their foreman stated that they desired "further instructions, \* \* \* a little information as to whether a verdict of guilty may be brought in only on the

grounds that it was proven that he (defendant) directed the girl's hand onto his private parts, and therefore they would like the indictment read. \* \* \* Thereupon the indictment was read to the jury; and immediately thereafter the court of its own motion charged them the "the plea of not guilty \* \* \* puts in issue the facts set up in the indictment which has just been read to you. In determining whether or not those acts thus described in the indictment have been established, it is proper to take into account all the evidence which has been introduced into the case. \* \* \* Finally, the jury must determine whether the facts alleged in the indictment have been proved to a moral certainty and beyond a reasonable doubt. What other question is there?" The foreman of the jury then stated that the jury were divided upon the question "as to whether it was the Atheas girl or the Richardson girl that testified in regard to her having her hand on his (defendant's) private parts." Thereupon counsel for the people and counsel for the defendant agreed and admitted without reading the record to the jury that it was the Richardson girl who had so testified; whereupon the foreman of the jury said: "I think that is all I care to know. Is there any question that some of you gentlemen would like to ask, if that don't clear it up?" At this point in the proceedings counsel for the defendant requested the court "to instruct the jury on one point upon which they asked instructions." The court in reply stated that it had "already instructed the jury on every point on which they had asked light," and then ordered the jury to retire for further deliberation. It is now contended that the trial court erred to the prejudice of the defendant in failing to instruct the jury "that unless it was established beyond all reasonable doubt that the defendant guided the hand of the child as in the indictment alleged, then it was their duty to acquit." This contention is based upon the assumption that the jury requested to be instructed upon this particular point in the case. It is further contended that, aside from any request of the jury, and notwithstanding the fact that no instructions were requested upon behalf of the defendant, the trial court should have included such an instruction in its charge.

[8] With reference to the latter contention, it will suffice to say that the trial court fully and fairly charged the jury upon the law appertaining to the facts of the case, and therefore the failure of the court to instruct upon any particular matter deemed essential by the defendant was not error in the absence of a request for such an instruction. *People v. Pice*, 97 Cal. 460, 32 Pac. 531; *People v. Oliveria*, 127 Cal. 376, 59 Pac. 772; *People v. Olsen*, 80 Cal. 122, 22 Pac. 125; *People v. Arnold*, 116 Cal. 682, 48 Pac. 803.



[9] Upon a first and hasty reading of what occurred when the jury returned to the courtroom for further instructions the impression is gained that the jury were desirous of being instructed specifically upon the particular point now under discussion; but upon a second and more careful reading of all that was said and done upon the return of the jury it is evident that they were merely seeking information as to what constituted the gist of the offense charged, and at the same time were desirous of clearing up a disputed point in the evidence. The information which they sought as to the gist of the offense was conveyed to them precisely as they requested by a reading of the indictment; and their doubt as to what certain witnesses had testified to was dissipated by the agreement of counsel. This was all that the jury asked for; and therefore it was all that the court was required to give them.

Finally, it is contended on behalf of the defendant that the evidence does not support the verdict. We have carefully read the record; and we have no hesitation in saying that the evidence fully supports the verdict, and that the defendant was justly convicted.

The judgment and order appealed from are affirmed.

We concur: HALL, J.; KERRIGAN, J.

20 Cal. App. 599

FOX v. MICK et al. (Civ. 1,165.)

(District Court of Appeal, Second District, California. Dec. 12, 1912.)

**1. JUDGMENT (§ 818\*)—FOREIGN JUDGMENTS—COLLATERAL ATTACK.**

The judgment of another state presented in the courts of this state can be controverted on the question of jurisdiction by extraneous evidence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1458-1481; Dec. Dig. § 818.\*]

**2. JUDGMENT (§ 944\*)—ACTION ON FOREIGN JUDGMENT—FRAUD—EVIDENCE.**

In an action to enforce a deficiency judgment of another state, evidence held to warrant a finding that the signatures to the acceptance of service of the summons in the action in which the judgment was rendered, by the defendants who were then residing in another state, were obtained by fraud, and that the foreign court had no jurisdiction over the defendants to render a personal judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1783; Dec. Dig. § 944.\*]

**3. APPEAL AND ERROR (§ 931\*)—PRESUMPTIONS—EVIDENCE—LAWS OF ANOTHER STATE.**

Although the validity of a judgment rendered in another state is governed by the laws of that state, and a law of another state if invoked must be proven, or the law of this state be deemed to be the law, where a judge stated that he would "take judicial notice of the laws of such state, it is so stipulated," to which neither party dissented, and no evidence other than the judgment of that state was introduced, and the judge found that such judgment was void,

it must be presumed that he found some law of that state justifying his conclusion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931.\*]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by William A. Fox against Mary E. McDowell Mick and another. Judgment for defendants, and plaintiff appeals. Affirmed.

J. Vincent Hannon, of Los Angeles, and Hannon & Gibbs, for appellant. Lucius M. Fall and Edwin A. Meserve, both of Los Angeles, for respondents.

SHAW, J. Action to recover upon an instrument purporting to be a deficiency judgment rendered by the district court of Arapahoe county, Colo., in favor of plaintiff and against defendants herein. Judgment went for defendants. Plaintiff's motion for a new trial was denied, and he appeals from the order of court denying same.

The suit wherein the judgment was rendered by the district court of Colorado was one instituted to foreclose a mortgage executed to defendant Brooks by defendant Mick for the purpose of securing the payment of a certain promissory note made and delivered by her to Brooks. Defendant Mick deeded the mortgaged property to one White, who assumed and agreed to pay the amount of the mortgage. Brooks assigned the note and mortgage to plaintiff herein. At the time of the commencement of the suit all of the defendants therein, including White, were residents of California. Plaintiff secured the signatures of both Mick and Brooks to an indorsement upon the original summons, the effect of which was to enter their voluntary appearance in the action, waive answer and consent to a trial without notice to them, and likewise secured an entry of appearance by White, agreeing that no personal judgment should be entered against him. In their answer defendants alleged that the signatures to the indorsement claimed by plaintiff to constitute their general appearance in the action was procured by the misrepresentation, fraud, and trickery of plaintiff, whereby they were led to believe that the effect of such appearance was merely in lieu of and equivalent to service by publication, and the court in effect so found. Appellant attacks this finding upon two grounds: First, that, as the judgment was rendered by a court of general jurisdiction, it must, in the absence of a direct attack thereon, be deemed to have had jurisdiction, and hence it cannot be impeached or attacked collaterally; and, second, that the evidence is insufficient to support the finding. Neither position is tenable.

[1] "When a judgment recovered in one state is pleaded or presented in the courts of another state, whether as a cause of action or a defense or as evidence, the party sought to be bound or affected by it may

always impeach its validity and escape its effect by showing that the court which rendered it had no jurisdiction over the parties or the subject-matter of the action." 23 Cyc. p. 1578. Whatever may have been the law as announced by the earlier decisions, it is now well settled that the record in such case is not conclusive upon the question of jurisdiction, but may be controverted by extraneous evidence. *Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897; *Greenzweig v. Strelinger*, 103 Cal. 278, 37 Pac. 398; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Abercrombie v. Abercrombie*, 64 Kan. 29, 67 Pac. 539; *Duringer v. Moschino*, 93 Ind. 495; *Townsend v. Smith*, 47 Wis. 623, 3 N. W. 439, 32 Am. Rep. 793; *Fitzgerald Construction Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608; *Wood v. Wood*, 78 Ky. 624.

[2] As to the second point, that the evidence is insufficient to support the finding, it appears that upon the bringing of the action in Colorado plaintiff's attorney wrote to plaintiff, who was then in Los Angeles county, where defendants resided, inclosing with the letter the original summons issued in the case and suggesting to plaintiff that he have the defendants sign the indorsement upon the back of the summons, stating: "They should accept service willingly, as we can secure the same result by publication and waiting longer." The evidence of both defendants tends to show that it was understood between plaintiff and themselves that the sole and only purpose of signing the indorsement was to give the court such jurisdiction only as would follow due publication of summons and enable plaintiff to foreclose his mortgage without the delay and expense of such publication, and that plaintiff told defendants that such acceptance of service and appearance was in effect substituted service, and that no personal judgment would be taken thereon. This theory is borne out, not only by the letter of instruction, but by the evidence of plaintiff himself, who testified as follows: "I have not the recollection of telling her anything, and I don't believe I told her anything more than that was a copy of the summons and complaint, and I would gain the same end by publication if she did not sign it, and she seemed perfectly willing to sign it." The end gained by publication of summons would not confer jurisdiction to render a personal judgment. It is thus apparent that the purpose and intention of the parties was not to obtain personal service upon defendants, but to obtain such service only as might be had by a publication of the summons.

[3] There is another point, however, which, upon any view of the case, is fatal to appellant's claim for a reversal of the order. The court found that no proof whatever was offered to sustain the allegations of the complaint other than the purported exemplified copy of the record of the proceedings, together with the certificate thereto attached,

all of which documents constituting the alleged record are set out in *hæc verba* in the finding. The court's conclusion of law based upon this (and other findings not now under consideration) was that plaintiff was entitled to nothing, and that defendants should have judgment for costs. Whether or not this finding justifies the conclusion of the court depends upon the law applicable to the evidence so found by the court to have been given and so embodied in the finding. The validity and effect of a judgment, however, is governed by the laws of the state where it is rendered. 23 Cyc. p. 1547; *Peet v. Hatcher*, 112 Ala. 514, 21 South. 711, 57 Am. St. Rep. 45. If it be made to appear that the judgment sued upon in another state is void, or for any reason nonenforceable, by statute or otherwise, in the courts of the state wherein rendered, it must be held likewise nonenforceable in an action brought thereon in a sister state. Where the law of another state is invoked as affecting a right asserted in the courts of this state, proof thereof must be made by evidence showing the existence of such law. Otherwise, the law of such state applicable to the case will be deemed to be the same as that of this state. *Cavallaro v. Texas Ry. Co.*, 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94; *O'Sullivan v. Griffith*, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323. In the trial of the case at bar no proof was made as to any laws of Colorado. Nevertheless, the presumption that they are the same as those of California is overcome by the fact that during the progress of the trial the learned trial judge presiding therein, in open court stated: "I take judicial notice of the laws of Colorado. All the laws of Colorado, whatever they are in the published books—it is so stipulated." Neither party present in court expressed any dissent therefrom, and under the circumstances their silence must be deemed equivalent to an assent. Having so stipulated, we must presume that the trial judge in considering the record of the Colorado court introduced in evidence took judicial notice of the laws of Colorado, and found some provision of law which, upon applying it to the evidence embodied in his findings, justified his conclusion that the judgment rendered by the Colorado court was void, or, at least, by reason of irregularity, nonenforceable. To justify a reversal, it must appear that error has been committed by the trial court. In the absence of any proof of the law of Colorado, which under the stipulation it is presumed the court applied to the facts, we cannot say that it erred in making the order denying plaintiff's motion for a new trial.

Other assignments of error, conceding appellant's contention therein, are, in view of our conclusion, rendered harmless; hence, it is unnecessary to discuss them.

The order appealed from is affirmed.

We concur: ALLEN, P. J.; JAMES, J.



20 Cal. App. 624

**STATE COMMISSION IN LUNACY v.**

WELCH, County Treasurer.

(Civ. 1,066.)

(District Court of Appeal, First District, California. Dec. 13, 1912. Rehearing Denied by Supreme Court Feb. 11, 1913.)

**1. STATES (§ 126\*) — GENERAL FUNDS — IMBECILE FUND.**

The money required to be paid to the state treasurer by each county treasurer by Pol. Code, §§ 2192, 2193, providing for the commitment of imbecile persons to the state home for the feeble-minded, and requiring each county auditor to include in his state settlement report the amount due the state for commitments to the home, and providing that the county treasurer, at the time of the settlement with the state, shall pay to the state treasurer, on the order of the controller, the amounts due the state, goes into the general fund of the state, and not into any fund for the home, and the State Commission in Lunacy has no control over the same, except such as is expressly given by statute.

[Ed. Note.—For other cases, see States, Cent. Dig. § 125; Dec. Dig. § 126.\*]

**2. INSANE PERSONS (§ 58\*)—SUPPORT OF IMBECILES—ACTIONS—STATUTES.**

Pol. Code, § 2197, authorizing the State Commission in Lunacy to sue in its own name any county, person, guardian, or relative liable for the maintenance of imbecile persons in the state home for the feeble-minded, does not authorize an action against a county treasurer, for the county treasurer is not the county, and a suit against the county is under the control of the county board of supervisors, while the county treasurer controls the defense in an action against him, and he is liable for the costs.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 90; Dec. Dig. § 58.\*]

**3. MANDAMUS (§ 154\*)—COMPELLING PAYMENT OF PUBLIC FUNDS—PETITION—REQUISITES.**

A petition for a writ of mandate to compel a county treasurer to pay money from the public funds must allege that there is money in the county treasury, or in the custody of the treasurer, with which to pay the demand sued for.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 296-316; Dec. Dig. § 154.\*]

**4. INSANE PERSONS (§ 55\*)—CARE OF IMBECILE PERSONS—FUNDS—PAYMENTS TO STATE.**

The duty of a county treasurer to pay money to the state treasurer as provided by Pol. Code, §§ 2192, 2193, providing for the commitment of imbecile persons to the state home for the feeble-minded, and requiring each county auditor to include in his state settlement report the amount due the state for commitments to the home, and the county treasurer to pay on the order of the controller the amounts due to the state by reason thereof, is dependent on his having money in his custody as county treasurer applicable to the payment of the demand.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 87; Dec. Dig. § 55.\*]

**5. CONSTITUTIONAL LAW (§ 186\*)—RETROACTIVE LAWS—VALIDITY.**

The Legislature may pass retroactive laws not impairing the obligation of contracts or vested rights.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 526-529; Dec. Dig. § 186.\*]

**6. STATUTES (§ 267\*)—RETROACTIVE EFFECT.**

A statute will not be construed to have a retroactive effect, so as to affect pending litigation,

unless such intent is expressly declared or necessarily implied in the language thereof.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 350-359; Dec. Dig. § 267.\*]

**7. MANDAMUS (§ 2\*)—RETROACTIVE EFFECT.**

Pol. Code, § 2193, as amended in 1911 (St. 1911, p. 86), providing that, on the failure of the county auditor or county treasurer to perform any of the things required by the statute, the State Commission in Lunacy may require the county treasurer by mandate to pay to the state treasurer all amounts due to the state for commitments of imbecile persons to the state home for the feeble-minded, contains nothing which justifies the court in giving it retroactive effect, so as to affect pending litigation, under the rule that, when a remedy is sought which is not authorized by law, a subsequent statute giving such remedy does not operate on the existing suit, unless required by express legislative mandate or unavoidable implication.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 4; Dec. Dig. § 2.\*]

Appeal from Superior Court, San Benito County; M. T. Darling, Judge.

Petition by the State Commission in Lunacy for a writ of mandate against John Welch, as Treasurer of the County of San Benito, to compel the payment of a specified sum to the state treasurer. From a judgment denying relief, petitioner appeals. Affirmed.

Robert L. Beardslee, of Stockton, John W. Stetson, of Oakland, and C. P. Cutten, of San Francisco, for appellant. Briggs & Hudner and H. W. Scott, all of Hollister, for respondent.

HALL, J. This is an appeal from a judgment rendered against plaintiff, after order sustaining defendant's demurrer to plaintiff's petition for a writ of mandate. The record affirmatively shows that no application for leave to amend was made.

Plaintiff filed its petition against defendant, as treasurer of the county of San Benito, asking for a writ of mandate to compel defendant, as such treasurer, to pay the state treasurer the sum of \$1,460, claimed to be due the state on account of the commitment to, and maintenance in, the Sonoma State Home, of certain children from said county. The second amended petition was filed August 5, 1910. A demurrer thereto was filed October 21, 1910, which raised the point of insufficiency of the facts stated to entitle plaintiff to any relief, and also the capacity of plaintiff to bring the action. Subsequently an act was passed, amending certain sections of the Political Code relating to the subject-matter of the action, which took effect in April, 1911. The demurrer was sustained May 10, 1911.

Appellant contends that the complaint was not demurrable under the law as it stood when the action was commenced, and also that the sufficiency of the complaint and the capacity of plaintiff to sue must be tested by the law as it stood after the taking effect of the amendment in April, 1911. We shall first examine the complaint in the light of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

law as it stood when the action was commenced and the demurrer filed.

[1] Section 2192 of the Political Code, after providing for the commitment of feeble-minded or imbecile persons to the home by a superior judge, and providing that the parent or guardian of such person shall pay to the State Home for his support, provides as follows: "For each child or other person committed to such home there shall be paid by the county from which he is committed to the state treasury the sum of ten dollars monthly for and during each month, or part of month, such person so committed remains an inmate of the hospital, in case the payments herein provided to be made by the parent, guardian or other person charged with the support of any such person shall not be made."

Section 2193 of the same Code, before the amendment thereof in 1911, was as follows: "Each county auditor must include in his state settlement report rendered to the controller in the months of May and December the amount due the state under this act by reason of commitments to the home for feeble-minded; and the county treasurer, at the time of the settlement with the state in such months, must pay to the state treasurer, upon the order of the controller, the amounts found to be due to the state by reason of the commitments herein referred to."

Section 2197 of the same Code provides that: "The Commission may in its own name bring an action to enforce payment for the cost of determining the insanity of any person and securing his admission into a state hospital, when his estate or any person is liable for the same, or to recover for the use and benefit of any state hospital or for the state the amount due for the care, support, maintenance and expenses of any patient or inmate therein, against any county, person, guardian or relative liable for such care, support, maintenance and expenses."

When the action was commenced, as well as when the second amended complaint and the demurrer thereto were filed, this was the only authority given the plaintiff to sue to recover any money for the use or benefit of the state. The money that is required to be paid to the state treasurer by the county treasurer (sections 2192 and 2193) is not paid into any fund for the State Home or hospital. The hospital is supported by a general appropriation made therefor, and such sums as may be paid into the contingent fund thereof by persons liable for the support of inmates. The money required to be paid by the county and its treasurer under sections 2192 and 2193 goes into the general fund of the state treasury, and there can, therefore, be no pretense that plaintiff has any control or power thereover other than such as is expressly given by the statute.

[2] The section (2197) under which the plaintiff claimed the right to bring this suit

against the county treasurer gives only the right to sue "any county, person, guardian or relative liable for such care, support, maintenance and expenses." Appellant claims that the right to sue the county treasurer is embraced within the right to sue the county. But the county treasurer is not the county, and a suit against the county is a very different affair from a suit against the county treasurer. In a suit against the county the board of supervisors controls the defense, and the county is liable for such costs as may be awarded to the plaintiff. The county treasurer controls the defense in an action against him and is liable for the costs. We cannot hold that the statute as it existed when this action was commenced authorized plaintiff to institute this suit without reading into the statute something neither expressly nor by necessary implication contained therein. This we may not do.

The trial judge, in passing upon the demurrer, seemed to be of the opinion that the complaint failed to state a cause of action because it not only did not appear that any claim had ever been presented to the board of supervisors, but it did affirmatively appear that the county auditor had never issued any warrant for the payment of the money demanded, and had never given any statement to the controller of any amount due the state, as required by section 2193, Pol. Code. It is alleged that the controller did issue his orders to the defendant to pay the amounts claimed, which aggregate the sum of \$1,460, and cover the years 1903, 1904, 1905, and 1906. Whether or not the county treasurer may be compelled to pay money from the county funds to the state upon the controller's order, without any warrant or statement from the county auditor, presents an interesting question, but one not necessary to be decided upon this appeal.

[3] There is in the complaint no allegation that there was any money in the county treasury, or in the custody of defendant as such county treasurer, with which to pay the demand sued for, which defect is expressly pointed out in the demurrer. Such an allegation is necessary in a petition for a writ of mandate to compel a county treasurer to pay money from the public funds. In the case of *Stevens v. Truman*, 127 Cal. 155, 59 Pac. 397, the rule is thus stated: "There was no duty put upon appellant, as treasurer, to pay the order, unless he had funds in his control applicable to that purpose, and whether he had the ability to comply with the order ought to have been shown. The rules of pleading in seeking the extraordinary aid of mandamus require the petitioner to show a clear prima facie case to warrant the alternative writ. There should be sufficient facts stated in the petition to show that the defendant is under legal obligation or duty to perform the required act. High's Extraordinary Legal Remedies, §§ 449, 450;



Wood on Mandamus, 18; Redding v. Bell, 4 Cal. 333. The complaint failed to allege that there was any fund out of which plaintiff could be paid, and was therefore insufficient."

*People v. Reis*, 76 Cal. 269, 18 Pac. 309, was a proceeding in mandamus against the treasurer of the city and county of San Francisco. The court said: "It is well settled that an officer cannot be compelled to pay a sum of money by mandate unless the money is in his official custody legally subject to the payment of the demand made when the steps are initiated to enforce the payment of such demand by writ of mandate. See *Redding v. Bell*, 4 Cal. 333; *Bates v. Porter*, 74 Cal. 224 [15 Pac. 732]. See, also, *Day v. Callow*, 39 Cal. 593. Where an officer's duty to issue a warrant for the payment of money is dependent upon there being money in the fund applicable to the payment of the warrant, a petition that is silent upon the subject of money in the treasury is insufficient to entitle the plaintiff to a writ of mandate. *Cramer v. Supervisors*, 18 Cal. 385.

[4] In the case at bar defendant's duty to pay was dependent upon his having money in his custody as county treasurer applicable to the payment of the demand; and under the rule of pleading laid down in the above-cited case such fact was an essential allegation of the petition for the writ. The cases of *Robertson v. Library Trustees*, 136 Cal. 403, 69 Pac. 88, *Babcock v. Goodrich*, 47 Cal. 488, and *Worthington v. Breed*, 142 Cal. 102, 75 Pac. 675, cited by appellant, were cases against an auditor, where the right to the warrant is not dependent upon the fact of money being in the treasury, and are not in point.

Appellant also relies upon certain expressions used by the court in *Connor v. Morris*, 23 Cal. 447, and *Jones v. Morgan*, 67 Cal. 308, 7 Pac. 734, which were proceedings against the treasurer; but in each of those cases the court was dealing with attacks made upon the petition for failing to aver facts authorizing the issuance of the auditor's warrant, and no question was presented as to any allegation as to the condition of the funds upon which the warrant was drawn. The cases are therefore not in point.

For the reasons above stated, the amended petition, when filed and when demurred to, did not state facts sufficient to constitute a cause of action against defendant.

[5-7] Appellant, however, contends that, even if the objections to the petition above discussed were good at the time of the commencement of the action and the filing of the demurrer, they were obviated by an amendment to the statute which took effect a few days before the demurrer was ruled upon. This amendment consisted of the re-enactment of section 2193, Political Code, with the addition thereto of the following words: "In the event of the failure of the county au-

ditor or county treasurer to do or perform any of the things required in this section, the State Commission in lunacy may require the county treasurer by writ of mandate to pay to the state treasurer, upon the order of the controller, all amounts found to be due to the state as aforesaid at the time of the next settlement of the said county treasurer with the state; and it shall be no defense to such a proceeding that the county auditor has failed to include such sums in his report rendered to the controller; and it shall not be necessary for the said commission to allege or prove any fact with relation to the condition of the funds of the county. The said commission may, in its discretion, recover sums due from counties as in this chapter provided, by the presentation of claims against the board of supervisors, and recovery may be had on all sums due the state for a period of three years next prior to the presentation of such claims." St. 1911, p. 86.

It is quite true that the Legislature has power to pass retroactive laws, that do not impair the obligation of contracts or vested rights; but it is equally true that laws are not construed as intended to have a retroactive or retrospective effect, so as to affect pending litigation, unless such intent is expressly declared or necessarily implied in the language of the statute. In *Smith v. Lyon*, 44 Conn. 175, the court was considering the effect of a statute enlarging the scope of an action in replevin, passed since the beginning of the action then before the court. The court held that no retroactive effect could be given to the statute, which was broad enough in its language to embrace all cases, past and future. The court said: "One of the firmly established canons for the interpretation of statutes declares that all laws are to commence in the future and operate prospectively, and are to be considered as furnishing a rule for future cases only, unless they contain language unequivocally and certainly embracing past transactions. The rule is one of such obvious convenience and justice as to call for jealous care on the part of the court to protect and preserve it. Retroaction should never be allowed to a statute unless it is required by express command of the Legislature, or by an unavoidable implication arising from the necessity of adopting such a construction in order to give full effect to all of its provisions."

There is nothing in the language of the statute relied on by appellant in this case that justifies us in giving it any retroactive effect under the rule above stated. That the rule above stated is quite correct, with one possible or rather apparent exception to be hereinafter stated, is abundantly established by adjudicated cases. The latest one to which our attention has been called is *Vanderbilt v. All Persons* (S. F. No. 5,960) 126 Pac. 158, decided by the Supreme Court of this state in bank, August 14, 1912, where it

is said: "When a remedy is sought which is not authorized by law, a subsequent statute giving such remedy does not operate on the existing suit. *Wetzler v. Kelly Co.*, 83 Ala. 440 [3 South. 747]. Retroaction is never allowed to a statute unless required by express legislative mandate or unavoidable implication. *Smith v. Lyon*, 44 Conn. 178." In *Baines v. Jemison*, 86 Tex. 118, 23 S. W. 639, the court held that a statute affecting venue could not be given retroactive effect, in the absence of express words giving it such effect, so as to vest a court with jurisdiction of an action then pending, but tried after the statute took effect. This case is interesting, in that the court distinguishes it from a previous case (*Railroad Co. v. Graves*, 50 Tex. 181), in which it was held that where an amended complaint had been filed without objection, after the new statute had taken effect, the filing of the amended complaint might be treated as the beginning of a new action, and therefore governed by the new statute. In *Wetzler v. Kelly Co.*, 83 Ala. 440, 3 South. 747, it was decided "that when a suit is instituted, or a defense is interposed, which is at the time unauthorized by the law, a subsequent statute giving such remedy does not operate on the existing suit, especially when it does not provide it shall so operate." See, also, *Sanborn's Estate*, 96 Mich. 606, 56 N. W. 25, *Gates v. Salmon*, 28 Cal. 321.

The cases of *Ferry v. Campbell*, 110 Iowa, 290, 81 N. W. 604, 50 L. R. A. 92, and *Dieterich v. Fargo*, 194 N. Y. 359, 87 N. E. 518, 22 L. R. A. (N. S.) 696, cited by appellant, were cases in equity, where injunctive relief was sought, and are apparent, and only apparent, exceptions to the general rule. In such cases the injunction operates to control the future and oftentimes continuous action of the defendant, and may be granted as required by the law in force when granted. *Bensley v. Ellis*, 39 Cal. 309, is an example of a case where retroactive effect was called for by necessary implication, and was only given effect to allow a remedial motion to be made under a statute passed, before the motion was made, but after the action was brought. In *Lee v. Buckheit*, 49 Wis. 55, 4 N. W. 1077, cited by appellant, the statute (revised statutes) expressly provided that it should apply to pending suits. This is made apparent by an examination of *Kopmeier v. O'Neil*, 47 Wis. 593, 3 N. W. 365, cited in *Lee v. Buckheit*, where it is said: "Section 4980, R. S. 1878, provides that subsequent proceedings in actions pending at the time the Revised Statutes of 1878 took effect, shall conform to the provisions of the Revised Statutes of 1878 when applicable." In *Johnson v. Bradstreet Co.*, 87 Ga. 79, 13 S. E. 250, cited by appellant, an act was passed providing that an action for libel should not abate by the death of the plaintiff. The plaintiff died after the passage of the stat-

ute, and it was held that the action did not abate. We do not think that this was in any just sense giving the statute a retroactive effect. The case of *Kansas Pacific Ry. Co. v. Twombly*, 100 U. S. 78, 25 L. Ed. 550, cited by appellant, simply holds the repeal of a statute, under which an action had been brought and judgment recovered and not appealed from, did not affect the judgment. If the case has any bearing upon the case at bar, it is distinctly against the position taken by appellant. *Judd v. Judd*, 125 Mich. 228, 84 N. W. 134, cited by appellant, simply holds that a person who refuses to pay a judgment for alimony after the passage of a law authorizing contempt proceedings, may be punished under the act, although the judgment which he refused to pay was rendered before the passage of the law authorizing the contempt proceedings. We do not think this was in any proper sense giving the law in question a retroactive effect.

At any rate, the correct rule supported by the great weight of authority is as laid down in *Smith v. Lyon*, 44 Conn. 175, and approved in *Vanderbilt v. All Persons*, supra; and under this rule the position of appellant is not helped by the amendment to the law passed after the filing of the complaint and the demurrer thereto.

The judgment appealed from must be affirmed, and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

20 Cal. App. 807

#### STATE COMMISSION IN LUNACY v.

WELCH, County Treasurer et al.  
(Civ. 1,065.)

(District Court of Appeal, First District, California. Dec. 13, 1912. Rehearing Denied by Supreme Court Feb. 11, 1913.)

Appeal from Superior Court, San Benito County; M. T. Darling, Judge.

Petition for a writ of mandate by the State Commission in Lunacy against John Welch, as Treasurer of the County of San Benito, and another. From a judgment denying relief, petitioner appeals. Affirmed.

Robert L. Beardslee, of Stockton, John W. Stetson, of Oakland, and C. P. Cutten, of San Francisco, for appellant. Briggs & Hudner and H. W. Scott, all of Hollister, for respondents.

HALL, J. This is an appeal from a judgment entered against plaintiff after order sustaining defendants' demurrer to plaintiff's complaint. The action is in all respects similar to action No. 1,066 (129 Pac. 974), this day decided, except that it covers a different period of time, and the auditor is joined with the treasurer. For the same reasons stated in the opinion in the action against the treasurer (No. 1,066), plaintiff had no capacity to sue either the treasurer or the auditor, and no cause of action is stated against the treasurer. The court, therefore, did not err in sustaining the demurrer, and the judgment must be affirmed.

It is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.



20 Cal. App. 483

**CALLAN v. EMPIRE STATE SURETY CO.**  
et al. (Civ. No. 1,102.)

(District Court of Appeal, First District, California. Dec. 3, 1912. Rehearing Denied by Supreme Court Feb. 1, 1913.)

**1. PRINCIPAL AND SURETY (§ 59\*)—CONTRACT OF SURETY—NATURE.**

A bond to secure the performance of a building contract attached thereto, which provided that it should be void if the contractors faithfully complied with the conditions of the contract, made the surety a party to the contract.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.\*]

**2. PRINCIPAL AND SURETY (§ 59\*)—CONDITIONS OF BOND—INCORPORATION OF OTHER INSTRUMENTS.**

A surety bond may incorporate by reference other contracts or written instruments, or be conditioned for the performance of agreements contained in such instruments, in which case the bonds and contracts should be construed together.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.\*]

**3. PRINCIPAL AND SURETY (§ 82\*)—BUILDING CONTRACT—LIABILITY OF SURETY—MECHANICS' LIENS.**

Under the bond of a surety company to secure the performance of a building contract, conditioned on compliance with all of the terms and conditions of the contract, the surety was liable for necessary excess cost to the owner of completing the building on abandonment by the contractor after furnishing material and labor, for which liens had been filed as well as for loss of rentals by failure to complete within the time fixed.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 127; Dec. Dig. § 82.\*]

**4. PRINCIPAL AND SURETY (§ 59\*)—CONSTRUCTION OF CONTRACT—STATUTORY PROVISIONS.**

Under Civ. Code, § 2837, providing that, in interpreting suretyship contracts, the same rule should be observed as in other contracts, such a contract should be fairly construed to effectuate its object, not distorting the natural meaning of its language or raising unreasonable implications.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.\*]

**5. APPEAL AND ERROR (§ 1073\*)—HARMLESS ERROR—AMOUNT OF JUDGMENT.**

Mere error in computing the amount of the judgment is not reversible, where all of the items entering into it are established, since it may be corrected by modifying the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4240-4247; Dec. Dig. § 1073.\*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by E. J. Callan against the Empire State Surety Company and others. From a judgment for plaintiff, and an order denying a motion for a new trial, the Surety Company appealed. Judgment modified, and, as modified, affirmed.

For opinion of Supreme Court denying rehearing, see 129 Pac. 981.

George F. Hatton and Hartley F. Peart, both of San Francisco, for appellant. William S. Downing, of San Francisco, for respondent.

**KERRIGAN, J.** The plaintiff herein entered into a building contract with certain contractors, by the terms of which the latter promised and agreed for and in consideration of the sum of \$7,000 to furnish all the material and labor necessary to build and complete, according to plans and specifications, a two-story frame building within 75 working days. Plaintiff agreed to pay in installments as the work progressed. Upon the execution of the contract the defendant Empire State Surety Company (appellant), as surety, executed a bond in the sum of \$1,750, which recited that the contractors had entered into this contract with plaintiff, describing it and having a copy thereof attached, and which was conditioned that, if the principals "shall well, truly and faithfully comply with all the terms, covenants and conditions of said contract on their part to be kept and performed according to its tenor, then this obligation to be null and void, otherwise to be and remain in full force and virtue in law." The contractors, after performing a portion of the work and receiving the first payment as prescribed in the contract, abandoned it, leaving debts for materials and labor, for which liens and claims accrued. These were paid by the plaintiff, who completed the structure. The action was brought to recover the sum of \$921.80 as damages from the Empire State Surety Company and the contractors, such sum being claimed to be the reasonable and necessary excess cost to plaintiff of completing the building, together with the further sum of \$380 damages for loss of rentals caused by the delay and failure of the contractors to complete the structure within the time fixed by the contract. No appearance was made on behalf of the contractors. Plaintiff recovered judgment against the appellant herein as surety upon its bond in the sum of \$1,301.80, the full amount prayed for in the complaint.

Several points are urged by the appellant for a reversal of the judgment and order denying a new trial; the main contention, however, being that the surety company is not bound, by the terms of its undertaking, to indemnify the plaintiff against loss arising from the payment by him of claims and mechanics' liens. It is contended by appellant that its bond and undertaking was for the performance of the agreement of the contractors to furnish materials and labor, and that, as neither the agreement nor the bond provided that the contractors or surety should pay or discharge any claims or liens for materials or labor furnished upon the structure, it is not incumbent upon appel-

lant to perform this condition. In other words, the appellant claims that, when the material and labor were furnished, their contract was complied with, and that it had not obligated itself to protect the owner against the costs of material and labor used in the construction of the building. In support of this contention, we are cited to the elementary proposition of law that sureties are never bound beyond the strict letter of their contract, that they have a right to stand upon the precise terms of their agreement, and that there is no authority for extending their liability beyond the stipulation to which they have chosen to bind themselves.

[1, 2] What was the contract? Upon the execution of the bond appellant became a party to the contract and was bound by its provisions. A bond may incorporate, by reference expressly made thereto, other contracts or written instruments; or it may be conditioned for the performance of agreements set forth in such instruments, in which case the bond and papers referred to should be read together and construed as a whole. 5 Ency. of Law and Proc. 757, and cases cited. This being so, what construction should be put upon the agreement, of which the bond was a part, to furnish all labor and material necessary to build and complete the house? Can it be said that, where a contractor agrees to furnish all the labor and materials necessary to build and complete a house, he may comply with this requirement by simply placing the materials upon the ground, engaging the labor, and leaving the owner to pay therefor, or permit a lien to stand against his property?

[3] Under its contract the surety company bound itself that the contractors would furnish the materials and erect the structure, and faithfully comply with all the terms, covenants, and conditions of the contract. To our mind this case would be easy of solution were it not for the decision in *Boas v. Maloney*, 138 Cal. 105, 70 Pac. 1004, where the precise question arose and was determined. There the contract provided that, in consideration of a sum to be paid in certain installments, Maloney was to furnish the necessary labor and materials, and perform and complete in a workmanlike manner all the new work and repair, etc., according to plans and specifications. The bond given, after reciting certain conditions of the contract, provided: "Now, therefore, if said Maloney shall well and truly perform, observe, abide by each and all the covenants, provisions and obligations contained in said contract, then this obligation shall be discharged and of no further force or effect, but otherwise it shall remain in full force and effect," etc. It will be noticed that the facts are on all fours with the present case so far as the contract itself is concerned. The court said: "The sureties are to be held according to the

strict terms of their contract, and it cannot be extended by implication so as to make them liable beyond its terms. Maloney agreed to build and construct the house for \$2,850. He did the work according to the contract, and has not claimed any more than the \$2,850. He furnished the labor and materials, and did not pay for them, and hence the liens were filed. The amount due for the labor and materials was due from Maloney, and not by the plaintiff. The bond did not provide that the building should be delivered up free from liens. The plaintiff did not require nor did Maloney put such clause in the bond. The fact that the debts due by Maloney became, by virtue of the statute, liens upon the plaintiff's property did not make the sureties liable. They had not agreed to pay such liens nor to be responsible therefor." The court cited to sustain this conclusion the case of *Gato v. Warrington*, 37 Fla. 542, 19 South. 883. The Maloney Case has not been followed in this state or elsewhere, and it, with the Gato Case, have been referred to with disapproval in various jurisdictions.

In view of the conclusion we have reached that the Maloney Case does not lay down the correct doctrine, a somewhat extended review of the authorities seems appropriate. In the case of *Bonding Co. v. Pueblo Inv. Co.*, 150 Fed. 17, 80 C. C. A. 97, 9 L. R. A. (N. S.) 557, 10 Ann. Cas. 357, the court rejects the doctrine expressed in *Boas v. Maloney*, supra, and *Gato v. Warrington*, supra. In the course of the opinion the court says: "That the effect of these decisions is that an agreement to furnish work and material to the owner of property for a price paid, which is commensurate with the full value thereof, is performed when the contractor furnishes the work and material at the expense of the owner, so that the latter is compelled to pay for them twice, while the former gets the price for little or nothing. This view failed to commend itself to the Supreme Courts of Indiana and Kentucky, and they held that an agreement to furnish was an agreement to pay for such work and material, and that the owner of the property was entitled to recover of the surety the money paid to discharge liens therefor under a similar contract and bond"—citing *Mackenzie v. School Trustee*, 72 Ind. 189, 196; *Mayer v. Lane*, 116 Ky. 566, 76 S. W. 399, 400. The Michigan Supreme Court in *Stoddard v. Hibbler et al.*, 156 Mich. 335, 120 N. W. 787, 24 L. R. A. (N. S.) 1075, deciding a similar case to the one at bar, commented upon *Boas v. Maloney* as follows: "The court (California) cited to sustain the contention the case of *Gato v. Warrington*. The reasoning of these cases does not commend itself to the court. In view of the statute of this state which entitled laborers and materialmen to liens, it seems to us a most narrow construction to say that, when the



contractor agrees to furnish all labor and material necessary to build and complete a house, he may comply with the requirements by simply placing the material on the ground, engaging the labor, and leaving the owner to pay for it, or to permit a lien to stand against his property. This is not furnishing the materials in any substantial way, and we find that other courts have taken a very different view from that expressed in the cases referred to." In *Mayes v. Lane*, 116 Ky. 566, 76 S. W. 399, the court had this same question under consideration, and it was claimed, as here, on behalf of the sureties, that the terms of their bond were complied with when the material and labor were furnished; that their contract did not require them to protect the owner against the costs of the material and labor. The court held that the contractor had not complied with his contract when he furnished the material and labor unless he also paid for it.

So, also, in the case of *Kiewit v. Carter*, 25 Neb. 460, 41 N. W. 286, where the contractor for the erection of a building gave a bond with sureties to faithfully perform all the covenants and agreements of a building contract, which provided that he was to furnish all materials, it was held that a failure to pay for such materials, whereby a mechanics' lien was filed on the building and lot, was a breach of the condition of the bond, and rendered the builder and his sureties liable thereon. This case was cited with approval in *Friend v. Ralston*, 35 Wash. 424, 77 Pac. 794. To the same effect is *Closson v. Billman*, 161 Ind. 610, 69 N. E. 449. In that case the contract was to furnish all materials and to build and construct a residence. The bond was to construct and complete according to contract and within a time limit. The court held that the provisions of the bond to construct and complete according to contract required the contractor to furnish and pay for the necessary materials so as to deliver them free of lien. The court added: "To hold, in the face of the bond and contract, that the construction and completion of the building in accordance with the plans and specifications was a compliance with the bond, although the owner would be compelled to pay out large sums in excess of the amount stipulated in the contract to discharge liens for the purchase price of materials, would be to keep the word of promise to the ear, but to break it to the hope." The same doctrine is sustained in *McRae v. University of the South* (Tenn. Ch. App.) 52 S. W. 463, where it was decided that although the bond was silent as to liens, and provided for forfeiture merely in case all the requirements of the contract were not carried out, nevertheless it was to be construed as an indemnity bond protecting the obligee against claims for labor and materials furnished.

And again, in *Crowley v. U. S. Fidelity &*

*Guaranty Co.*, 29 Wash. 268, 69 Pac. 784, where it was contended, under a bond with the same conditions as here, that an amount received by lien claimants should not be allowed, because the terms of the bond did not contemplate such damages, it was held that a bond providing that the contractor should perform his contract—which required him to furnish materials and labor—should be construed to obligate him to pay for them, not simply to supply them. The court said: "This is the only reasonable doctrine from such an agreement. If the contractor furnished materials under the contract, for which he did not pay and on account of which liens were filed, it became the duty of the contractor, or in default thereof the surety, to pay these liens; and neglecting to do so and thereby causing damage to the respondent he can recover." To the same point is *Wheeler Osgood v. Everett Land Co.*, 14 Wash. 630, 45 Pac. 316, where it was claimed that the provision in the bond requiring the contractor to furnish the material did not mean that he was to pay for it; but the court rejected this contention. It will thus be seen that *Boas v. Maloney*, upon which appellant relies, has not met with approval in other jurisdictions; nor has it been followed by our Supreme Court. The case was decided upon the strict doctrine that sureties are never bound beyond the strict letter of their contract, and that claims against them are *strictissimi juris*.

[4] Section 2837 of the Civil Code provides that in interpreting the terms of a contract of suretyship the same rules are to be observed as in the case of other contracts. As was said by Mr. Justice Lorigan in *Sather Banking Co. v. Briggs Co.*, 138 Cal. 724, 72 Pac. 352: "While it is true that a surety cannot be held beyond the express terms of his contract, yet in interpreting the terms of a contract of suretyship the same rules are to be observed as in the case of other contracts. Such construction does not mean that words are to be distorted out of their natural meaning, or that by an implication something can be read into the contract that it will not reasonably bear; but it means that the contract shall be fairly construed with a view to effect the object for which it was given, and to accomplish the purpose for which it was designed. The old rule of *strictissimi juris* applies only to the extent that no implication shall be indulged in to impose a burden not clearly inferable from the language of the contract, but does not apply so as to hold that a contract shall not be reasonably interpreted as other contracts are." See, also, to the same effect *Pratt v. Matthews*, 24 Hun (N. Y.) 387.

The obligation of the surety here was that the contractor should faithfully perform the conditions of his contract, and this he did not do. The case of *Russell v. Ross*, 157 Cal. 174, 106 Pac. 583, involved a bond con-

ditioned as here for the faithful performance of a contract. In that case Russell contracted with Ross to build a vessel, and a surety company executed a bond, as here, for the faithful performance of the contract. An examination of the record on appeal in that case will disclose that there was no provision made for the payment of liens in the contract or bond. The contractor abandoned his contract; and Mr. Justice Melvin, speaking for the court in affirming the judgment of Judge Sloss, before whom the case was tried, held the surety company to be liable for the amount of the bond. We are thus of the opinion that the case of *Boas v. Maloney* does not lay down the prevailing doctrine in this state.

It is further claimed by appellant that the record does not show by competent evidence that any of the claims for labor or material satisfied by the owner were valid, or that any of the labor or material alleged to be represented by those claims were furnished to be used, or were used, in the erection of the building, and that the only evidence presented in regard to the same was hearsay and inadmissible. An examination of the record does not support this contention. Plaintiff testified without objection as to the investigation of each of the claims, and was examined by the court as to whether or not the materials were used in the building.

The further objection is made that the evidence fails to disclose proof of the reasonable cost of completion. There is ample evidence to support this finding, as also the finding as to the damages of \$380 for the delay in the completion of the building.

[5] There is, however, a discrepancy between the computation of respondent's claim and the judgment. The items going to make up the cost of the completion of the building appear to be \$907.13, while the judgment was for \$921.80, a difference of \$14.67. This sum deducted from \$1,301.80, the full amount of the judgment, leaves the sum of \$1,287.13. It is not necessary to reverse the judgment or order for this reason, as the error may be corrected by a modification of the judgment. *McConnell v. Water Co.*, 149 Cal. 60, 85 Pac. 929, 8 L. R. A. (N. S.) 1171; *Klokke v. Raphael*, 8 Cal. App. 1, 96 Pac. 392.

It is therefore ordered that the judgment be modified by deducting from the amount thereof the sum of \$14.67, and with this modification the judgment and order denying a new trial are affirmed.

We concur: LENNON, P. J.; HALL, J.

20 Cal. App. 483

CALLAN v. EMPIRE STATE SURETY CO.  
et al. (S. F. 6,444.)

(Supreme Court of California. Feb. 1, 1913.)

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by E. J. Callan against the Empire State Surety Company and others. Judgment for plaintiff in the District Court of Appeal (129 Pac. 978), and defendant named petitions for hearing in the Supreme Court. Petition denied.

George F. Hatton and Hartley F. Peart, both of San Francisco, for appellant. William S. Downing, of San Francisco, for respondent.

PER CURIAM. The petition for hearing in the Supreme Court is denied and we agree with the reasoning of the District Court of Appeal, to the effect that *Boas v. Maloney*, 138 Cal. 105, 70 Pac. 1004, is no longer to be regarded as authority.

164 Cal. 532

BOHN v. BOHN. (L. A. 2,743.)

(Supreme Court of California. Jan. 18, 1913.)

1. VENUE (§ 32\*)—WAIVER OF OBJECTION.

Although, under the express provisions of Code Civ. Proc. § 395, a defendant has an absolute right to have an action in claim and delivery tried in the county in which he resided at the commencement of the action, this right is waived, unless asserted in the proper manner.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 47-50; Dec. Dig. § 32.\*]

2. VENUE (§ 58\*)—CHANGE—PROCEDURE.

Although Code Civ. Proc. § 396, requires a defendant desiring a change of venue to the proper county to file an affidavit of merits and a demand in writing for the change, the filing of the demand and affidavit does not in itself change the place of trial; a motion being necessary under section 397, providing that the court may, on motion, change the place of trial, when the county designated is not the proper county.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 88-90; Dec. Dig. § 58.\*]

3. VENUE (§ 63\*)—CHANGE—NOTICE OF MOTION.

A motion to change the place of trial of an action in claim and delivery to the county where defendant resided at the commencement of the action must be on notice to the adverse party.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 104-108; Dec. Dig. § 63.\*]

4. VENUE (§ 63\*)—CHANGE—NOTICE OF MOTION—SUFFICIENCY.

Under Code Civ. Proc. § 1010, providing that notice must be in writing, and that notice of a motion, other than for a new trial, must state when and the grounds upon which it will be made, a formal motion for change of venue, served on the attorneys for the adverse party, is insufficient as a notice of motion, where it does not state when the motion will be brought on for hearing, although the court has designated certain days for the hearing of motions.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 104-108; Dec. Dig. § 63.\*]

5. COURTS (§ 91\*)—RULES OF DECISION—DECISIONS OF INTERMEDIATE COURT.

The Supreme Court, by refusing to transfer a cause from the District Court of Appeal for hearing and determination, does not adopt the opinion of the Court of Appeal, so as to



give such opinion the authoritative effect of a Supreme Court decision.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 313, 325, 326; Dec. Dig. § 91.\*]

#### 6. COURTS (§ 90\*)—RULES OF DECISION—PREVIOUS DECISIONS AS PRECEDENTS.

An order properly made will be affirmed, even though the court has, in another case, reversed an order similar in all respects.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 313-321, 351; Dec. Dig. § 90.\*]

#### 7. MOTIONS (§ 23\*)—NOTICE—WAIVER.

While the want of proper notice of a motion is waived, where the opposing party appears and contests the motion on the merits, the opposing party does not waive want of notice by merely appearing for that purpose and objecting to consideration of the motion because of the insufficient notice.

[Ed. Note.—For other cases, see Motions, Cent. Dig. § 20; Dec. Dig. § 23.\*]

#### 8. APPEAL AND ERROR (§ 882\*)—REVIEW—INVITED ERROR.

Where defendant persisted in presenting his motion for a change of venue in the face of plaintiff's objection to its consideration for want of notice, he cannot complain because the court denied the motion, instead of deferring action to enable him to give the proper notice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

In Bank. Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Samuel Bohn against John L. Bohn. From a judgment for plaintiff, and from an order denying a change of venue, defendant appeals. Affirmed.

Winslow P. Hyatt, of Los Angeles, for appellant. Williams & Rutan, of Santa Ana, for respondent.

SLOSS, J. A hearing in bank was ordered after judgment in department. Upon the former submission, the following opinion, prepared by Lorigan, J., was filed:

"This action is in claim and delivery, and was brought in the superior court of Orange county.

"Defendant, being served, filed a demurrer to the complaint on April 22, 1910, and on the same day filed and served, on the attorneys for plaintiff, an affidavit of merits, and a demand that the action be transferred for trial to the superior court of Los Angeles county, on the ground that, at the time of the commencement of the action, defendant was a resident of the city and county of Los Angeles. At the same time he filed and served the following motion, entitled in the court and cause: 'Now comes \* \* \* the defendant \* \* \* and moves this honorable court to transfer the above-entitled action \* \* \* to the superior court of Los Angeles county, upon the ground [setting it forth as above]. Said motion will be based on the pleadings and papers on file herein, and the affidavit and demand of the defendant herewith served and filed.'

"On the filing of these papers, the clerk of

the court placed said motion on the regular law and motion calendar of said court for Friday, April 29, 1910. On that date defendant presented his motion for transfer of the cause, and plaintiff objected to the granting thereof on the ground that the notice of motion was insufficient in that no time of hearing was designated in said notice of motion, and on the further ground that no sufficient service of notice of motion had been given. In support of the last ground, an affidavit of one of the attorneys for plaintiff was filed, showing that, when service of the above papers were made on which the motion for a transfer was based, the attorneys for plaintiff and the attorney for defendant resided and had their offices in Orange and Los Angeles counties, respectively.

"The court heard said motion, the above papers and no others being used on the hearing thereof, and then and there entered an order denying said motion for a transfer of said cause, to which ruling and order the defendant excepted.

"Subsequently the demurrer to the complaint was sustained, and plaintiff filed an amended complaint. The time stipulated within which defendant might answer having expired, and no answer being filed, his default was entered and judgment given for plaintiff for the recovery of the property or its value and damages. Defendant appeals from the judgment; the appeal being based on the judgment roll, accompanied by a bill of exceptions, under which (and this is the only question presented) the validity of the order denying the motion for transfer of the cause is attacked.

"Several sections of the Code of Civil Procedure are to be considered in determining this question. Section 395 thereof provides, as to actions of the character brought here, that 'the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action.' Section 396 provides that, 'if the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless defendant at the time he answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county.'

"The claim of appellant is that, under the first section referred to, an absolute right is given a defendant to have the action brought against him tried in the county where he resided when it was commenced, and that, under section 396, all that is necessary to be done by a defendant to secure that right is to serve and file the affidavit, and demand that the trial be had in the proper county, as provided in the section; that no motion as such, or notice of motion, is necessary or provided for; that the demand is all the notice that is required to bring it on for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

hearing, where the court has established regular law and motion days, as was the case in Orange county. We state these points as appellant makes them.

[1, 2] "Undoubtedly, as he claims, a defendant has the absolute right to have the action brought against him tried in the county where he resided at the time it was brought. But this pertains to the right, not to the remedy by which it may be secured. While an absolute right, if it is insisted on, it is one which a defendant may waive, and which he does waive, unless he follows the procedure provided for asserting it. This procedure, however, is not regulated solely by section 396, but by section 397, also, which provides, among other things, that: 'The court may, on motion, change the place of trial in the following cases: (1) When the county designated in the complaint is not the proper county.' Under the position which appellant takes, he necessarily denies, and consistently so, the application of this latter section, contending that his rights are to be measured by the terms of section 396 alone. But it is quite obvious, on a little reflection, that this cannot be so. Our attention has not been called by counsel on either side to any decision directly involving this point. Our own research discloses numbers of decisions on appeal where the validity of orders granting or refusing a transfer were involved; but the point considered was generally the sufficiency of the demand or affidavit of merits, a motion and notice of hearing thereof being given, as is the practice. That this is the proper and required procedure, we think quite plain.

"The demand and affidavit which are required to be filed under section 396 are not addressed to the court, nor do they of themselves, by virtue of such filing, call for or require any action by the court. They advise the plaintiff that the right of transfer shall be insisted on, and their service and filing are the initial steps required to be taken as between the parties to secure that transfer. The filing of the demand and affidavit do not operate ipso facto to change the place of trial. They have no such force. The change can only be effected through an order of the court, after its judicial action has been invoked by bringing the matter on for hearing, where the right of the defendant to the transfer can be contested by the plaintiff. The court must be applied to for an order of transfer. Such application is a motion (section 1003, Code Civ. Proc.); and under section 397, supra, a motion for the change must be made, in addition to the demand and affidavit, as one of the necessary steps in the procedure to obtain the order of transfer.

[3] "Having determined that a motion is necessary, we now come to the question of notice and its character. It is, of course, beyond question that, where a motion is required to be made for an order in a cause

whereby the right of an adverse litigant may be affected, it must be upon notice to such party.

[4] "Now as to the character of the notice necessary to be given to authorize a court to entertain a motion. This is clearly shown by section 1010, Code of Civil Procedure, as follows: 'Notices must be in writing, and the notice of a motion, other than for a new trial, must state when, and the grounds upon which it will be made, and the papers, if any, upon which it is to be based.'

"In the present matter, if the formal motion which appellant served on the attorneys for plaintiff be treated as a notice of motion, it was radically defective, as such, in the very essential particular that it did not state any time when the motion would be made or brought on for hearing, and for that reason the motion for a change of the place of trial was properly denied.

"In this view, we do not deem it necessary to consider the objection urged by respondent at the hearing below, and insisted on here, of insufficiency of service of the notice to warrant a hearing on the day when appellant presented his notice. Nor is it necessary to particularly discuss the claim made by appellant, based on the existence of the rule of the superior court of Orange county respecting law and motion days. Rules of court have usually to do with the conduct and orderly dispatch of the business of the court, and cannot control or be substituted for statutory provisions as to procedure. The rule relied on by appellant simply provides when the court will take up, for consideration, motions of the contemplated presentation of which proper notice has been given. It could not, and of course does not, pretend to dispense with the notice which the Code declares shall be given to authorize it to hear a motion.

"Appellant suggests that, as the provisions of section 396 are remedial, a liberal construction in favor of the remedy should prevail. It would, if there was any room for such a construction, but there is not. The rule of liberal construction may not be applied to excuse a failure to adopt the rules of necessary procedure under which alone the remedy may be invoked.

"The judgment and order appealed from are affirmed."

[5, 6] Our further examination of the case has led us to the conclusion that the department opinion was correct. The principal reason for granting a hearing in bank was that, in a case between the same parties, presenting precisely the same issues of fact and law, the District Court of Appeal for the Second appellate district had reversed an order like the one here appealed from, and that a petition to have the appeal transferred to this court for hearing and determination had been denied. *Bohn v. Bohn*, 16 Cal. App. 179, 116 Pac. 568. It is, of course, much to be



regretted that opposite rulings should be made in two cases which present identical questions. But an order by this court, refusing to transfer a cause after judgment in the District Court of Appeal, does not adopt the opinion of the appellate court so as to give it, in this court, the authoritative effect which one of our own decisions would have. Being now convinced that the order appealed from should be affirmed, we must so declare, even though this view necessarily involves the conclusion that the earlier appeal should have been transferred to this court, and thereupon disposed of by a judgment differing from that rendered in the District Court of Appeal. Indeed, believing, as we do, that the order now under review was properly made, it would be our duty to affirm it, even if this court had itself, in another case, reversed an order similar in all respects.

[7] One or two further observations concerning the disposition of the former appeal may properly be made. The justices of the District Court of Appeal did not agree upon the reasons for reversing the order appealed from. Two of them based their conclusion upon the ground that a written notice of intention to move is not required in the case of an application to change the place of trial to the proper county. This position is, we think, fully met in the foregoing department opinion. The third justice held that the conduct of plaintiff's counsel in appearing to oppose the granting of the application was a waiver of notice. There are several decisions to the effect that want of proper notice of a motion is waived where the opposing party appears and contests the motion. *McLeran v. Shartzler*, 5 Cal. 70, 63 Am. Dec. 84; *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459; *Acock v. Halsey*, 90 Cal. 215, 27 Pac. 193; *Herman v. Santee*, 103 Cal. 519, 37 Pac. 509, 42 Am. St. Rep. 145. "Where the object of notice was accomplished," said the court in *McLeran v. Shartzler*, *supra*, "it is immaterial whether there was notice or not." But, in all the cases in which this rule was applied, the party entitled to notice had appeared and contested the motion on the merits. His position was analogous to that of a defendant who, although not regularly served with summons, files an answer, or does any other act amounting to a general appearance. Under such circumstances, any defect in the service of process is waived. Here, however, the plaintiff made no opposition to the motion,

except to object to its consideration upon the ground of the insufficiency of notice. The affidavit presented by him had reference to this objection alone. His attitude is to be compared to that of a defendant appearing specially to question the court's jurisdiction of his person. It is difficult to see how a defendant can be held to have waived a valid objection, when he has done no more than to insist upon it in the only manner that is open to him. Where the appearance in opposition to a motion is for this limited purpose, it does not constitute a waiver. 28 Cyc. 8; *Curtis v. Walling*, 2 Idaho (Hasb.) 416, 18 Pac. 54; *Wood v. Critchfield*, 1 Dowl. 587.

[8] It is suggested that, if sufficient notice had not been given, the court below should not have denied the application for change of venue, but should have deferred action to enable the defendant to give a proper notice. This would, no doubt, have been a proper course, if the defendant had requested it. But, instead of so requesting, he persisted, in the face of the objection of want of notice, in presenting his motion. No doubt he then took the position which he now advances, viz., that no notice was required. Under these conditions, he cannot claim that the court erred in passing upon the motion which he had thus pressed upon it for determination. It may be, too, that a denial of the motion for want of notice would not be a bar to a subsequent motion upon proper notice. But the question of defendant's right, if seasonably asserted, to renew his motion is not involved here.

The department opinion states that the appeal is from the judgment. It omits to mention, except inferentially, that there is also an appeal from the order denying a change of place of trial. Since the latter order is itself appealable (Code Civ. Proc. § 939), its correctness cannot be reviewed on the appeal from the judgment. Code Civ. Proc. § 956. Under the views herein expressed, both the judgment and the order will have to be affirmed, the former because the points raised cannot be considered on appeal from the judgment, the latter because there is no merit in said points.

The judgment and the order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

164 Cal. 573.

**O'BRIEN v. NELSON et al.** (S. F. 6,119.)  
(Supreme Court of California. Jan. 21, 1913.  
Rehearing Denied Feb. 20, 1913.)

**1. EXECUTORS AND ADMINISTRATORS (§ 20\*)—  
PROCEEDINGS FOR APPOINTMENT—TITLE OF  
PROCEEDING.**

On an appeal from an order denying a new trial of an application for letters of administration, the title of the cause should be "In the Matter of the Estate of N. Deceased," and not "O. [the petitioner] v. N. [the contestant]."

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 83-105; Dec. Dig. § 20.\*]

**2. EXECUTORS AND ADMINISTRATORS (§ 23\*)—  
APPOINTMENT AFTER FINAL SETTLEMENT OF  
PRIOR ADMINISTRATION.**

After final settlement of an estate, the court having probate jurisdiction is not bound to, and should not, issue further letters of administration, unless there still remains property not fully disposed of, or some act to be done relating thereto which only an administrator can do, especially in view of Code Civ. Proc. § 1698, providing that the settlement of an estate shall not prevent the issuance of further letters, if other property be discovered, or if good cause appear therefor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 128-131; Dec. Dig. § 23.\*]

**3. EXECUTORS AND ADMINISTRATORS (§ 315\*)—  
SETTLEMENT OF ESTATE—CONCLUSIVENESS.**

An administration proceeding, or the decree of final settlement, was not void because the court erroneously held that all the property was community property and distributed it to the surviving husband's grantee; but such error should have been corrected by motion for a new trial, or an appeal, and, in the absence of such proceedings for a review, the decree was final and conclusive.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.\*]

Department 1. Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Proceeding by P. J. O'Brien against C. O. Nelson and another for letters of administration on the estate of Annie Nelson. From an order denying the application, the petitioner appeals. Affirmed.

J. C. Black, of San Jose, for appellant.  
A. A. Caldwell, of San Jose, for respondents.

SHAW, J. [1] We give the title as above set forth, because it so appears in the transcript and papers filed in this court. The correct title of the cause would be: "In the Matter of the Estate of Annie Nelson, Deceased." The appeal is taken from an order denying the appellant's motion for a new trial in the matter of his application for letters of administration upon the estate of said Annie Nelson. The application was contested by C. O. Nelson and Annie Reardon, the matter was duly tried, findings were made and filed, and the order denying said petition was entered on March 13, 1911.

[2] Annie Nelson died intestate on February 19, 1910. The application of the appel-

lant for letters of administration upon her estate was filed on December 2, 1910. The evidence showed that there had been a previous administration of the estate, that the same had been fully completed and distribution thereof made, and that the decree of distribution had become final at the time of the hearing of the contest. Annie Reardon was appointed administratrix thereof on March 19, 1910, and the decree of distribution was made on September 30, 1910. The proceedings were in all respects regular. It is admitted that the petition upon which she was appointed contained a statement of all the facts necessary to confer upon the court jurisdiction of the matter of the administration of the estate and that the required notices were duly given. It is not claimed that there remains any estate not administered. Indeed, the property described in the petition of the appellant as the property of said decedent is precisely the same as that described in the former petition of Annie Reardon and in the said decree of distribution. It is well established that, after final settlement of an estate, the court having probate jurisdiction is not bound to issue further letters of administration, and should not do so, unless there still remains property of the estate not fully disposed of, or some act to be done relating thereto which only an administrator can do. *Murphy v. Menard*, 14 Tex. 67; *San Roman v. Watson*, 54 Tex. 254; *Wilcoxon v. Reese*, 63 Md. 545; *Myers v. Baltimore, etc., Co.*, 73 Md. 425, 21 Atl. 58; *Grayson v. Weddle*, 63 Mo. 539; *Long v. Joplin, etc., Co.*, 68 Mo. 427; *Haven v. Haven*, 69 N. H. 204, 39 Atl. 972; *Glover v. Hill*, 85 Ala. 41, 4 South. 613. This is implied by section 1698 of the Code of Civil Procedure, providing that the final settlement of an estate, as provided in the Code, shall not prevent the issuance of further letters of administration thereon, if other property of the estate be discovered, or if good cause appears therefor. The implication is that there should be no issue of subsequent letters, where no other property is discovered, and no good cause appears therefor.

[3] The appellant claims that the former administration was void or ineffectual, because of the fact that the record therein shows that the court declared that the property as to which administration was had was the community property of the decedent and C. O. Nelson, her surviving husband, and distributed it all to Annie Reardon, to whom Nelson had conveyed all his title and interest therein. This does not make the proceedings or decree void. At the most it was a mere error, a mistake injurious to the persons who would have inherited the property from Annie Nelson, if it had been her separate estate, and which they could correct only by moving for a new trial, or by taking an ap-



peal from said decree. In the absence of such proceedings for a review of that decree, it became final and conclusive upon all heirs, legatees, and devisees. Code Civ. Proc. § 1668. If, as a matter of fact, the property did belong to C. O. Nelson, as the survivor of the community, it did not form any part of the estate of his wife, it is no part of that estate at the present time, and no administration of her estate should be had to interfere with it. If it was her separate estate, then, as before stated, the distribution of it to the grantee of Nelson was final and conclusive, and no further administration of it can be made.

We do not deem it necessary to notice the other points made in support of the appeal. There is no dispute regarding the facts above stated, and they conclusively sustain the decision of the court below.

The order is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

(164 Cal. 532)

BAUMANN et al. v. KUSIAN et al. (FISCHER, Intervener). (Sac. 2,010.)

(Supreme Court of California. Jan. 23, 1913.)

1. WILLS (§ 58\*)—CONTRACT TO DEVISE.

An agreement to rear and educate, in a suitable manner, two children procured from an orphans' home, and to treat them in all respects as their own, was not an agreement to will property to the children; no legal obligation resting on any parent to will any property to any child.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 164, 165; Dec. Dig. § 58.\*]

2. SPECIFIC PERFORMANCE (§ 25\*)—CONTRACT TO DEVISE—VALIDITY.

To warrant specific enforcement of a contract to will property, the contract must be definite and certain, and also just and fair.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 56-58, 60; Dec. Dig. § 25.\*]

3. SPECIFIC PERFORMANCE (§ 49\*)—CONTRACT TO DEVISE—CONSIDERATION.

That plaintiffs, who, while children, were taken from an orphans' home by the deceased, agreed to remain with her for an indefinite time, conducting themselves as dutiful children and rendering dutiful services, without making any sacrifice of present or prospective advantage or doing more than it was their duty in return for the care taken of them, was not such a sufficient consideration for a contract by the deceased to will them her property as to warrant a court of equity in enforcing such contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 140-151; Dec. Dig. § 49.\*]

In Bank. Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Mrs. Minnie Baumann and another against F. G. Kusian and others, in which Lucie Fischer intervened. From a judgment that plaintiffs take nothing, they appeal. Affirmed.

McCoy & Gans, of Red Bluff, for appellants. W. P. Johnson and W. A. Fish, both of Red Bluff, for respondent intervener. John J. Wells, of Red Bluff, for other respondents.

ANGELLOTTI, J. The demurrers of the defendants and intervener to plaintiffs' amended complaint, on the ground that the same does not state facts sufficient to state a cause of action, having been sustained without leave to amend, judgment was given that plaintiffs take nothing. This is an appeal by plaintiffs from such judgment.

The action is one to obtain a decree declaring the plaintiffs to be the owners of, and entitled to receive, all the property of one Christiane W. Fischer, deceased, subject to the administration of her estate pending in the superior court of Tehama county; their claim being substantially that deceased had contracted to leave all of her property to them when she died, and had failed to do so. The defendants are heirs of deceased, and the intervener is an adopted daughter. The action is thus practically one against the heirs of deceased to specifically enforce an alleged contract of deceased, by which she agreed to make a will in favor of plaintiffs.

The amended complaint substantially alleges as follows: On September 28, 1892, deceased and her husband, Herman A. F. W. Fischer, executed mutual wills, each leaving to the other all of his or her property. On October 8, 1892, each executed a codicil providing that no part of his or her estate should go to a specified adopted daughter, and reaffirming the will in all other respects. Mr. Fischer died November 29, 1908, and under his will all of the property of his estate was distributed to Mrs. Fischer. Mrs. Fischer died December 28, 1910, leaving no lineal descendant, and leaving all the property acquired from her husband's estate and other property, the same being of the value, after the payment of debts and expense of administration, of not exceeding \$12,000. She made no other will than that above referred to, and this will has been admitted to probate. On April 9, 1896, plaintiffs, who were in no way related to either of the Fischers, were, and for some years had been, orphan children, and were inmates of "the Five Points House of Industry" of the city of New York, state of New York, being cared for thereby. They were respectively 11 and 14 years of age. On or about April 9, 1896, the Fischers, who then lived in the state of Iowa, took them from said institution to their home. Plaintiffs remained with the Fischers at their home in Iowa until January, 1901, when the Fischers moved to Corning, Cal.; the plaintiffs accompanying them. They continued to live with the Fischers in California until their respective marriages. Plaintiff Minnie Baumann was married in October, 1905, and plaintiff Jennie Eriksson

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was married in September, 1903. From April 9, 1896, until their respective marriages, each bore the name of Fischer as her family name, and during the whole of said period each treated the Fischers as her lawful parents, and rendered to them "dutiful service."

At the time the Fischers took the plaintiffs from said institution, they promised and agreed that "they would take said plaintiffs to their home and would take good care of them, and would rear and educate them in a suitable and proper manner, and that they would treat them in all respects as their own children." The plaintiffs were then being well cared for and well reared and educated in said institution; and, if the Fischers had not taken them, they would have continued to have been well cared for and educated therein, or placed in some suitable family for such care and education. The authorities of said institution would not have permitted the Fischers to take plaintiffs, if it had not been for such promises and agreements on their part. Such promises and agreements were made by the Fischers for the purpose of securing plaintiffs from said institution.

On divers occasions, while plaintiffs were living with the Fischers in Iowa, they "became homesick to return to the said Home in New York." The Fischers promised and agreed to and with them that, "if they would remain with them at their said home in Iowa, they would rear and educate them in a suitable and proper manner, and treat them in all respects as their own children, and that they (said plaintiffs) should have the property of the said Fischers," and frequently told them that they had adopted them, and that they should have their property, and that they had made a will for them. Plaintiffs believed all these statements, and on account thereof remained with the Fischers. They would not have so remained but for said promises and agreements. The Fischers made such promises for the purpose of inducing plaintiffs to remain with them as their own children. When, in 1901, the Fischers were about to move to California, they renewed such promises, and because thereof plaintiffs came to California with them, and would not otherwise have come. After coming to California, the Fischers renewed said promises, "from time to time, \* \* \* and up to the time of and even after the marriage of plaintiffs."

It was substantially alleged that plaintiffs can be adequately compensated for the injury caused by the failure of the Fischers to leave them their property only by being awarded the residue of the property of Mrs. Fischer after the payment of debts and expenses of administration. Although a failure on the part of both the Fischers to perform any of their promises and agreements is alleged, we do not understand that plaintiffs claim any part of the estate, or, indeed, any

relief whatever, on account of any alleged failure on the part of the Fischers, except that relating to the alleged promise to leave their property to them. Obviously, plaintiffs are seeking specific enforcement of the alleged contract only in so far as that part thereof is concerned; and, in determining whether they are entitled to such relief, it cannot at all assist them that the Fischers failed and neglected to perform other alleged promises and agreements. The general allegations as to such other failures and neglects may therefore be entirely disregarded.

[1] It is clear enough, from what we have said, that the complaint does not show any promise or agreement on the part of the Fischers before they received these orphan children from the New York institution and took them to their home in Iowa, to the effect that they would bequeath or devise to them any of their property. Upon this point, we cannot do better than to quote from the opinion of the learned trial judge, which is contained in respondents' brief. He said: "The terms on which they were to take and rear and educate the plaintiffs were fixed before they left the home in New York. Those terms were, on the part of the Fischers, that they would take the plaintiffs to their home in Iowa and take good care of them and rear and educate them in a suitable manner, and treat them in all respects as their children. This was the whole offer on their part; and, by its acceptance by those acting on behalf of the plaintiffs, it became the terms of the contract. There is nothing in this contract about making a will and leaving the plaintiffs property. Property is not mentioned. It does state that the Fischers agreed to treat them as their own children. But this does not imply that they would get the Fischers' property. There is no legal obligation resting on any parent to will any property to a child, if he does not feel so disposed; and, if he does not, the child has no cause of action."

[2] It is well settled that, to warrant specific enforcement of a contract of the character here alleged, the contract must be definite and certain. See *Owens v. McNally*, 113 Cal. 444, 451, 45 Pac. 710, 33 L. R. A. 369, and cases there cited. Certainly there is nothing alleged in the complaint, as to the agreement made in New York, that warrants a conclusion that such agreement is definite and certain to the effect that the Fischers undertook to bequeath or devise any property to plaintiffs, or even to make them their heirs, by legally adopting them as their own children.

[3] We are thus brought to what subsequently took place in Iowa between 1896 and the removal to California in 1901 as the sole basis of plaintiffs' claim. On divers occasions plaintiffs "became homesick to return to the said home in New York," and would not have remained with the Fischers but for



the promises and agreements then made by them to and with plaintiffs, to induce them to remain. Those promises and agreements were that, "if they (plaintiffs) would remain with them at their said home in Iowa," in addition to the fulfillment of the promises made in New York by the Fischers, plaintiffs should have the property of the Fischers, and that they (the Fischers) had adopted them and made a will for them. When about to come to California in 1901, the Fischers renewed said promises and statements, and because thereof plaintiffs came with them, and would not otherwise have come. During all the time plaintiffs were with the Fischers, they were "dutiful children" to them, and rendered "dutiful service" to them. Said promises and agreements and statements were renewed from time to time after the said coming to California, and even after the marriage of plaintiffs.

It is to be noted that there is no express allegation in the complaint as to what plaintiffs agreed to do in consideration of the alleged promises on the part of the Fischers, except in so far as such undertaking may be implied from the allegations as to what they in fact did, namely, remained with the Fischers, both in Iowa and California, as a part of the family, until their respective marriages, and during all of said time conducted themselves as "dutiful children" to them, and rendered "dutiful service" to them. It is nowhere expressly alleged that there was ever any stipulation on the part of plaintiffs as to the time during which they were to continue to live with the Fischers, or as to the kind of service they were to render them.

The principle applicable to cases of this character was stated by this court in *McCabe v. Healy*, 138 Cal. 81, 84, 70 Pac. 1008, quoting from *Pomeroy on Specific Performance*, as follows: "Courts of equity will, under special circumstances, enforce a contract to make a will, or to make a certain testamentary disposition; and this may be done, even when the agreement was parol, where, in reliance upon the contract, the promisee has changed his condition and relations so that a refusal to complete the agreement would be a fraud upon him. The relief is granted, not by ordering a will to be made, but by regarding the property in the hands of the heirs, devisees, or representatives of the deceased promisor, as impressed with a trust in favor of the plaintiff, and by compelling defendant, who must of course belong to some one of these classes of persons, to make such a disposition of the property as will carry out the intent of the agreement." The same doctrine had been substantially declared in an earlier case (*Owens v. McNally*, 113 Cal. 444, 448, 45 Pac. 710, 33 L. R. A. 369), and the views expressed in these two cases have been followed in subsequent cases. It is entirely unnecessary in this case to consider to what extent the doctrine of these

cases has been affected by the amendment of section 1624 of the Civil Code in the year 1905, by which a new subdivision was added to said section, including such contracts among those declared by the section to be invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent.

The facts alleged in the amended complaint are not such as to serve as a basis for a very strong appeal to the sense of justice of a court of equity, on the theory that there was such a change of conditions and relations on the part of plaintiffs, made in reliance on any promise or promises of the Fischers, that it would be a fraud upon them not to give them the Fischer property. When originally taken by the Fischers, they were orphan children, aged, respectively, 11 and 14 years, without a single relative on earth, so far as appears, and without any friend or home, except such as was afforded them by the charitable institution of which they were inmates. They could expect nothing therefrom, except such care, support, and education as are ordinarily afforded by such an institution, until such time as they might be placed in some family under such terms as the Fischers agreed to with the authorities of the institution. It is not to be assumed that they would have fared better in any other family than they did with the Fischers. They were furnished by the Fischers with a home until their respective marriages. So far as appears, they gave up and sacrificed absolutely nothing in the way of present or prospective advantage by remaining with the Fischers. This is especially true as to the situation when any alleged promise as to property was made; none of which promises is alleged to have been given until after they went to Iowa. Up to this time, certainly, as was stated by the learned judge of the court below: "It seems to have been just the ordinary case of a person taking a child from an orphan asylum to rear and educate it for whatever services it might render and for its companionship." There is nothing to indicate that it would have been to plaintiffs' advantage in any way to leave the Fischers, or to return to the charitable institution in New York, if they could have done so, or to remain in Iowa when the Fischers came to California. While with the Fischers, they are not alleged to have rendered any unusual service. They simply conducted themselves as "dutiful children" and rendered "dutiful service." They certainly have received, so far as appears, what would ordinarily be considered adequate compensation for all they have given.

As we have said, it is settled that, to warrant specific enforcement of a contract of the character here alleged, the contract must be definite and certain. It is also settled that it must be just and fair. It was said in

Owens v. McNally, supra: "But the question whether relief should be granted or denied in a particular case addresses itself to the conscience of the chancellor; and, before a plaintiff entitles himself to it, many considerations enter and are to be weighed. \* \* \* Where a contract such as this, resting in parol, and sought to be enforced after the death of the other party to it, comes before a court of equity for review, it is scrutinized, and should be scrutinized, with particular care, and only upon a satisfactory showing that it is definite and certain and just will it be enforced. The proofs of the contract should be clear, and the acts of the claimant referable alone to the contract."

We have already pointed out wherein the alleged contract is vague and uncertain as to the undertaking of plaintiffs, in consideration of which the alleged promises on the part of the Fischers were made. From what we have said as to the facts of this case, as alleged in the complaint, we are of the opinion that it also sufficiently appears that there was no such showing of adequacy of consideration for the alleged promise of the Fischers in regard to their property as to appeal to a court of equity as requiring specific enforcement, in the face of the rule that the contract must be just and fair. That plaintiffs agreed simply to remain with the Fischers for some unspecified and indefinite time, conducting themselves during said time as "dutiful children" and rendering "dutiful service," which is substantially all that appears, is, under all the circumstances of this case, far from such a fair and adequate consideration as would appeal to a court of equity as being fair and just. And, finally, we agree entirely with what was said by the learned judge of the trial court, to the effect that it is not perceivable how the plaintiffs made such a sacrifice of present or prospective advantages, in reliance upon the alleged statements of the Fischers, that it would now be a fraud upon them not to give them the Fischer property.

In one or two of the cases cited by learned counsel for plaintiffs, relief in the nature of specific enforcement was given, although it does not appear from the opinion that there was any explicit promise in the matter of property. Such a promise appears to have been implied in one case from an undertaking to provide for the child and bring her up as her own (*Van Tine v. Van Tine* [N. J. Ch.] 15 Atl. 249, 1 L. R. A. 155), and in the other from a written statement in adoption proceedings, which proved abortive to the effect that the deceased and his wife intended to make the child their heir. *Wright v. Wright*, 99 Mich. 170, 58 N. W. 54, 23 L. R. A. 196. Both cases were, by reason of their peculiar circumstances, what are called "hard cases," and the opinion in the last case cited was by a divided court; two out of five

justices dissenting. We cannot at all accede to the view that relief may be given in such a case, in the absence of a clear and definite promise, on the part of the deceased, to the effect that the child shall have his property, or some specified portion thereof, when he dies. We say this much with reference to the understanding and agreement at the time the Fischers took the plaintiffs in New York.

We find nothing in any of the other cases cited that requires notice. Each case must necessarily depend upon its own peculiar circumstances. We are satisfied that the lower court did not err in sustaining the demurrer to the amended complaint.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

164 Cal. 564

# PRITCHARD v. WHITNEY ESTATE CO.

(S. F. 5733.)

(Supreme Court of California. June 13, 1912.

On Rehearing in Bank, Jan. 20, 1913.)

## 1. DEATH (§ 14\*)—RIGHT OF ACTION FOR WRONGFUL DEATH—STATUTES—"RECEIVED AS AFORESAID."

Civ. Code, § 1970, provides that an employer is not liable for an injury to his employé caused by the negligence of another servant, unless he has not used proper care in selecting the other servant, or the negligent servant was a superior, or was engaged in another line of work; that knowledge by an employé injured because of defective character of any appliances shall not be a bar to a recovery, unless such employé appreciated the danger; and that when death, whether instantaneous or otherwise, results to an employé from an injury received as aforesaid, the personal representative of such employé shall have a right of action on behalf of a widow, children, dependent parents, and dependent brothers and sisters in the order of precedence as stated. *Held*, that the phrase "received as aforesaid," used in the third clause of the act, refers, not only to injuries from defective ways and appliances, but to injuries because of the negligence of fellow servants, and therefore the administrator of an employé killed by reason of the negligence of a servant in another line of work is given no right of action to recover damages suffered by a dependent nephew.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 16; Dec. Dig. § 14.\*]

## 2. DEATH (§ 9\*)—WRONGFUL DEATH—RIGHT OF ACTION.

Code Civ. Proc. § 377, which was enacted long prior to Civ. Code, § 1970, provides that, when the death of a person is caused by the wrongful act of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or, if such person be employed by another person, then also against such other person. *Held*, that as the Civil Code, which supersedes the Code of Civil Procedure in case of conflict, gives no right of action for the benefit of a nephew, the administrator of a deceased servant killed because of the negligence of a servant in another line of work can maintain no action for the damages suffered by a dependent nephew of the decedent.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 11; Dec. Dig. § 9.\*]



## On Motion for Rehearing.

## 3. STATUTES (§ 117\*)—TITLE—CONSTITUTIONAL PROVISION.

St. 1907, p. 119, entitled "An act to amend section 1970 of the Civil Code relating to the responsibility of employers for injuries or death to employés," is not in violation of Const. art. 4, § 24, declaring that every act shall embrace but one subject, which shall be expressed in its title, because, in addition to fixing the responsibility of the employers, it declares who may sue for damages resulting from the death of employés.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 154-157; Dec. Dig. § 117.\*]

## 4. ABATEMENT AND REVIVAL (§ 54\*)—PERSONAL INJURY.

At common law an heir has no right of action for an injury to his ancestor.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 255-258, 260-278; Dec. Dig. § 54.\*]

## 5. DEATH (§ 9\*)—STATUTES (§ 72\*)—CONSTITUTIONAL LAW (§ 205\*)—CLASS LEGISLATION—UNIFORM OPERATION.

St. 1907, p. 119, amending Civ. Code, § 1970, and giving a right of action for damages against an employer in favor of the widow, children, dependent parents, and brothers and sisters of an employé whose death is caused from negligence of a fellow servant, is not in violation of Const. art. 1, §§ 11, 21, requiring general laws to have uniform operation, and forbidding a grant of special privileges to one citizen or class which are not given on the same terms to all because failing to grant such right in favor of the husband, nephews, nieces, or other collateral heirs of the deceased employé, for at common law an heir had no right of action for an injury to his ancestor, and in creating new rights of action the Legislature may in its discretion determine how far it will extend them.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 11; Dec. Dig. § 9;\* Statutes, Cent. Dig. § 72; Dec. Dig. § 72;\* Constitutional Law, Cent. Dig. §§ 591-624; Dec. Dig. § 205.\*]

## 6. CONSTITUTIONAL LAW (§ 205\*)—STATUTES (§ 72\*)—SPECIAL PRIVILEGES.

A law establishing rules of liability for negligence applying only to actions arising from the relation of master and servant does not violate Const. art. 1, §§ 11, 21, forbidding grant of special privileges, and requiring general laws to have uniform operation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-624; Dec. Dig. § 205;\* Statutes, Cent. Dig. § 72; Dec. Dig. § 72.\*]

Department 2. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Joseph A. Pritchard, as administrator of the estate of Albert D. Shepard, deceased, against the Whitney Estate Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Rothchild, Golden & Rothchild, and J. A. Pritchard, all of San Francisco, for appellant. Samuel Rosenheim and Bernard Silverstein, both of San Francisco, for respondent. Frank H. Short and F. El. Cook, both of Fresno, and L. A. Redman, of San Francisco, amici curiæ.

MELVIN, J. A demurrer to the complaint in this case having been sustained without

leave to amend, and the judgment having been accordingly entered in favor of the defendant, an appeal therefrom is taken by plaintiff.

[1] The action was commenced by the administrator of the estate of Albert D. Shepard on behalf of a nephew of the deceased for damages alleged to be due by reason of the death of said Shepard caused by the negligence of defendant's servant. There were three counts in the complaint, all of them setting forth the alleged interest of Wayne Shepard, the minor in whose behalf the action was brought. According to these averments, Albert D. Shepard was over the age of 21 years. He was a housesmith, earning from \$7.50 to \$20 a day, was employed to place certain iron fittings in and about the elevator shafts in defendant's building, and in the performance of said work it became necessary for him to project himself into the elevator shafts, as defendant well knew. While he was so performing his duties, defendant's night watchman negligently set in motion one of the elevators, which, striking Albert D. Shepard, caused his death. There was no contributory negligence on the part of said Albert D. Shepard. It was further alleged that Albert D. Shepard left surviving him two brothers and Wayne Shepard, aged six, the son of a deceased brother; that Wayne's mother was in impoverished circumstances, and was unable to maintain her child; that Wayne Shepard was supported by his uncle Albert; that the latter regularly contributed sums varying from \$50 to \$75 per month for the maintenance of his said nephew; that plaintiff knew of no damage sustained by the brothers of the deceased; and that Wayne Shepard was damaged in the sum of \$25,000 for the carelessness of defendant in causing the death of Albert D. Shepard.

Appellant insists that section 1970 of the Civil Code, which was adopted many years after section 377 of the Code of Civil Procedure went into effect, does not repeal the latter section, but that the right of action is cumulative with that conferred by the Code of Civil Procedure. Appellant's theory of the relation between these two sections is that while the third paragraph of section 1970, Civil Code, may in some degree modify the right of action conferred by section 377, Code of Civil Procedure, it restricts that right of action only so far as it would arise from a state of facts contemplated by the second paragraph of section 1970, Civil Code, and in no manner changes the right of action conferred by the Code of Civil Procedure arising by reason of the death of an employé caused by the negligence of a fellow servant in a different department of labor. In order that we may the better analyze these theories it may be well to quote the two sections:

"Sec. 1970 (Civ. Code). An employer is not

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employé, or unless the employer has neglected to use ordinary care in the selection of the culpable employé; provided, nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect or default of any agent or officer of such employer, superior to the employé injured, or of a person employed by such employer having the right to control or direct the services of such employé injured, and also when such injury results from the wrongful act, neglect or default of a co-employé engaged in another department of labor from that of the employé injured, or employed upon a machine, railroad train, switch signal point, locomotive engine, or other appliance than that upon which the employé injured is employed, or who is charged with dispatching trains, or transmitting telegraphic or telephonic orders upon any railroad, or in the operation of any mine, factory, machine shop or other industrial establishment. Knowledge by an employé injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employé fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and thereafter consented to use the same or continued in the use thereof. When death, whether instantaneous or otherwise, results from an injury to an employé received as aforesaid, the personal representative of such employé shall have a right of action therefor against such employer, and may recover damages in respect thereof, for and on behalf, and for the benefit of, the widow, children, dependent parents, and dependent brothers and sisters, in order of precedence as herein stated, but no more than one action shall be brought for such recovery. Any contract or agreement, express or implied, made by any such employé to waive the benefits of this section, or any part thereof, shall be null and void, and this section shall not be construed to deprive any such employé or his personal representative of any right or remedy to which he is now entitled under the laws of this state. The rules and principles of law as to contributory negligence which apply to other cases shall apply to cases arising under this section, except in so far as the same are herein modified or changed."

"Sec. 377 (C. C. P.). When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case, may be just."

We can see no reason for adopting the reading which would make the words "received as aforesaid" refer only to the second paragraph of section 1970 of the Civil Code. The main purpose of the amendment to that section, adopted in 1907, was the modification of the "fellow servant" doctrine, whereby only pleading and proof that the injury or death was caused by the negligence of a coemployé in the same department of labor with the person injured or killed was available as a defense. The Legislature might well have believed that in thus curtailing this defense it should in fairness to defendants more accurately than did section 377 of the Code of Civil Procedure designate the persons for whose benefit the personal representative of one who had been killed because of another's negligence might prosecute an action, but, whatever may have been the purpose the words "received as aforesaid" neither in themselves nor because of their location in the section indicate the intention of giving them a special limitation to the paragraph preceding the one in which they are used. Giving to these words their ordinary meaning, they apply as well to the case of an employé killed through the negligence of a fellow servant as to one whose death is caused by the defective or unsafe condition of machinery or appliances furnished by an employer.

[2] The complaint here, as appellant insists, is one which charges the death of plaintiff's decedent through the negligence of a fellow servant engaged in another department of labor; but in such a case no right of action accrues to an administrator on behalf of a nephew of his decedent. As Wayne Shepard does not come within any of the classes mentioned in paragraph 3 of section 1970 of the Civil Code, no cause of action is stated in the complaint, no matter what pecuniary loss said nephew might suffer by reason of his uncle's death. This reading of section 1970 of the Civil Code does not interpret that section as repealing section 377 of the Code of Civil Procedure. The last-named section appears in that part of the Code relating to "parties to civil actions." Section 1970 of the Civil Code does not take away the "right of action" by a personal representative as outlined in section 377 of the Code of Civil Procedure, but it does affect the "cause of action" when such representative,



seeks damages on behalf of a collateral relative of his decedent of the third degree. In such a case no recovery is possible. It is to be noted, also, that section 377 still gives a right of independent action to heirs which is not granted by the Civil Code; but, when an administrator brings suit, his powers are limited by section 1970 of the Civil Code, which is the last declaration of the Legislature on the subject.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

#### On Rehearing.

SHAW, J. After the decision of this case in department 2, a rehearing was granted before the court in bank. With the exception of the statement in the department opinion to the effect that the heirs of a deceased person may maintain an action under section 377 for an injury causing his death against an employer who is liable only because of the new provisions contained in the amended section 1970 of the Civil Code, we adhere to the department opinion. Said statement was not necessary to the decision.

Upon the argument before the court in bank it was contended that the paragraph of the amendment to section 1970, declaring who may sue for an injury causing death, is unconstitutional, because that subject is not embraced in the title of the act, that the entire act is unconstitutional because it embraces two subjects, and that said paragraph is also invalid because it is discriminatory and not uniform in its operation. Additional briefs have also been filed upon the question of the effect of this paragraph upon 377 of the Code of Civil Procedure, claiming that section 1970 covers the entire subject and wholly supersedes and repeals section 377.

[3] 1. The title is as follows: "An act to amend section 1970 of the Civil Code of the state of California, relating to the responsibility of employers for injuries to or death of employes." Stats. 1907, 119. The Constitution declares that every act shall embrace but one subject, which subject must be expressed in its title. Article 4, § 24. It is not necessary to discuss this question at length. The act relates to the responsibility of employers for the death of employes. This general subject properly includes provisions declaring who may sue the employer for damages resulting from such death. The details need not be expressed in the title. Ex parte Liddell, 93 Cal. 637, 29 Pac. 251; Abeel v. Clark, 84 Cal. 229, 24 Pac. 383; Matter of Miller, 162 Cal. 700, 124 Pac. 427. It follows also that the act embraces but one subject.

[4, 5] 2. The paragraph does not violate the constitutional provision requiring general laws to have uniform operation, nor that forbidding a grant of special privileges to one

citizen or class which are not given on the same terms to all. Article 1, §§ 11, 21. Upon this point the argument is that it gives a right of action for damages against an employer in favor of the widow, children, dependent parents, and dependent brothers and sisters of an employé whose death is caused by an injury received from negligence of a fellow servant, and does not grant such right in favor of the husband, nephews, and nieces, or other collateral heirs of the person so killed. A right of action to an heir for an injury to an ancestor does not exist at common law. It is not an inherent right. It exists only so far and in favor of such person as the legislative power may declare. The constitutional provisions aforesaid were not intended to make it necessary that the Legislature, when conferring new rights of action upon particular classes of citizens for injuries not previously actionable, should by the same act declare that all persons who may suffer damages from injuries of that character shall also have such right of action. Many considerations of public policy affect the question of the propriety and extent of such laws, the weight and effect of which, and the method of meeting or avoiding them, are matters resting exclusively in the legislative discretion. The probable number of husbands, or of collateral heirs of the third degree, who may suffer damage from such deaths, their probable necessitous circumstances and the consequences of extending the right to a more numerous and remote class, are among the circumstances to be considered. The decision of the Legislature as to how far it will extend the new right is conclusive, unless it appears beyond rational doubt that an arbitrary discrimination between persons or classes similarly situated has been made without any reasonable cause therefor. Matter of Miller, supra, 162 Cal. 698, 124 Pac. 427; Ex parte Martin, 157 Cal. 57, 106 Pac. 235, 26 L. R. A. (N. S.) 242. It cannot be said that there is no reasonable ground for the exclusion of husbands and collateral heirs of the third degree from the benefits of the act. Hence we must give it effect as an act within the legislative discretion.

[6] A law establishing rules of liability for negligence applying only to actions arising from the relations between employes and employers does not violate the constitutional provisions in question. The relation of employer and employé is sufficiently peculiar and distinct from others to warrant legislation for it as a class distinct from other relations.

3. We do not consider it necessary in this case to determine the precise extent to which section 1970 may prevail over section 377 so far as they authorize actions for injuries causing death. The latter is general, applying to all persons. The former applies only to injuries arising out of the relation of employer and employé. So far as injuries

arising out of that relation are made actionable where death ensues, where they were not actionable before, section 1970 is now the only statute authorizing the action. The language of the opinion in department is to be understood to refer only to such actions. Farther than this we need not go. The present case arose out of the newly created liability.

The judgment is affirmed.

We concur: HENSHAW, J.; SLOSS, J.; ANGELLOTTI, J.; MELVIN, J.

164 Cal. 555

GARDELLA v. AMADOR COUNTY et al.  
(Sac. 1,912.)

(Supreme Court of California. Jan. 20, 1913.  
Rehearing Denied Feb. 19, 1913.)

1. BRIDGES (§ 26\*)—TOLLS—EXPIRATION OF PRIVILEGE.

Where the Legislature granted a franchise to construct a bridge across a river between two counties, and to collect tolls thereon for 20 years, the bridge, at the expiration of the 20 years, became a free public highway, even if Pol. Code, § 2619, providing that when a franchise for a toll bridge, etc., expires by limitation or nonuser the bridge becomes a free public highway, does not apply to bridges extending from one county into another, since the construction of a road or bridge upon the grant of a franchise to collect tolls is a dedication of the road to public use, subject only to the right to collect tolls, and subject to such right the road belongs to the public.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 67, 68; Dec. Dig. § 26.\*]

2. JUDGMENT (§ 725\*)—CONCLUSIVENESS—MATTERS DETERMINED.

In 1862 the Legislature granted a franchise to construct a bridge, and for 20 years to collect such tolls as might be fixed by the board of supervisors of C. county. In 1885 the board of supervisors of C. county passed an order declaring the bridge to be a free public highway, which was annulled by a proceeding in certiorari, because in excess of the board's jurisdiction. *Held*, that this was not an adjudication that the bridge was not at the time a free public highway, since, under Code Civ. Proc. § 1911, only that is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1255-1257; Dec. Dig. § 725.\*]

3. TURNPIKES AND TOLL ROADS (§ 9\*)—RIGHT TO ESTABLISH.

There is no power to grant a franchise to take tolls on a free public highway, except that given by Pol. Code, § 4041, subd. 33, authorizing boards of supervisors to grant such a franchise, when, in their judgment, the expense necessary to operate or maintain the highway as a free public highway is too great to justify the county in so operating it.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Cent. Dig. §§ 5, 12-18; Dec. Dig. § 9.\*]

4. BRIDGES (§ 15\*)—TOLLS—STATUTORY PROVISIONS.

Pol. Code, § 4041, subd. 33, authorizing boards of supervisors to grant franchises for taking tolls on public highways, when, in their

judgment, the expense necessary to operate such highways as free public highways is too great to justify the county in so operating them, if applicable to bridges at all, does not apply to bridges across waters separating two counties.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 26-34; Dec. Dig. § 15.\*]

5. BRIDGES (§ 15\*)—TOLLS—STATUTORY PROVISIONS.

Under Pol. Code, § 2843, requiring application for authority to construct a toll bridge over waters dividing two counties to be made to the board of supervisors of the county situated on the left bank, such authority cannot be granted unless section 2870, requiring publication of notice of the intended application, and section 2872, requiring a certified copy of the order granting the application, together with the application, to be recorded in the office of the county clerk before proceeding under it, are complied with.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 26-34; Dec. Dig. § 15.\*]

6. BRIDGES (§ 15\*)—TOLLS—STATUTORY PROVISIONS.

The Legislature having made specific provision for the granting by boards of supervisors of authority to construct toll bridges, and having limited the extent of the power and the mode of its exercise, a grant of such authority, not in accordance with the statute, cannot be upheld under the general powers of boards of supervisors to make contracts.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 26-34; Dec. Dig. § 15.\*]

7. BRIDGES (§ 15\*)—POWERS OF BOARDS OF SUPERVISORS—ESTOPPEL.

A county is not estopped to deny the validity of a franchise for the construction of a toll bridge, granted by its board of supervisors, because it has received the benefits of the grantee's expenditures in reliance on such franchise.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 26-34; Dec. Dig. § 15.\*]

In Bank. Appeal from Superior Court, Calaveras County; A. I. McSorley, Judge.

Action by Angella Gardella against the County of Amador and another. From a judgment for plaintiff, defendants appeal. Reversed.

Wm. G. Snyder, Dist. Atty., of Jackson, and Will A. Dower, of San Andreas, for appellants. Frank J. Solinsky, of San Andreas, and Paul C. Morf, of San Francisco, for respondent.

SLOSS, J. The defendants appeal from a judgment in favor of plaintiff

The action was brought to quiet plaintiff's title to a bridge, called "the Big Bar Bridge," crossing the Mokelumne river, and to quiet title to a portion of the road leading to the bridge at either end. At Big Bar, where the bridge crosses, the thread of the Mokelumne river forms the boundary between Amador and Calaveras counties. The latter county is on the left bank of the river. The plaintiff claims under two ordinances passed by the supervisors of Calaveras and Amador counties on the 4th and 5th days of April, 1898, respectively, purporting to grant to her a franchise permitting her, for the period of



30 years, to collect tolls from the public traveling upon said roads and over said bridge. The counties defendant assert, on the other hand, that the bridge, with its approaches, is a free public highway, and that the alleged franchises to collect tolls are void.

In March, 1862, the Legislature passed an act (Stats. 1862, p. 76) granting to Louis Soher and his associates the right to construct a bridge at Big Bar, with a road crossing said bridge from Mokelumne Hill, in Calaveras county, to Butte, in Amador county, and to collect thereon for 20 years such tolls as might annually be fixed by the board of supervisors of Calaveras county. The bridge was constructed and tolls collected by Soher & Co. until, in October, 1885, the supervisors of Calaveras county passed an order declaring the bridge to be a free public bridge, and the road leading thereto in said county a free public highway. In February, 1886, Soher & Co. filed a petition in the superior court of Calaveras county for a writ of certiorari to review such order, and the proceeding resulted in a judgment declaring the action of the board to be in excess of its jurisdiction, and annulling the order complained of. No appeal was ever taken from this judgment.

In July, 1886, the board of supervisors of Calaveras county granted to Soher & Co. a license to collect tolls on the bridge until the first Monday in October of the same year. Thereafter the rights of Soher & Co., whatever they were, became vested by transfers in Joseph Gardella, who died in 1891. The plaintiff and her four children succeeded to his interest. After October, 1886, no license was granted, but the supervisors continued, from year to year, to fix the tolls to be collected by the successors of Soher & Co.

In April, 1898, the plaintiff filed with the board of supervisors of Calaveras county a petition praying for a franchise to collect tolls on the Big Bar Bridge for 30 years. The petition averred that it was necessary to repair the bridge and replace a large portion thereof with a combination iron bridge; that the expense of reconstruction would be about \$4,000. The petitioner alleged her willingness to reconstruct the bridge, and to keep it in repair during the term of such franchise. A similar petition was presented to the supervisors of Amador county. The orders granting the franchises were adopted, as already stated, on the 4th and 5th days of April, 1898. In neither case did the order of the board, or its records, contain, by way of recital, or otherwise, a finding or declaration that in the judgment of the board "the expense necessary to operate or maintain" the bridge was "too great to justify the county in so operating or maintaining" it. Pol. Code, § 4041, subd. 33. The court, however, admitted, over the objection of the defendants, parol testimony tending to show that the respective boards did make a determina-

tion of this fact. Thereafter Mrs. Gardella repaired and reconstructed the bridge and its approaches, expending thereon some \$8,000; and she has ever since, until the present controversy arose, made all necessary repairs, and has collected tolls at the rates fixed, from time to time, by the supervisors of Calaveras county.

[1] In this state of facts, the bridge unquestionably was, when the orders of the 4th and 5th days of April, 1898, were made, a free public highway, and not, as declared in one of the conclusions of law, a toll bridge, with respect to which the plaintiff was the owner of a valid franchise. By the act of 1862, under which the bridge was originally constructed, the right to collect tolls was granted for the period of 20 years. Upon the expiration of that period, the right ceased by limitation. Pol. Code, § 2619; *People v. Anderson, etc., Co.*, 76 Cal. 190, 18 Pac. 308; *People v. Davidson*, 79 Cal. 166, 21 Pac. 538; *Blood v. Woods*, 95 Cal. 78, 86, 30 Pac. 129; *People v. Auburn, etc., Turnpike Co.*, 122 Cal. 335, 55 Pac. 10. The construction of a road upon the grant of a franchise to collect tolls is a dedication of the road to public use, subject only to the right to collect tolls. *Blood v. Woods*, *supra*. The road belongs to the public, and the only interest of the holder of the franchise is the right to collect tolls as a compensation for building the road. *Wood v. Truckee Turnpike Co.*, 24 Cal. 475; *Kellett v. Clayton*, 99 Cal. 210, 33 Pac. 885. There is no right to compensation when the right to take tolls has ceased by expiration of the term for which it was granted, or by abandonment. *McMullin v. Leitch*, 83 Cal. 239, 23 Pac. 294. The same rule applies to bridges (*Sears v. Tuolumne County*, 132 Cal. 167, 64 Pac. 270), which are highways under the definition of the statute. Pol. Code, § 2618.

It is argued that section 2619 of the Political Code, providing that, "whenever the franchise for any toll bridge, trail, turnpike, plank or common wagon road has expired by limitation or nonuser, such bridge \* \* \* becomes a free public highway," applies only to bridges or roads wholly within a single county. The section was relied upon in *Blood v. Woods*, *supra*, where the road in question extended from one county into another. But, if we were to disregard the Code section, the result would be the same. In the absence of any statute, a toll road, upon the expiration of the time for which the franchise to take tolls was granted, would become a free public highway. *People v. Davidson*, *supra*.

[2] It is claimed, however, that the judgment in the certiorari proceeding brought by Soher & Co. in 1886 was an adjudication that the bridge was not a free public highway, and that this adjudication, whether erroneous or not, has become final and conclusive. We think the judgment had no such

effect. "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." Code Civ. Proc. § 1911; *Fulton v. Hanlow*, 20 Cal. 456; *Chapman v. Hughes*, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982. All that was adjudged in the judgment in certiorari was that the board of supervisors had no jurisdiction to make an order declaring the bridge to be a free public highway. The want of such jurisdiction may have rested on any one of a variety of grounds. Certainly the ownership by Sober & Co. of a franchise to collect tolls was not a necessary part of the adjudication.

[3] If, then, the bridge in question was, on the 4th and 5th days of April, 1898, a free public highway, there was no power, unless by virtue of subdivision 33 of section 4041 of the Political Code, to grant a franchise to take tolls thereon. This subdivision is, in effect, a re-enactment of a provision which appeared for the first time in subdivision 41 of section 25 of the "Act to establish a uniform system of county and township governments," approved March 24, 1893. Stats. 1893, pp. 346, 359. Prior to the enactment of this statute, no franchise to collect tolls upon a public highway could be granted at all. *El Dorado County v. Davison*, 30 Cal. 520. As was said in the case last cited, where the board of supervisors had undertaken to grant such a franchise to the defendant: "A tollgate erected upon a highway which belongs to the state or the people thereof is a nuisance, and might be abated as such. The grant to the defendant was to do an illegal act."

[4] Since 1893, however, boards of supervisors have had power to grant franchises for taking tolls on public highways, "when in their judgment the expense necessary to operate or maintain such public roads or highways as free public highways is too great to justify the county in so operating or maintaining them." *Blood v. McCarty*, 112 Cal. 561, 44 Pac. 1025. In the present action the court made a finding to the effect that the board of supervisors of each of the counties of Calaveras and Amador did, before granting the franchises of April 4 and 5, 1898, make a determination that the expense of maintaining and operating the bridge was too great to justify the respective counties in so maintaining and operating it. This finding is attacked by appellants; their position being that the determination in question, which is prerequisite to the validity of the order (*Bedell v. Scott*, 126 Cal. 675, 59 Pac. 210), must appear affirmatively upon the record of the board, and if not so appearing, cannot be proven otherwise. The records of the respective boards do not, as already stated, show such determination. While the point thus urged finds some sup-

port in the case last cited, the weight of authority seems to be to the effect that parol evidence is admissible to show that a court or board of limited power has acted within its jurisdiction, in the absence of a statute requiring such facts to appear in the minutes or other record of its proceedings. *Jolley v. Foltz*, 34 Cal. 321; *Reclamation Dist. v. Goldman*, 65 Cal. 638, 4 Pac. 676; *In re Williams*, 102 Cal. 70, 77, 36 Pac. 407, 41 Am. St. Rep. 163; *Freeman on Judgments* (4th Ed.) § 523; *Black on Judgments*, § 282. But it is unnecessary to decide this question here. The respondent herself suggests, and we think correctly, that subdivision 33 of section 4041 has no application to the case of a bridge across waters separating two counties. In *Croley v. Cal. Pac. R. R. Co.*, 134 Cal. 557, 66 Pac. 860, the court held that subdivision 4 of section 25 of the county government act (Stats. 1891, p. 300), giving the supervisors power to erect bridges, but providing that when the cost of erection of any bridge exceeds the sum of \$500 the board must advertise for bids, etc., had no bearing upon the authority of the board to contract for the construction of a bridge crossing a stream which separated two counties. It was pointed out that, as the authority of the board was limited to the construction of bridges "within the county," the construction of a bridge, only one-half of which would be in the county, was not included in the grant of power, or controlled by the limitations upon such grant. "It is also evident," says the court, "that neither county would have the right to construct a bridge beyond its own boundary line, and there is no provision in the subdivision for any concert of action between the boards of two counties, or for harmonizing any difference between them, if such should exist." The reasoning applies with equal force to the case before us. By the introductory words of section 4041, the supervisors are vested with enumerated powers "in their respective counties." A bridge across a river dividing two counties is an entirety. In the nature of things, it calls for unity of control. This is illustrated by the Code sections authorizing the construction of toll bridges over waters dividing two counties. Pol. Code, § 2843 et seq. By these provisions the grant of the right to construct, the fixing of license taxes and tolls, and all details of regulation, are placed in the jurisdiction of the supervisors of the county on the left bank of the stream or other water. That no similar provision is found in the general enactment (Pol. Code, § 4041, subd. 33), authorizing the grant of a right to take tolls upon a public highway, is persuasive evidence that the subdivision was not designed to include the case of a bridge over waters dividing two counties. It was certainly never contemplated that the board of supervisors of the county in which one-half of such bridge was located should have au-



thority to grant a franchise to take tolls over such half, while the remainder of the bridge might be free and open. Here, as in the case of the construction of a new bridge (the case considered in *Croley v. Cal. Pac. R. R. Co.*, supra), there is no provision for concerted action between the two counties. The reasonable interpretation of subdivision 33 of section 4041 is that the section, if it covers the case of a bridge at all, has reference only to bridges situated entirely within the limits of a county.

[5] The respondent urges, however, that the transaction of April, 1898, may be viewed in another aspect. The claim is that what was offered by plaintiff in her petition, and subsequently carried out by her, was, in effect, the construction of a new bridge in return for the grant of a right to take tolls thereon. As has already been suggested, authority to so construct a toll bridge may be granted by the board of supervisors of the county situated on the left bank of the river. Pol. Code, § 2843. But such grant may be made only upon compliance with various requirements, such as the publication of a notice of the intended application. Pol. Code, § 2870. The applicant must also cause a certified copy of the order granting the application, with the application, to be recorded in the office of the county clerk before "proceeding under it." Pol. Code, § 2872. It is not claimed that there was any compliance with these provisions, and the grant to plaintiff cannot, therefore, be sustained under the power conferred upon the board of supervisors by the sections just cited.

[6] There is no force in the contention that the proceedings constituted a contract, which the respective boards of supervisors were authorized to make with plaintiff under their general powers. In *Croley v. Cal. Pac. R. R. Co.*, supra, it was held that section 2713 of the Political Code gave to the supervisors of the counties bordering upon streams plenary powers, in the matter of the construction of bridges crossing such streams, to such extent as to permit the county to agree to pay to a railroad corporation constructing such bridge a given sum in return for the furnishing, on the bridge, of a separate roadway for teams and pedestrians.

The decision is based upon the ground that there is no legislation limiting the power of the board in the matter, "nor upon the extent or mode in which it is to be exercised." But, obviously, this reasoning has no application to the grant of a franchise to construct a toll bridge; for with respect to this subject the Legislature has made specific provision, limiting both the extent of the power and the mode of its exercise. Pol. Code, § 2843 et seq. On the other hand, if this be regarded, not as the construction of a new bridge, but as the grant of a franchise to take tolls upon an existing public and open bridge, the power to grant such franchise cannot be implied from any general expression in the statute defining the powers of boards of supervisors (*Blood v. Woods*, supra), since, as we have seen, there is, in the absence of statute expressly granting it, no power to authorize the taking of tolls upon a public highway. *El Dorado County v. Davison*, supra; *Blood v. Woods*, supra.

[7] Finally, it is argued that the counties, having received the benefits of plaintiff's expenditures, are estopped to deny the validity of the franchise forming the consideration of such expenditures. But the doctrine of estoppel cannot, we think, be applied so as to validate, as against the public, grants in excess of the limited powers conferred upon the public agents who assumed to make them. If there be any estoppel in cases of this character, its effect must be limited to permitting the plaintiff to retain what she has received (*Sacramento County v. Southern Pacific Co.*, 127 Cal. 217, 59 Pac. 568, 825), or to recover the reasonable value of what she has conferred upon the defendants in reliance upon their action. To grant further relief, such as that sought in this action, would obliterate the distinction between powers conferred upon public officers or boards and those expressly withheld from them. The mere assumption of a power would, if acted upon to his cost by a third person be equivalent to the exercise of a power actually possessed.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

164 Cal. 576

## In re MOLLENKOPF'S ESTATE.

(S. F. 6,258.)

(Supreme Court of California. Jan. 22, 1913.)

## 1. WILLS (§ 277\*)—PROBATE—FILING OF CONTEST—STATUTORY PROVISIONS.

Code Civil Proc. §§ 1306-1308, 1312, providing that at the time appointed for the hearing of the petition for the probate of a will or the time to which the hearing may have been postponed the court must hear the proof of the will, and that any person interested may appear and contest the will, that, if no person appears to contest, the court may admit the will to probate on the testimony of one of the subscribing witnesses, and that, if any one appears to contest, he must file written grounds of opposition to the probate, do not in terms prescribe when written opposition to probate must be filed in the case of a contest before probate to entitle it to be considered, but to be effectual as a contest before probate, the written opposition must be filed before the will is admitted to probate, and a contest initiated after the time originally appointed for the hearing of the petition, but before the hour to which the hearing has been postponed, is in time.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 632-635; Dec. Dig. § 277.\*]

## 2. WILLS (§ 277\*)—PROBATE—FILING OF CONTEST—STATUTORY PROVISIONS.

Where the court at the time fixed for the hearing of the petition for the probate of a will took the testimony of witnesses for their convenience without prejudice to the rights of a contestant, and then adjourned the hearing to a subsequent hour, a contest filed before such hour was in time.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 632-635; Dec. Dig. § 277.\*]

## 3. WILLS (§ 384\*)—PROBATE—FILING OF CONTEST—STATUTORY PROVISIONS.

The disregard of a contest before probate initiated in time is prejudicial, though contestant may institute a new contest within one year after probate, especially where the contest before probate, if successful, would prevent the petitioner for probate from acting as executor without bonds, while contestant was the owner of one-half of the property of testator if the will was invalid, and hence interested in having proper security from the person administering the estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 855-858; Dec. Dig. § 384.\*]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Proceedings for the probate of the will of Constancia Mollenkopf, deceased. From an order admitting the will to probate and appointing William Mollenkopf as executor, the party agreed appeals. Reversed.

Isidore B. Dockweiler, of Los Angeles, Costello & Costello, of San Francisco, and Robert B. Murphy, of Los Angeles (A. W. Brouillett, of San Francisco, of counsel), for appellant. F. G. Hentig, of Los Angeles (Haas & Dunnigan, of Los Angeles, of counsel), for respondent.

ANGELLOTTI, J. This is an appeal from an order admitting a certain document to probate as the last will of deceased, and appointing the petitioner William Mollenkopf

executor thereof without bond as specified therein.

The material facts on this appeal are substantially as follows: The petition for the probate of said alleged will came on for hearing on March 19, 1912, at 10 o'clock a. m. At that time no written grounds of opposition had been filed. One of the attorneys of the contestant (Juliana R. de Long, mother of deceased) announced to the court that written grounds of opposition to the probate had been mailed in Los Angeles to the clerk of said court the day before, and were then due in San Francisco, and that a copy thereof had been served on petitioner's attorney the day before. The court announced that, "as some of the witnesses had come from Los Angeles, he would hear their testimony, preliminarily, and without prejudice to the rights of the contestant." Witnesses were then called and examined on behalf of the petitioner, and gave testimony that the will was duly executed, and that deceased was of sound mind, and not acting under duress, fraud, etc. The court then stated that it would continue the further hearing of the matter to 2 o'clock p. m. of the same day, which was done. Prior to that time the written opposition to the probate was filed in the office of the clerk of said court, and the same showed, by affidavit attached thereto, that it had been served by copy on the attorney for the petitioner by the leaving of such copy in his office with a person in charge thereof under the circumstances and in the manner specified in subdivision 1 of section 1011 of the Code of Civil Procedure. This written opposition was in proper form, and to use the language of *In re Stewart*, 100 Cal. 249, 34 Pac. 707, "set forth many alleged facts which, if true, established the invalidity of the asserted will." When the matter came on for further hearing at 2 p. m., the written opposition on file, with proof of service, was brought to the attention of the court. The court then ruled that, as the written opposition was not on file at 10 a. m. of that day, the same should be disregarded, and also that the attorney for petitioner had not received sufficient notice. Thereupon the order admitting the will to probate and appointing petitioner executor was made, without any other disposition of the written opposition to probate.

It is not disputed that if the written opposition was properly served on petitioner's attorney, and was not filed too late to entitle it to be considered, it was a bar to the admission of the alleged will to probate until disposed of in the manner provided by law. Such disposition involved an opportunity to those interested in the will to answer the opposition, and a trial of the issues thus made, by a jury if either party so requested.

It is not suggested by respondent that



service of the written opposition by copy, was not made on petitioner on March 18, 1912, in all respects as required by law, and we are satisfied that the affidavit attached to the written opposition sufficiently showed due service.

[1] Our law nowhere in terms prescribes when the written opposition must be filed, in the case of a contest before probate, in order to entitle it to be considered. Notice of the time appointed for the probate having been provided, it is declared in section 1306 of the Code of Civil Procedure that "at the time appointed for the hearing, or the time to which the hearing may have been postponed, \* \* \* the court must hear the testimony and proof of the will." In section 1307 of the Code of Civil Procedure it is declared that "any person interested may appear and contest the will," and in section 1308 of the Code of Civil Procedure that, "if no person appears to contest the probate of a will, the court may admit it to probate on the testimony of one of the subscribing witnesses only," etc. By section 1312 of the Code of Civil Procedure it is declared that, "if any one appears to contest the will, he must file written grounds of opposition to the probate thereof," etc. Obviously, to be effectual as a contest before probate, the written opposition must be filed before the alleged will is admitted to probate, but there is nothing in the provisions of our Code that in terms makes it ineffectual if filed at any time prior to the admission of the will to probate. The statute contemplates, of course, that it will be filed at or before the time designated in the notice for the hearing of the petition for probate, and inasmuch as, in the absence of a contest, the formal proofs as to execution, etc., may be and are ordinarily then received and the alleged will admitted to probate, a party desiring to contest will naturally file his opposition at or prior to the time so designated. But the person proposing to contest before probate does not forfeit his right to do so merely by reason of failing to file his opposition at or prior to the time so designated in the notice for the hearing.

It has been held that, if the contest is properly instituted before the time to which the hearing on the petition is continued, it is in time, and must be considered. This is practically held in *Estate of Stewart*, 100 Cal. 246, 34 Pac. 706. It is true that in that case the opposition was on file at the original time fixed for hearing, but there was then lacking proof of service thereof on certain parties other than the petitioner who were required by the statute to be served. A motion to strike the opposition from the files on the ground that the same had not been filed or served as required by law was made, and this motion was taken under advisement until 2 p. m. of the same day. Before that time arrived, contestant supplied

such proofs, but the lower court held that they should have been filed at 10 a. m. and came too late. It therefore struck the opposition from the files, and admitted the will to probate. This court held, first, that the absence of such proof of service was no warrant for a disregard of the contest as to the petitioner for probate, as to whom proof of service was on file; and, second, assuming that such absence of proof rendered the opposition ineffectual, nevertheless, the furnishing of such proof "before the hour to which the matter had been continued" sufficiently answered the objection of petitioner. In other words, that, if all the requirements of the law as to the institution of a contest are complied with at or prior to the time to which the hearing on the petition is continued, the contest is in time, even though none of such requirements was complied with at or prior to the time designated for hearing by the notice. In the case just cited this court said that, "under these circumstances, we see no ground upon which the order appealed from (the order admitting the will to probate) can be affirmed." That a contest initiated after the time originally appointed for the hearing of the petition, but before the hour to which such hearing has been postponed, is in time, has twice been held by the Supreme Court of Montana, upon statutes substantially similar to ours. See *Raleigh v. District Court*, 24 Mont. 306, 61 Pac. 991, 81 Am. St. Rep. 431; *State v. District Court*, 25 Mont. 355, 65 Pac. 120. We think that there can be no doubt as to the correctness of these rulings, in view of the statutory provisions in California and Montana on the subject.

[2] The record on appeal, fairly construed, brings this case within the doctrine of these decisions. Much reliance is placed by respondent upon the fact that the court did receive testimony in support of the will at the morning session and before continuing the further hearing to 2 p. m., and he claims that the record shows that the hearing was then completed; no further testimony having been given at the afternoon session. But the bill of exceptions shows that, in response to the statement of counsel for the contestant as to the proposed contest, the learned judge of the trial court announced that "as some of the witnesses had come from Los Angeles he would hear their testimony preliminarily and without prejudice to the rights of the contestant," and that after doing this he continued the further hearing of the matter to 2 o'clock p. m. This was practically, for all the purposes of a contest, a continuance of the whole hearing from the time originally set until 2 o'clock p. m. of the same day, and it was a continuance that the court had power to grant. Under the authorities already cited, the contest was therefore filed in time. The mere receiving of testimony at the morning session under the circumstances stated in no wise affects the question, even though

thereby a prima facie case for the admission of the will to probate was shown.

We are by no means prepared to concede that a failure to file a contest before the commencement of the taking of testimony on a petitioner's application would under any circumstances preclude the filing of the same subsequently, and before the matter was finally submitted to the court for decision. But we are not called upon to determine this question here, as we are satisfied that, upon any fair construction of the record, the contest must be held to have been instituted before the time to which the matter had been continued for hearing from the time originally fixed; the testimony actually received at the first session being expressly declared to be received preliminarily or in advance, merely for the convenience of the witnesses from Los Angeles, and "without prejudice to the rights of the contestant."

[3] Although contestant was not barred by the order admitting the will to probate from instituting a new contest at any time within one year after the alleged will was admitted to probate, it cannot be held, and indeed is not claimed, that she is not substantially prejudiced by the disregard of her contest before probate. One result of such contest, if successful, would have been to prevent the petitioner for probate from acting as executor without bonds, and, if appointed administrator of the estate of deceased, he would be required to give security for the faithful performance of his duties. As the owner of half of the property of the decedent if the will was invalid, contestant was substantially interested in having proper security for the discharge of his duties by the person administering the estate. She would have no such security under the order appealed from during the pendency of any contest instituted by her after probate. We do not mean to suggest that this is the only reason for holding the order prejudicial to contestant's substantial rights.

The order appealed from is reversed.

We concur: SHAW, J.; SLOSS, J.

164 Cal. 540

In re YOELL'S ESTATE.

YOELL v. LEVY.

(S. F. 6,201.)

(Supreme Court of California. Jan. 20, 1913.  
Rehearing Denied Feb. 19, 1913.)

**1. EXECUTORS AND ADMINISTRATORS (§ 194\*)  
—FAMILY ALLOWANCE TO WIDOW—CONTEST  
—ISSUES.**

In opposition to a wife's petition for a family allowance, based on her relationship, the administrator pleaded an executed separation agreement between husband and wife, fully performed by the husband until his death, and acts of the wife as to the property set off to her by the agreement which should estop her to question its validity. *Held*, that the question of fraud by the husband in obtaining it

was not in issue, not having been pleaded, but that the only issues were the validity of the agreement on its face, the effect of the agreement to bar the allowance, either by its terms or because under it the wife had ceased to be a member of the family, and whether the superior court sitting in probate had jurisdiction to give effect to the agreement, if valid.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 713-723; Dec. Dig. § 194.\*]

**2. FRAUD (§ 50\*)—NECESSITY OF PLEADING.**  
Fraud is not presumed, but must be pleaded.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 46, 47; Dec. Dig. § 50.\*]

**3. APPEAL AND ERROR (§ 169\*)—ISSUES BELOW—REVIEW.**

Issues not made or found upon in the trial court are not open to review on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018-1034; Dec. Dig. § 169.\*]

**4. HUSBAND AND WIFE (§ 278\*)—SEPARATION AGREEMENT—VALIDITY—PUBLIC POLICY.**

An agreement between husband and wife to live separate and apart, with property provision for each, is not against public policy, and may be entered into and enforced according to its terms, when no undue advantage is taken of either spouse.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1046-1053; Dec. Dig. § 278.\*]

**5. HUSBAND AND WIFE (§ 278\*)—SEPARATION AGREEMENT—VALIDITY.**

The fact that, when a separation agreement was made, there were minor children, whose right to a family allowance from the husband's property pending administration of his estate could not be contracted away, is immaterial on the issue of the validity of the agreement after all the children have reached majority.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1046-1053; Dec. Dig. § 278.\*]

**6. EXECUTORS AND ADMINISTRATORS (§ 185\*)  
—FAMILY ALLOWANCE—WAIVER BY ANTE-  
NUPTIAL OR POSTNUPTIAL AGREEMENT.**

By either an antenuptial or postnuptial contract, a widow may waive her right to a family allowance, when the rights of minor children are not involved.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 695; Dec. Dig. § 185.\*]

**7. HUSBAND AND WIFE (§ 279\*)—SEPARATION AGREEMENT—ESTOPPEL TO QUESTION.**

Where a separation agreement provided that deeds by a husband and wife should be made to a third person, who, in turn, should execute the deeds contemplated by the agreement, the parties after execution of such deeds and the receipt of the benefits thereunder, and after invoking the courts to declare their validity, are equitably estopped while retaining the benefits to question the validity of the agreement.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1054, 1056-1060; Dec. Dig. § 279.\*]

**8. HUSBAND AND WIFE (§ 278\*)—SEPARATION AGREEMENT—VALIDITY—MEANS.**

Where the provision for deeds to and from a third person was a mere means to carry into effect the purposes of a separation agreement between husband and wife, and not an essential part of the agreement, the validity of the agreement after execution and accept-



ance of the deeds by the parties will not be affected by any alleged invalidity of the means adopted.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1046-1053; Dec. Dig. § 278.\*]

**9. EXECUTORS AND ADMINISTRATORS (§ 185\*)  
—FAMILY ALLOWANCE—RELINQUISHMENT—  
SEPARATION AGREEMENT.**

Under an agreement between a husband and wife in contemplation of a permanent separation, making a complete and final disposition of their property rights, and providing that the execution of the agreement should be a final adjustment of such rights, and that neither should claim any other rights in the property of the other, and stipulating that neither party would assert any right against the will or estate of the other as heir, or as surviving husband or wife, the wife renounced and released her right to make application for a family allowance.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 695; Dec. Dig. § 185.\*]

**10. EXECUTORS AND ADMINISTRATORS (§ 188\*)  
—FAMILY ALLOWANCE—RIGHTS OF WIFE—  
SEPARATION.**

A wife who voluntarily severs her connection with the family is not entitled to a widow's allowance out of her husband's estate; her right to support resting upon the family relationship.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 698-700; Dec. Dig. § 188.\*]

**11. HUSBAND AND WIFE (§ 281\*)—SEPARATION AGREEMENT—JURISDICTION—EQUITY.**

During the lives of a husband and wife a court of equity is the proper forum for the enforcement of any rights conferred by a separation agreement.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1061; Dec. Dig. § 281.\*]

**12. EXECUTORS AND ADMINISTRATORS (§ 194\*)  
—FAMILY ALLOWANCE—SEPARATION AGREEMENT—JURISDICTION OF PROBATE COURT.**

Where a separation agreement between husband and wife, making complete disposition of their property rights, has been fully executed, and the wife is making an unwarranted claim to a widow's allowance, the probate court has equitable jurisdiction to pass upon the validity and effect of such agreement.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 713-723; Dec. Dig. § 194.\*]

Department 2. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of J. Alexander Yoell, deceased. On petition of Emily C. Yoell for a family allowance. From an order awarding petitioner a family allowance in the sum of \$100 a month, dating from the death of her husband, Evaline A. Levy, special administratrix, appeals. Reversed.

Carl Westerfeld, Sullivan & Sullivan, and Theo. J. Roche, all of San Francisco, for appellant. J. L. Taugher, of San Francisco, for respondent.

HENSHAW, J. J. Alexander Yoell died in July, 1904. In 1909 his widow, Emily C. Yoell, petitioned for a family allowance. Her petition was opposed by the special adminis-

tratrix, but the court, after hearing, awarded a family allowance in the sum of \$100 a month, dating from the death of the husband. From this order the appeal under consideration is taken.

As ground of opposition the special administratrix set up a postnuptial agreement between the deceased and his wife, with appropriate averments, to the effect that it had been faithfully carried out according to its tenor and terms by the deceased during his lifetime, and with further allegations tending to show upon the part of Emily C. Yoell, respondent herein, a full acceptance of all of the benefits and considerations moving to her under the agreement. Thus it is alleged that during the lifetime of the parties Emily C. Yoell sold certain real property which, under the articles of separation, was hers, subject to a life estate in the husband, and caused her grantee to begin a suit to quiet his title to the property so conveyed, which action resulted in a decree so doing, in confirmation of the terms of the articles of separation. The validity of the articles of separation it is further alleged was established in another action brought by the husband against the wife and others, which action was to settle conflicting claims to certain of the real estate disposed of under the articles of separation, and which action resulted in a valid and subsisting decree establishing the title to the property in accordance with the terms of the articles of separation. Again, it is alleged that after the death of J. Alexander Yoell, his wife, this respondent, took appropriate proceedings in certain of the superior courts of the state to have decrees entered declaring the termination of the life estate of her husband in the property, and vesting the fee thereof, untrammelled by the life estate, in her, all in accordance with the terms of the articles of separation, and that decrees to this effect in favor of the widow were duly given and made.

Under these pleadings, herein before sufficiently indicated, the matter came on for hearing. The court found that immediately after the execution of the separation agreement Yoell and his wife separated as husband and wife by mutual consent and continued to live apart until the death of the husband; that the husband paid to his wife continuously during many years and up to the time of his death \$350 a month, as called for by the articles of separation. Then by finding 12 the court declared: "That there is no covenant, term, or condition in the said separation agreement which deprives Emily C. Yoell of the right to a family allowance during the progress of the administration of the said estate, and that she is entitled to such allowance to be paid to her out of the said estate, notwithstanding such separation agreement or anything done thereunder or in pursuance thereof." Thus

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the award of the family allowance was made. The evidence disclosed that J. Alexander Yoell and his wife, Emily C. Yoell, had been married for 35 years, and that to them seven children had been born, when differences arose between them culminating in an action for divorce brought by the wife against the husband. A reconciliation was effected, the action was dismissed, but within a year harmony was once more destroyed, the wife left the home, and began a second action for divorce in April, 1898. This action was never tried, and, in fact, was finally dismissed. Negotiations were opened looking to an adjustment of their differences without divorce, and the articles of separation were entered into. It appears that throughout Mrs. Yoell was fully cognizant of the nature, character, and value of her husband's properties, besides which, as to those values and as to the terms of the agreement of separation, she had acted upon the advice of her counsel, an attorney at law. The articles of separation, as formulated, agreed upon and executed, described the husband as the party of the first part, the wife as party of the second part, and proceeded as follows: "Whereas, unhappily there exist marital differences between the said parties of the first and second parts, which, in their opinion, render it impossible that they can longer live together as man and wife, and in consequence thereof they have agreed to live separate and apart from each other, and, whereas, it is the desire of said party of the first part to make a permanent provision to the party of the second part, and it is the desire of both parties hereto that all of the property rights of the parties of the first and second parts respectively, shall be finally adjusted, settled and determined, it is now mutually agreed and understood as follows: (1) That the parties hereto have agreed and do now agree to an immediate separation as husband and wife and do now agree to live for the future separate and apart from each other." The agreement then made provision to the effect that the real property of the community (and all of the property of the husband was community property) should be divided in moieties, the husband and the wife each taking an undivided half of the fee of each piece or parcel, but that the husband should have a life estate in the one-half so conveyed to the wife, and, in lieu of the income which otherwise the wife would derive from her property, the husband was to pay her \$350 per month, the explanation of this being that it was thought the husband could better manage the properties by having control over them all, and that \$350 per month represented the full net rental value of the undivided one-half. Next (so proceeds the agreement) it is declared that: "The true intent and meaning of this agreement is that upon the death of the said party of the first part, the said party of the

second part shall be entitled to the full, entire, undivided one-half of said four described pieces and parcels of land, in fee simple." And "it is further covenanted and agreed \* \* \* that the execution of this agreement and the consummation thereof by the execution and delivery of said various instruments shall be and is intended to be a full, complete and final adjustment of all the property rights of the parties hereto, and that neither party hereto shall or will at any time hereafter make or attempt to make any other or further claim than as herein stipulated. That the property stipulated to be conveyed shall be and remain forever the separate property of each of the parties hereto and neither of the parties hereto will claim as against the other or as against their heirs or legal representatives or otherwise, the increase in value of the undivided one-half of any of said property or make or advance any claim that any portion thereof is community property. It is further covenanted and agreed that either of the parties hereto shall have an immediate right to devise or bequeath by will their respective interests in the property belonging to each other under the provisions of this agreement; and that the devisees and legatees under any such will shall and may have the same privileges and rights as the respective testators may have had or exercised. It is further expressly covenanted and agreed that neither party hereto will in any way or manner contest or oppose the probate of the other's will, whether heretofore or hereafter made, or interfere with the other, their heirs or assigns, in the exercise of the rights of property herein stipulated and agreed to; that neither of them will at any time hereafter assert any right, interest, or title as heirs at law of the other to any property devised or bequeathed by such will, or as against the estate of the other, should the other die intestate and all claim as such heir, or as surviving husband and wife, respectively, and all right to contest or oppose the last will of the other is hereby expressly waived, together with all right to administer or to apply for letters of administration, or letters of administration with the will annexed, upon the estate of the other."

It has been pointed out that the court's award of a family allowance was based upon its legal construction of the tenor and effect of these articles of separation, the court stating this legal conclusion as a finding that the articles contained no covenant, term, or condition depriving Emily C. Yoell of the right to a family allowance. In addition this respondent insists that the agreement is void or voidable or nonenforceable by reason of the fraud practiced upon Emily C. Yoell by her husband in the very procurement of the execution of the articles of agreement, and in his conduct subsequent thereto. Of the nature of this fraud it is unnecessary here to



say more than that, under the views of respondent's counsel, it was so comprehensive and apprehensive in its perfidiousness that it would have excited the envious admiration of Machiavelli. To this appellant, protesting that the matter may not here be considered, makes answer that no fraud is shown in any wise vitiating the agreement, that no fraud is shown in any wise justifying the respondent in the repudiation of the agreement, that the asserted fraud was fully known to the respondent shortly after the execution of the agreement, and that after this knowledge she reaffirmed it in every possible particular, both by failure to rescind, by accepting all the benefits conferred upon her by it, by the invocation of judicial process and judicial decree establishing her rights under it, by the submission and assent to like judicial decrees brought to establish the validity of it by her husband, and, finally, by the petition and assertion of her rights under it after her husband's death in terminating the life estate and securing to herself the untrammelled fee of the properties, so that finally, by estoppel, by laches and by the statute of limitations she is forever debarred from asserting its invalidity.

[1, 2] These matters have thus been indicated because of the emphasis placed upon them in respondent's brief necessitating a reply in kind from appellant. But into the consideration of them, for the following reasons, we may not and will not enter. Respondent's petition for an allowance for family support made no mention of the articles of separation. It did not disclose their existence. Still less did it disclose a desire upon the part of the petitioner to have them set aside and declared null and void upon the ground of fraud. It is fundamental that fraud is not presumed, and, whenever it constitutes an element of a cause of action which is of an affirmative nature or is invoked as conferring a right, it must be alleged. *Wetherly v. Straus*, 93 Cal. 283, 28 Pac. 1045; *Burris v. Adams*, 96 Cal. 664, 31 Pac. 565; *Burris v. Kennedy*, 108 Cal. 333, 41 Pac. 458; *Estate of Vance*, 141 Cal. 627, 75 Pac. 323. If, therefore, petitioner, who at the time she signed her petition had full knowledge of all of these matters, believed that the existence of the articles of separation stood as an obstacle in the way of her receiving a family allowance, and that that obstacle was removable for fraud, she should so have pleaded. Not having so pleaded, the result is that the agreement stood before the trial court unimpeached for fraud, and the rights of the parties were left to be adjudicated in accordance with its legal terms and effect. Thus, if petitioner believed that, notwithstanding the terms of the separation agreement, she was still entitled to the family allowance, this was a position tenable under her pleading, since it called only for a legal construction of the agreement, and un-

der that legal construction she would or would not be entitled to the allowance. This seems to have been the view taken by the judge in probate, who held that nothing in the agreement debarred her from the right to the family allowance.

And, from another point of view, no different result is reached if it be said that the petitioner was not obliged to anticipate a reliance by the administratrix upon the terms of the separation agreement, and that, therefore, when, in the answer and opposition of the administratrix, the agreement was set forth, the petitioner was allowed the implied replication of section 462 of the Code of Civil Procedure. Assuming that under such an implied replication evidence of fraud might be given, it necessarily follows that by the same implication of law there is given to the defendant (in this case the administratrix in opposition) an implied rejoinder, under which she may prove estoppel, a failure to rescind, laches, the statute of limitations, or any other matter of defense.

[3] But, assuming that all these new issues may thus be injected into the case without pleading, nevertheless it follows that before a judgment can be entered under such circumstances, and before these matters can be reviewed upon appeal, the court must have made specific findings one way or the other thereon. *American-Hawaiian Engineering & Construction Co. v. Butler* (S. F. No. 5,888), filed January 6, 1913<sup>1</sup>. This the court did not do, and so, as has been said, from this point of view, the matters are not open to consideration on this appeal. There is left then for consideration only the legal questions which group themselves under these heads: First. Is the agreement itself legal and binding upon the parties? Second. Does the agreement itself bar petitioner of a right to a family allowance (a) under its very terms, or (b) by virtue of the fact that by conduct under it she ceased to be a member of the deceased's family? Third. Has the court in probate jurisdiction to give effect to such an agreement, if it finds it to be valid?

[4] 1. Upon the first proposition, notwithstanding the confidential relations which exist between husband and wife, it may not be disputed that such agreements are not against public policy, and may be entered into and will be enforced in accordance with their terms when undue advantage has not been taken of either spouse. We need not go outside of the decisions of our own state for the complete establishment of this, though it may be added that the decisions of other states are in harmony therewith. *In re Noah*, 73 Cal. 583, 15 Pac. 287, 2 Am. St. Rep. 829; *Wickersham v. Comerford*, 96 Cal. 433, 31 Pac. 358; *In re Davis*, 106 Cal. 453, 39 Pac. 756; *Fealey v. Fealey*, 104 Cal. 354, 38 Pac. 49, 43 Am. St. Rep. 111; *Estate of Winslow*, 121 Cal. 92, 53 Pac. 362; *Hite v. Mercantile Trust Co.*, 156 Cal. 765, 106 Pac. 102;

<sup>1</sup> Decision in department, which was superseded by decision in bank published in 133 Pac. 280.

Estate of Edelman, 148 Cal. 233, 82 Pac. 962, 113 Am. St. Rep. 231. In this case the evidence is undisputed, as above set forth, that the division of the property was advisedly entered into by Mrs. Yoell, she thoroughly understanding the condition of her husband's affairs, the values of the properties, the incomes which they returned, and having throughout the negotiations and to their consummation the advice of her own attorney and counselor at law. Further, as has been indicated, it is shown that in numerous and indeed in all ways Mrs. Yoell accepted the benefits of the agreement, and that the husband fully performed his part thereof, faithfully paying the \$350 per month as contemplated. This continued through many years, and therefore no question can here arise of the fairness of the transactions between the parties.

[5] To the argument of respondent that at the time these articles of agreement were entered into there were minor children whose rights upon the estate of their father could not be contracted away by the mother, the answer is that this is very true, but the question of the limitation of the power of the parties to contract in this regard arises only when it is shown that the rights of minor children are presently involved. At the time of the death of J. Alexander Yoell there were no minor children. A family allowance under our law is given only for the support of the widow or of the widow and minor children or of the minor children.

[6] Where there are no minor children, then the family allowance is for the widow alone, and, as is said in the well-considered case of Rieger v. Schaible, 81 Neb. 33, 115 N. W. 560, 17 L. R. A. (N. S.) 866, 16 Ann. Cas. 700: "The rule seems to be that a widow may by appropriate and sweeping provisions of an antenuptial contract (and so of course of a postnuptial contract) waive her right to an allowance when the rights of minor children are not involved." In the present case it is for herself alone that the widow makes application for the allowance.

[7] The separation agreement provided, as a mode of establishing title and separate estate in the undivided moieties of the real property, that deeds by Yoell and his wife should be made to one Buckbee, who, in turn, should make to the Yoells the deeds contemplated by the agreement. It is said that here was a void trust to convey, rendering the whole agreement void. But to this it must be answered, first, that this was not an executory trust, but an executed one. Buckbee made the deeds, both parties assented to them, received the benefits of them, acted under them, sought the courts to enforce their validity, and so both, upon the simplest principles of equitable estoppel, will be forbidden, while retaining the benefits, to question the validity of the agreement under which they received them. Los Angeles v. Los Angeles City Bank, 100 Cal. 24, 34 Pac.

510; Pixley v. W. P. R. R. Co., 33 Cal. 183, 91 Am. Dec. 623; Burris v. Adams, 96 Cal. 668, 31 Pac. 565.

[8] And, finally, upon this point, it may be said that the provision for deeds to and from Buckbee was a mere means of carrying into effect the principal purposes of the agreement. It was not an integral nor an essential part of it. The method provided was executed and accepted by both parties, and the whole contract in itself valid will not be permitted to fall because of the supposed invalidity attaching to the means adopted. Estate of Heywood, 148 Cal. 194, 82 Pac. 755; Lauricella v. Lauricella, 161 Cal. 61, 118 Pac. 430. This disposes of the imperfections asserted to exist in the agreement itself which respondent insists are of such gravity as to destroy the instrument. We pass then to the second consideration.

[9] 2. It has been pointed out that the separation agreement made complete disposition of the property of the spouses, dividing it equally between them; that the contemplated separation was a permanent one, and the disposition of the property was designed and declared to be final and complete. A complete release and relinquishment of all rights, present and prospective is indicated, first, by the general scope and intent of the instrument, and, second, by the following language: "The execution of this agreement and the consummation thereof \* \* \* shall be and is intended to be a full, complete and final adjustment of all the property rights of the parties hereto, and that neither party shall or will at any time hereafter make, or attempt to make, any other or further claim than as herein stipulated. That the property stipulated to be conveyed shall be and remain forever the separate property of each of the parties hereto. It is further expressly covenanted and agreed that neither party will \* \* \* interfere with the other, their heirs or assigns, in the exercise of the rights of property herein stipulated and agreed to; and that neither of them will, at any time hereafter, assert *any right, interest or title as heirs at law of the other*, to any property devised or bequeathed by such will or as against the estate of the other, should the other die intestate, and *all claim as such heir, or as surviving husband and wife respectively*, and all right to contest or oppose the last will of the other *is hereby expressly waived*."

Upon the death of the husband the surviving wife may receive a family allowance when and only when she is a member of the family, and receiving or entitled to receive support as such member, and when, even though a member of the family, she has not parted with or relinquished her right to make demand for such allowance.

(a) To establish such relinquishment of right, no more apt words could be chosen than those deliberately employed in the agreement under consideration. True, it does not



in terms and by name relinquish the right to a family allowance, but it does more than this. The wife covenants that she has renounced and waived all claim which she has or may have as heir of the husband or as his surviving wife. It is only as heir and surviving wife that she could make her demand for a family allowance, a demand which she has solemnly renounced. In the leading case in this state upon the subject—*In re Noah*, 73 Cal. 583, 15 Pac. 287, 2 Am. St. Rep. 829—under the articles of separation, the husband was to pay and did pay to the wife \$10,500, the contract providing that the \$10,500 should be in full satisfaction of "all her marital claims," etc. This was held to be a relinquishment upon the part of the wife of her right to family allowance. In *Wickersham v. Comerford*, 96 Cal. 433, 31 Pac. 358, the wife having received an allotted sum under the agreement of separation, which provided that she "relinquish all right as his wife in law or equity or by descent and each party shall have hereafter no claim upon the other for support or sustenance," it was held that the agreement was binding upon the parties, and deprived the wife of the right thereafter to select a homestead out of the husband's separate property either during his life or after his death. In this case *Eproson v. Wheat*, 53 Cal. 715, is distinguished; it being pointed out that in the latter case "the wife relinquished no right to property and the setting apart to her of a homestead after his (the husband's) death was not in contravention of any express or implied term of the agreement." In somewhat different form the question arose in *Re Davis*, 106 Cal. 453, 39 Pac. 756, where the spouses "relinquish all claims of every nature upon the property of each other then owned or thereafter to be acquired and to immediately separate and live apart from each other during their natural lives," the wife stipulating as to certain moneys to be paid her "that she will receive the same in full satisfaction of all claims she may have as the wife of said W. W. Davis on any property he now has or may in any manner acquire; and hereby does relinquish and surrender forever all claims of any nature she may now or hereafter have against any property that said W. W. Davis may now or may hereafter in any manner acquire." The wife applied for letters of administration upon the estate of her husband, the right to such letters depending upon the relative's right to succeed to the personal estate or some portion thereof. It was held that the articles of agreement worked the disinheritance of the wife, and she was therefore not entitled to letters; this court saying: "Of course she remains the widow, since the parties could not by their contract change their matrimonial status; but it was perfectly competent for them to alter their legal relations as to their property, and this they accomplished.

The wife contracted away her inheritable interest in her husband's property, and with that right went the right to administer." In *Estate of Winslow*, 121 Cal. 92, 53 Pac. 362, the agreement provided that it should operate "as a complete settlement and adjustment of all their property rights, relations, and affairs." There was property affected by a homestead. The husband paid to the wife one-half of the agreed valuation of this homestead property. The spouses lived apart up to the time of the husband's death. There were no children. The widow petitioned the court that the homestead property should be set aside to her, claiming that the homestead had never been abandoned, and that she was entitled to the same as the survivor of the marital community. The court in probate granted the application, and its order was reversed upon appeal, this court pointing out that it was declared that the agreement should operate as a complete settlement and adjustment of all their property rights, relations and affairs, that it was executed, and that it operated as an abandonment of the homestead. Elsewhere, language not so strong as that contained in this agreement has been held to bar the widow under similar applications. Thus in *Kroell v. Kroell*, 219 Ill. 105, 76 N. E. 63, 4 Ann. Cas. 801, by terms of an antenuptial contract, each party released, conveyed, and quitclaimed to the other "all interest in the property of the other, both real and personal, renouncing forever all claims, in law and equity, of curtesy, dower, homestead and survivorship." It was contended by counsel for the widow that these terms of the contract did not embrace the widow's award, to which she was therefore entitled on application. But the court said: "The right to a widow's award, under the statute, depends upon marriage, the continuance of the marriage relation until death, and the survivorship of the wife. The contract included all rights acquired by either one of the parties to it who should outlive the other, in the property or estate of the other, and clearly embraced the widow's award." In *Appeal of Staub*, 66 Conn. 127, 33 Atl. 615, where the wife in an antenuptial agreement received a certain sum "in lieu of dower and all other rights and interest and claims which she would but for the agreement have had in the estate covenanted to receive this money 'in lieu and as full payment for her dower right and of all other claims and interest she otherwise would have had in his estate,'" this language was held to bar her right to the statutory allowance during the settlement of the estate. To the same effect are *Cowles v. Cowles*, 74 Conn. 24, 49 Atl. 195; *Paine v. Hollister*, 139 Mass. 144, 29 N. E. 541; *Tiernan v. Binns*, 92 Pa. 248; *Buffington v. Buffington*, 151 Ind. 200, 51 N. E. 328; *Young v. Hicks*, 92 N. Y. 235; *Johnston v. Spicer*, 107 N. Y. 191, 13 N. E. 753; *Paylicek v. Roessler*, 222 Ill. 83, 78 N.

E. 11; *Brown v. Brown's Adm'r* (Ky.) 80 S. W. 470; *Deller v. Deller*, 141 Wis. 255, 124 N. W. 278, 25 L. R. A. (N. S.) 751.

Of the cases in this state which respondent contends support the contrary view, *Eproson v. Wheat* has already been considered, and shown not to be in point. In *Re Vance*, 100 Cal. 425, 34 Pac. 1087, no separation agreement was under consideration. The same is true of *In re Bump*, 152 Cal. 274, 92 Pac. 643. *Warner v. Warner*, 144 Cal. 615, 78 Pac. 24, did not involve the consideration of a separation agreement, but of an antenuptial agreement by which the wife "does hereby relinquish and disclaim any and all right, claim and interest in and to the property of said first party (the plaintiff) either as heir or otherwise." It was held that a declaration of homestead which the wife placed upon the separate property of the husband was not in violation of the terms of this agreement. Construing it, the court said that it was an agreement upon the part of the wife "not to seek to deprive him of any of his property or to assert any claim thereto adverse to him during his lifetime, or any claim of inheritance therein after his death. Her declaration of homestead was not a violation of this obligation thus assumed by her." It is concluded, therefore, that by the very language of the separation agreement the wife renounced, surrendered, and released her right to make application for a family allowance.

[10] (b) The wife, however, was not entitled to succeed in her application by reason of the fact that she had voluntarily and deliberately severed her relationship as a member of the husband's family. The separation agreement, as we have said, makes plain that such is her intent, while the proved facts of her conduct after the execution of these papers, including the fact, that, though in the same city with the husband at the time of his death, she did not even attend his funeral, emphasize the absolute severance of all family ties. In *re Noah*, supra; *Wickersham v. Comerford*, supra; *Estate of Miller*, 158 Cal. 420, 111 Pac. 255. In *Bose v. Bose*, 158 Cal. 428, 111 Pac. 258, it is held that under the statutes pertaining to a homestead and making provision for maintenance and support of the family, setting aside estates of small value, and property exempt from execution, the widow, to take, must

come within the definition of the "family," must have been a member thereof "or at least must, without fault of her own, have been entitled to maintenance and support from the husband during his lifetime." This language, of course, means that she must have been entitled to support as a member of his family. In the case at bar, the agreement being valid, the widow had voluntarily severed her connection with the family, and her right to support did not rest upon the family relationship at all, but upon the terms of the articles of agreement.

[11] 3. Finally, respondent contends that the court in probate may not consider the separation agreement; that the widow is entitled to all rights in and to the estate of her husband until, in an action in equity, the court has entered its decree specifically enforcing the contract against the widow. *Bridge v. Kedon*, 126 Pac. 149, is cited as authority in support of this view. The position is not sound, nor is it supported by the case mentioned. Of course, during the lives of the parties a court of equity would be the forum for the enforcement of any violated rights conferred by the agreement.

[12] But here the agreement has been fully executed, and one of the parties to it is dead. The other is making unwarranted claims in probate upon the estate of the deceased, and his representative interposes this agreement as a defense by way of estoppel to those claims. That the probate court has equitable jurisdiction for the purpose of passing upon the validity and effect of such agreements our cases not only recognize, but declare. In *re Noah*, supra, and *Estate of Garcelon*, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134, are typical, while in *Estate of Edelman*, supra, discussing the bar of such an agreement, it is said: "While it is true that the law was unable to, and therefore did not, give effect to such transfers, releases, or extinguishments of heirship, it is equally true that they were always cognizable in equity, and that in proper cases they afforded a complete defense by way of estoppel. And this equitable defense by way of estoppel is cognizable by the court in probate."

The order appealed from is therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.











# CALIFORNIA REPORTER

130 PACIFIC REPORTER









(164 Cal. 591)

**SUHR et al. v. LAUTERBACH.**

(S. F. 6,094.)

(Supreme Court of California. Jan. 24, 1913.)

**1. EQUITY (§ 88\*)—LACHES—PLEADING—NECESSITY.**

Defendant may avail himself of the defense of laches without having pleaded it, as where shown by the evidence the court will deny relief sua sponte.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 245, 395; Dec. Dig. § 88.\*]

**2. TRIAL (§ 397\*)—FAILURE TO FIND ON AN ISSUE—LACHES.**

In an action to cancel a deed, the denial of defendant's motion for judgment on the ground of laches amounted to a finding that plaintiff was not guilty of laches.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940-945; Dec. Dig. § 397.\*]

**3. CANCELLATION OF INSTRUMENTS (§ 47\*)—EVIDENCE—LACHES.**

Evidence in an action to cancel a deed for duress and undue influence, which action was commenced one year and nine and a half months after delivery of the deed, held to sustain a finding that plaintiff was not guilty of laches.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 102, 103; Dec. Dig. § 47.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

#### 4. EQUITY (§ 72\*)—LACHES—OPERATION TO BAR RELIEF.

Relief in equity is barred by laches where a plaintiff has slept upon his rights for so long a time and under such circumstances as to make the granting of relief inequitable, but for delay to bar a remedy the circumstances must be such that prejudice to some one may be reasonably supposed if the remedy be allowed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 207, 210-220, 225, 226; Dec. Dig. § 72.\*]

#### 5. APPEAL AND ERROR (§ 1009\*)—FINDINGS OF TRIAL COURT—LACHES—CONCLUSIVENESS.

Whether a plaintiff's delay in suing has been of such long standing and under such circumstances that it would be inequitable to allow the remedy sought is a question for the trial court in the first instance, and its conclusion thereon, if reasonably supported by the evidence, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.\*]

#### 6. DEEDS (§ 75\*)—VALIDITY—DURESS—RATIFICATION.

That the grantee of a deed which was procured by duress and undue influence contemporaneously with the execution of the deed and as part of the same transaction agreed, as a "further consideration for the conveyance," to execute a note as security for a loan in conjunction with the grantor, was not a ratification of the deed by the grantor, though the agreement stated that it was signed "after" the deed, and was marked "recorded at request of L," the grantor, where no such note was ever given or requested by the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 206-208; Dec. Dig. § 75.\*]

Department 1. Appeal from Superior Court, Alameda County; N. A. Hawkins, Judge.

Action by Louise Lauterbach, for whom after her death H. F. Suhr and another as her executors were substituted, against George Lauterbach. From judgment for plaintiffs, defendant appeals. Affirmed.

Robert Edgar and Oliver Youngs, both of Berkeley, for appellant. Frank V. Kingston, of San Francisco, for respondents.

ANGELLOTTI, J. This is an action initiated by Louise Lauterbach to obtain a decree adjudging a deed executed by her to defendant, the brother of her deceased husband, on November 24, 1906, to be null and void, and quieting her title to the land described therein as against said defendant, on the ground that the execution of the same was procured by defendant by means of duress and undue influence exercised by him upon her. This deed reserved to Mrs. Lauterbach a life estate in the property conveyed. The action was commenced on September 16, 1908. The findings and judgment were in favor of plaintiff. This is an appeal by defendant from such judgment. Since the taking of the appeal, Louise Lauterbach died, and the executors of her will have been substituted as plaintiffs.

1. No claim is made in the briefs that the

evidence is insufficient to support any of the findings of the trial court.

2. It is claimed that Mrs. Lauterbach's right of action was "barred by reason of her laches in bringing suit." As we have seen, the date of the execution of the deed, as alleged in the complaint, was November 24, 1906, while the action was not commenced until September 16, 1908. The complaint was treated in the lower court by all the parties as sufficiently stating a cause of action; no objection by demurrer being made and the defendant answering upon the merits. Nothing was said about laches in the lower court until the very close of the trial, when all of the evidence on both sides had been received. Defendant then moved for judgment "on the ground of plaintiff's laches in commencing the action." Although the record does not show that the court formally ruled upon this motion, the judge saying only "Very well, the case is submitted," in view of the findings and the judgment the motion must be deemed to have been denied. We do not think that the allegations of the complaint were such in so far as the question of laches is concerned, as to warrant us in holding, after answer, trial and judgment, that the complaint failed to state a cause of action. The only question then is whether the evidence was such as to support the conclusion of the trial court that there was no such unreasonable delay on the part of Mrs. Lauterbach in asserting her right to avoid this deed as would bar her action.

[1] "It is well settled that the defense of laches need not be pleaded but that when it appears from the evidence that the seeker of relief in equity has been guilty of laches the court will deny such relief sua sponte without any pleading."

[2] The denial of defendant's motion for judgment on the ground of laches amounted to a declaration and finding to the effect that the plaintiff was not guilty of laches. *Stevinson v. San Joaquin, etc., Co.*, 162 Cal. 141, 121 Pac. 398.

[3] The evidence indicates that the deed, although dated November 24, 1906, was not delivered until December 1, 1906. The time between the delivery of the deed and the commencement of the action was thus one year and nine and one-half months.

[4] This was much less than the period prescribed by our statute of limitation within which such an action may be brought. But, of course, that fact does not bar the defense of laches, which is based entirely on equitable principles. It is well settled that, "entirely independent of any statutory period of limitations, stale demands will not be aided where the claimant has slept upon his rights for so long a time and under such circumstances as to make it inequitable to enter upon an inquiry as to the validity thereof." *Kleinclaus v. Dutard*, 147 Cal. 245, 81 Pac. 516. "Where such is the condition, the



demand is, in a court of equity, barred by laches." *Id.* "As has often been said, there is no artificial rule as to the lapse of time or circumstances which will justify the application of the doctrine. Each case as it arises must necessarily be determined by its own circumstances." *Id.* "In order to bar a remedy because of laches, there must appear, in addition to mere lapse of time, some circumstances from which the defendant or some other person may be prejudiced, or there must be such lapse of time that it may be reasonably supposed that such prejudice will occur if the remedy is allowed." *Cahill v. Superior Court*, 145 Cal. 42, 47, 78 Pac. 467.

[5] The plaintiff is not to be held barred from his remedy for the wrong alleged to have been done him, on the ground that he has been guilty of laches, unless his delay in bringing action has been of such length and under such circumstances that it would be inequitable to enter into an inquiry as to the validity of his claim or to allow such remedy. Whether such is the situation is a question in the first instance for the trial court, and, if its conclusion thereon can reasonably be held to find sufficient support in the evidence, an appellate court should not interfere therewith.

The evidence in this case was such as to amply support a conclusion by the trial court to the effect that defendant could not have been prejudiced in the slightest degree by plaintiff's delay in commencing this action. The only matter suggested by counsel for defendant as to which such prejudice was or might be caused was that he (defendant) had a claim for \$3,680.75 against plaintiff for services rendered and board, at the time of the delivery of the deed, which he claimed on the trial was the real consideration for the execution of the deed, that relying upon the deed he had failed to take any proceeding for the enforcement of his claim, and that at the time of the commencement of the action this claim had become barred by the statute of limitations. Of this alleged claim, as was shown by the account furnished by defendant on the trial, \$3,217 was already barred by such statute at the date of the delivery of the deed, and of the remaining \$463.75 at least \$98 was not barred at the time of the commencement of this action, leaving only \$365.75 of the \$3,680.75 as to which defendant could have possibly lost any right by reason of the statute of limitations on account of defendant's delay. His additional charges, aggregating \$576.25, for alleged services, etc., subsequent to the delivery of the deed, were, of course, in no way imperiled by any statute of limitations by reason of the delay. The evidence was such as to support a conclusion that, regardless of the statute of limitations, defendant had no legal claim whatever against plaintiff at the time of the delivery of the deed, and had never asserted any such claim except for board for a short time, for which Mrs.

Lauterbach testified he had been fully paid. The account presented by him on the trial, when for the first time apparently Mrs. Lauterbach was made acquainted with the fact that he asserted any claim against her for money on account of services rendered, was of such a character, when considered in connection with the other evidence, as to warrant the learned judge of the trial court in entirely disregarding it, as is apparent from his opinion he did. There was also sufficient support in the evidence for the conclusion that there was no understanding on the part of plaintiff that she was deeding this property to defendant on account of any claim for money due him, and that the only thing in the way of consideration suggested to her was that he would see that she did not want anything during her lifetime. From what we have said it is clear that the court below was warranted in concluding that even as to the small portion of the asserted claim as to which the statute of limitations intervened as a bar between the time of the delivery of the deed and the date of the commencement of the action, defendant suffered no prejudice by reason of the delay.

It is further to be noted that there was evidence sufficient to support a conclusion that plaintiff made known to defendant very shortly after the delivery of the deed that she was not satisfied and wished to have the property back, and several times made a request of defendant to that effect. The evidence was also such as to support a conclusion that for a long time after the delivery of the deed plaintiff was to a great extent under the same influence that existed at the time of the execution thereof.

We are satisfied that it cannot be held that the conclusion of the lower court that plaintiff was not guilty of laches was not sufficiently supported by the evidence.

3. The other points made for reversal require but little notice.

[6] There was no subsequent ratification by plaintiff of the deed. The instrument signed by defendant, dated November 23, 1906, but signed "after" the deed, and marked "Recorded at request of L. Lauterbach," relied on as showing such a ratification, was practically contemporaneous with the deed and part of the same transaction. This instrument was simply an undertaking on the part of defendant, "as a further consideration for the conveyance," to execute a note secured by mortgage on the property conveyed, in conjunction with the grantor, to enable the grantor to obtain a loan thereon for her own use, if it became absolutely necessary to raise money in that way for her support. No such note or mortgage was ever given, or requested by plaintiff.

There is nothing at all in the claim that Mrs. Lauterbach was not damaged by the loss of her property.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

164 Cal. 620

**VAN HORNE v. TREADWELL et al.**  
(S. F. 6,101.)

(Supreme Court of California. Jan. 27, 1913.)

**JUDGMENT (§ 592\*)—BAR—SPLITTING CAUSES OF ACTION.**

After a judgment in an action brought by a pledgor against the pledgee for the recovery of the pledged property, he could not bring a new action for the depreciation in the value of the property between the date of the tender of the amount of the secured debt and the return of the property, or for attorney's fees expended in recovering the property, since all the damages arising from the pledgee's wrongful refusal to redeliver the property should have been recovered in the first action, whether that action was one in claim and delivery, or was a suit in equity for specific performance of the agreement to return the property, and whether or not the elements of damage sought to be subsequently recovered were then known or ascertainable.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1107; Dec. Dig. § 592.\*]

Department 1. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by J. H. Van Horne against Ivan G. Treadwell and another. From a judgment for defendants, plaintiff appeals. Affirmed.

L. S. Melsted and Edwin H. Williams, both of San Francisco, for appellant. H. H. McPike, of Los Angeles, and Crittenden Thornton, of San Francisco, for respondents.

**SLOSS, J.** The court below sustained demurrers to the complaint, granting plaintiff leave to amend. No amendment having been filed within the time allowed, judgment was entered in favor of the defendants. The plaintiff appeals.

The complaint alleges the following facts: On June 30, 1910, plaintiff, who was then and has ever since been the owner of 3,500 shares of the capital stock of the Sutter Hotel Company, pledged said shares to defendant Reese to secure the payment of a loan of \$2,000. In February, 1911, plaintiff, with Reese's consent, pledged said shares to defendant Treadwell to secure an advance of \$4,350 made by Treadwell to plaintiff. It was agreed that out of the sum so advanced, Reese's loan should be repaid. This was done; plaintiff executing a note to Treadwell for \$4,350, and Reese turning over the stock to Treadwell upon receiving from the latter repayment of the \$2,000 loan, with interest. On March 26, 1911, plaintiff tendered to Treadwell payment of the full amount due upon the note, but Treadwell refused to accept said payment, or to deliver the pledged stock. On March 31, 1911, plaintiff brought an action against the defendants to recover said stock and tendered into court the sum of \$4,500 in payment of all indebtedness due from plaintiff to Treadwell. On June 16, 1911, plaintiff recovered judgment in said action against defendants for the return of said 3,500 shares of stock, and on

June 19, 1911, Treadwell actually delivered the stock to plaintiff.

It is further alleged that on March 26, 1911, the day of the tender to Treadwell, plaintiff had received an offer of \$7,500 for said stock, "and was ready, able, and willing to sell said stock for said sum of \$7,500." On the 19th day of June, 1911, and at all times subsequent to the 16th day of June, 1911, the value of the stock was \$4,500, and no more. In the action to recover possession of the stock plaintiff was compelled to and did expend \$1,500 in the pursuit of the property; i. e., in payment of attorney's fees. The complaint prays judgment for \$4,500.

So far as the plaintiff's demand is based upon the depreciation in the value of the stock, it is apparent that the action seeks to claim damages for the wrongful act of the defendants in withholding possession of the property, which had already been regained by means of the former action. Such damages cannot be recovered, for the simple reason that the plaintiff's right to them should have been litigated in the former action. The judgment there rendered was a conclusive adjudication of all matters, arising out of the withholding of the stock, which might have been presented to the court for determination. Whether we regard the first action as one in claim and delivery, or as a suit in equity for specific performance of the agreement to return pledged property on payment of the debt (in other words, a bill to redeem), there can be no question that in that action plaintiff was entitled to recover all damages sustained through the wrongful refusal of the defendants to redeliver the property. There was a total breach of a single and entire obligation, and the plaintiff could not split his demand for relief on account of such breach, so as to entitle him to recover a part of such relief in one action, and the remainder in another. The rule thus stated is applicable, even if we assume, contrary to what we consider the fair construction of the pleading, that the complaint shows that the elements of damage now sought to be recovered were not known or ascertainable at the date of the former judgment. The principle involved has been fully considered and discussed in the recent case of *Abbott v. 76 Land & Water Co.*, 161 Cal. 42, 118 Pac. 425, and it is unnecessary to repeat the arguments there elaborated. It will suffice to quote from the opinion a single sentence, applying directly to the precise case before us: "In accord with the views we have stated," says Angellotti, J., "it has been held that the continued withholding of stocks or bonds after the bringing of action to enforce their delivery, pending the litigation and up to the time of the enforcement of the decree, is not a new wrong redressible by a new action, but is simply a continuation of the original wrong, for which the only redress given by the law must be had in the



original action; and that consequently, a second action would not lie for the damage due to depreciation in the value of the stocks or bonds occurring between the time of the commencement of the first action and the determination of such action on appeal. See *Bracken v. Atlantic Trust Co.*, 167 N. Y. 510 [60 N. E. 772, 82 Am. St. Rep. 731]; *Commerce Exchange Nat. Bank v. Blye*, 123 N. Y. 132 [25 N. E. 208]."

The demand for repayment of attorney's fees in the former action stands upon no different ground. If this was a proper element of damage at all, it was a damage which flowed from the single wrongful act of withholding redelivery of the stock. Plaintiff's right to reimbursement was therefore adjudicated against him by the judgment in the action to enforce such redelivery.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

164 Cal. 623

FOSTER v. BUTLER et al. (L. A. 2,929.)

(Supreme Court of California. Jan. 29, 1913.

Rehearing Denied Feb. 28, 1913.)

**1. LIMITATION OF ACTIONS (§ 84\*)—MORTGAGES—ABSENCE FROM STATE.**

Although under Code Civ. Proc. § 351, providing that the time during which a person sued is absent from the state is not a "part of the time limited for the commencement of the action," a nonresident mortgagor cannot plead the two-year limitations of section 339, subd. 1, if he has not been in the state; it is otherwise as to one who has acquired the interest of the mortgagor through an execution sale.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 199, 200; Dec. Dig. § 84.\*]

**2. TRIAL (§ 368\*)—AGREED STATEMENT—CONSTRUCTION—ABSENCE FROM STATE.**

A statement in an agreed statement of facts that one has never been a resident of the state does not preclude his physical presence under Pol. Code, § 52, relating to residence, so as to save the right to sue him as against a plea of limitations; it not being the purpose of Code Civ. Proc. § 351, providing that the time during which a person sued is absent from the state is not a "part of the time limited for the commencement of the action," to deprive nonresidents of the benefits of the statute of limitations.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 880; Dec. Dig. § 368.\*]

**3. APPEAL AND ERROR (§ 1015\*)—REVIEW—APPEAL FROM MOTION FOR NEW TRIAL—JUDGMENT.**

On appeal from an order denying a new trial, the question whether the findings support the judgment cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876; Dec. Dig. § 1015.\*]

Department 1. Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by Nathaniel C. Foster against Phoebe M. Butler and others. Judgment for plaintiff, and defendants appeal. Affirmed.

A. H. Sweet and Sam Ferry Smith, both of San Diego, for appellants. W. J. Moss-holder and Marks P. Mossholder, both of San Diego, for respondent.

SLOSS, J. This action was brought by Nathaniel C. Foster against the personal representative and the heirs at law of Andrew O. Butler, deceased, to quiet plaintiff's title to a tract of land in San Diego county. The heirs answered, asserting an interest under a mortgage executed by Charles G. Wheeler, Foster's predecessor in interest, to Andrew O. Butler. The administrator with the will annexed of Butler's estate answered, denying plaintiff's title. The court gave judgment in favor of plaintiff. The defendant heirs moved for a new trial, which was denied, and they now appeal from the order denying their said motion.

The cause was presented upon an agreed statement of facts. Upon this statement the court below found that the mortgage from Wheeler to Butler did not constitute a lien upon the premises, for the reason that the mortgage and the note secured by it were barred by limitation. The principal question raised by this appeal is whether this finding properly resulted from the stipulated facts which are as follows:

On July 3, 1899, Charles G. Wheeler, who was then the owner of the land in question, executed to Andrew O. Butler his promissory note for \$3,000, with interest, payable six months after date, together with a mortgage of the land to secure said note. Both Wheeler and Butler were residents of Chicago, and the note and mortgage were executed and delivered in that city. Neither of them, as we construe the statement, has since been in the state of California, "except that Wheeler was temporarily in the county of San Diego for about three weeks in March and April, 1902." No part of the principal or interest on said note has been paid. On March 2, 1901, Foster, the plaintiff herein, commenced an action in the superior court of San Diego county against Wheeler, and on the same day a writ of attachment was duly issued in said action and levied upon the land in controversy as Wheeler's property. Wheeler appeared and answered. On March 21, 1902, a personal judgment was entered in said action in favor of Foster and against Wheeler for some \$14,000. On March 22, 1902, a writ of execution was issued and levied upon said land, and on April 24, 1902, the interest of Wheeler therein was sold by the sheriff at execution sale to the plaintiff Foster. A certificate of sale was duly issued to the purchaser, and a duplicate filed in the office of the county recorder on the same day. No redemption was made, and on June 18, 1903, the sheriff executed and delivered to Foster a deed of said property. The sheriff's deed was recorded on June 19, 1903. Foster has

never parted with his title, and has, ever since, been in constructive possession of the premises.

Andrew O. Butler died at Chicago on the 15th day of January, 1902, leaving a will, which was admitted to probate by the superior court of San Diego county on July 1, 1904. Butler's only heirs were his widow and three sons, all of whom are defendants herein. The widow is sole legatee and devisee under the will. The plaintiff has never been a resident of the state of California.

[1] The complaint in this action was filed on the 18th day of June, 1908. The answer of appellants, asserting the mortgage lien, was filed November 25, 1908. The mortgage debt was payable on February 3, 1900, and, since the note and mortgage were executed out of the state, the time within which an action of foreclosure could have been brought was that declared by subdivision 1 of section 339 of the Code of Civil Procedure; i. e., two years. Under section 351 of the same Code, the time during which a person sued is absent from the state is not "part of the time limited for the commencement of the action." So far, then, as Wheeler, the original mortgagor, is concerned, his absence from the state would have debarred him of the right to set up the statute of limitations in defense to an action brought against him on the note and mortgage.

But the plaintiff, as successor to the interest of the mortgagor, stands in a different position. It is settled by a series of decisions, extending over many years, that the mortgagor cannot, by waiving the bar of the statute, affect the right of a subsequent purchaser or incumbrancer of the mortgaged premises to insist as to himself that the action was not brought in time. The rule was applied at an early date to cases where the waiver had been by express agreement. *Lord v. Morris*, 18 Cal. 482; *McCarthy v. White*, 21 Cal. 495, 82 Am. Dec. 754. And no different question arises where the original mortgagor has lost his right to plead the statute by absenting himself from the state. *Wood v. Goodfellow*, 43 Cal. 185; *Watt v. Wright*, 66 Cal. 202, 5 Pac. 91; *Filipini v. Trobock*, 134 Cal. 441, 62 Pac. 1066, 66 Pac. 587; *Brandenstein v. Johnson*, 140 Cal. 29, 73 Pac. 744; *Cal. Title Ins. & T. Co. v. Miller*, 3 Cal. App. 55, 84 Pac. 453. "When third persons have subsequently acquired interests in the mortgaged property, they may invoke the aid of the statute as against the mortgage, even though the mortgagor, as between himself and the mortgagee, may have waived its protection; and we see no difference in principle between a suspension of the running of the statute resulting from an express waiver and one caused by his voluntary act in absenting himself from the state." *Wood v. Goodfellow*, supra, "The law as to this point," said *McFarland, J.*, in *Brandenstein v. Johnson*, supra, "has been settled by former decisions of this

court, \* \* \* and there seems to be no necessity for discussing it as if the question were still an open one."

[2] If the statutory period of limitation did not commence to run in favor of Foster, the respondent, as early as March 2, 1901, when, by virtue of the levy of his writ of attachment, he became the owner of a lien appearing of record (Code Civ. Proc. § 542), the statute was certainly set in operation, at the latest, on June 19, 1903, when the sheriff's deed to him was recorded. In either view, the time for enforcing any rights under the mortgage against Foster's interest in the property had long expired when this action was brought. It is argued that the agreed statement shows that not only the original mortgagor, but the plaintiff himself, was, by reason of absence from the state, precluded from setting up the bar of the statute. See *Com. Sav. Bank v. Hornberger*, 140 Cal. 16, 73 Pac. 625. But the facts do not support this contention. There is no stipulation that Foster was out of the state for a period sufficient to save the mortgagee's right to sue him, or, in fact, that he was absent at all. It is declared in the agreed statement that plaintiff has never been a resident of California, but, of course, the fact that one is not a resident of a place is in nowise inconsistent with his physical presence there. *Pol. Code*, § 52. To bring the plaintiff within the exception of section 351, it would have been necessary to show that he was not in fact within the state for periods aggregating two years between the accrual of a cause of action against him and the commencement of the action. The section does not assume to deprive nonresidents of the benefits of the statute of limitations. What it does is to exclude from computation the time during which any defendant, resident or nonresident, may have been out of the state. The force of this distinction was evidently recognized by the defendants themselves, for in their answer they do not content themselves with alleging that Foster was a nonresident, but aver, in addition, that he had been absent from the state since the 28th day of March, 1901. The latter averment, however, did not find its way into the agreed statement of facts.

For these reasons, the finding that the note and mortgage were barred by the statute of limitations cannot be held to be unsupported.

[3] The appellants make the further contention that the plaintiff should not be permitted to quiet his title against the appellants without paying or offering to pay the mortgage debt, even though an action to foreclose the mortgage be barred. On the record before us, this point cannot be presented otherwise than by a claim that the findings do not support the judgment. Such claim might properly be made on an appeal from the judgment, but is not involved, and cannot be considered on an appeal from an



order denying a new trial (Great Western, etc., Co. v. Chambers, 153 Cal. 307, 310, 95 Pac. 151, and cases cited), which is all that we have before us here.

The order is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

164 Cal. 596

GUGOLZ v. GEHRKENS et al. (L. A. 2,799.)  
(Supreme Court of California. Jan. 24, 1913.)

1. CONTRACTS (§ 113\*)—WILLS—AGREEMENT TO SET ASIDE—VALIDITY.

Plaintiff was devised one quarter of an estate and made an executor, and, with the devisee of another quarter, who was also an executor, agreed with testator's widow, who had a life interest in the whole estate, that if she would promise to devise each of them a quarter of her estate they would help her to have the will set aside. The executors, after filing application for probate, which was resisted by the widow, represented by the partner of their own attorney, made no effort to sustain the will; and it was denied probate and the property distributed to the widow as sole heir. The devisees of the other half of the estate knew nothing of the proceedings. Testator was competent to execute the will, and it was valid, as known to plaintiff. *Held*, in an action against the executor of the deceased widow, that the agreement was unenforceable, as opposed to public policy and based upon an illegal consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 521-541; Dec. Dig. § 113.\*]

2. CONTRACTS (§ 129\*)—WILLS—PROBATE—AGREEMENT BETWEEN PARTIES—VALIDITY.

While an agreement between all the parties interested in the probate of a will that some course be followed as to contesting the will, or as to the property involved, in the absence of contemplated fraud or violation of law, is valid, yet an agreement to resist the probate of a will and procure it to be set aside, so as to cut off the interest of one who was not a party to the agreement, tends to thwart justice, and is against public policy.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 616-632; Dec. Dig. § 129.\*]

3. CONTRACTS (§ 139\*)—ILLEGALITY OF CONSIDERATION—EFFECT—PARTIES NOT IN PARI DELICTO.

An agreement between testator's widow and an executor and devisee under the will, whereby the executor helped the widow, who had a life interest in the whole estate, to have the will set aside and the estate distributed to her as sole heir, in consideration of her promise that she would devise him a quarter of her estate, though made without duress or undue influence, but void in equity on the grounds of public policy and illegality of consideration, was not enforceable against the widow's estate, on the ground that such executor was not in p<sup>ar</sup>i delicto.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 684-700; Dec. Dig. § 139.\*]

In Bank. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by Emil S. Gugolz against C. M. Gehrrens, executor of Marie Gugolz, deceased, and others. Judgment for plaintiff, and defendants appeal. Reversed.

Mott & Dillon and Louis W. Myers, all of Los Angeles, for appellants. R. L. Horton, of Los Angeles, for respondent.

ANGELLOTTI, J. Plaintiff had judgment, from which, and from an order denying their motion for a new trial, defendants appeal. The action is one to enforce an alleged oral agreement, made in 1881, by which Marie Gugolz, the deceased, agreed to make a will in favor of plaintiff to the extent of one-fourth of all the property that she should die possessed of. She died testate in January, 1907, leaving an estate of the value of about \$37,000. By her will she bequeathed to various persons other than plaintiff sums aggregating about \$22,000. To plaintiff she left \$5, and no more. The defendants, other than the executor of the will, are all either legatees thereunder, or heirs of the deceased. The trial court found in accord with the allegations of the complaint, and concluded that plaintiff was entitled to a one-fourth interest in the entire estate, subject to administration thereof, and that defendants are constructive trustees of such interest therein for the benefit or use of plaintiff.

Plaintiff was a nephew of the deceased husband of Marie Gugolz, Caspar Gugolz, being the son of a brother of said Caspar Gugolz. He lived with and was maintained and cared for by said Caspar and Marie Gugolz from 1871, when he was about 10 years of age, to the time of death of Caspar, which occurred in December, 1881, in Denver, Colo., where Caspar resided. He continued to live with deceased after the death of Caspar until some time in 1890, when he married, after which he lived in Denver, and deceased lived in Los Angeles, Cal. He was never legally adopted by either Caspar or Marie. Notwithstanding many allegations and findings as to matters of this character, there is no contention that there is anything alleged or found that would entitle plaintiff to any relief, other than the alleged agreement hereinbefore referred to, and no such contention could reasonably be made. Plaintiff bases his claim, as he must, solely on such agreement.

The facts relating to the agreement, as alleged in the complaint, were substantially as follows: Caspar died testate, leaving an estate amounting in value to about \$30,000. By his will he gave to plaintiff a one-fourth interest in all his property and estate. Marie Gugolz informed plaintiff that she was dissatisfied with the terms of said will and would contest it, asked plaintiff not to make any objection to such contest, and promised him that if he made no such objection she would make a will in his favor, leaving him a one-fourth interest in all of the property that she should die possessed of, and that he would lose nothing by refraining from making such opposition. He, having perfect confidence and trust in said aunt and her promise, consented and agreed. She did contest the will, plaintiff made no opposition to said contest, and the will was set aside and denied probate by the court. "If he had

made opposition to the contest, \* \* \* he believes that the same would have been sustained," and he would have opposed it but for her promise. The contest went by default, by reason of his failure to oppose the same. It was alleged that such promise was based upon a good, valid, and adequate consideration.

The findings of the trial court show, in addition to the above, the following: By the will of Caspar a life interest in all his property was given to said Marie Gugolz. Subject to such life interest, plaintiff was given one-fourth of the estate, a brother, Edward, in Switzerland, was given one-fourth, one Adolph Aepli was given one-fourth, and the six children of Gottlieb Aepli were given one-fourth. Plaintiff and Adolph Aepli were, by the terms of the will, made the executors thereof. At the time of the agreement plaintiff had not quite attained the age of majority, but was of full age on the day when the hearing on the application for probate was had. The findings as to the terms of the agreement and the matter of consideration were in accord with the allegations of the complaint.

The answers of defendants sufficiently deny the allegations of the complaint as to the terms of the agreement and the matter of a good, valid, and adequate consideration; and the findings on these matters are sufficiently attacked by specifications of insufficiency.

The evidence as to the terms of the agreement, in so far as they refer to what plaintiff was to do in consideration of the promised act of Marie Gugolz, shows a very different case from that presented by either complaint or findings, and one, we believe, that presents a materially different legal question. Of course, it is naturally to be expected that there would ordinarily be some difficulty in proving just what an oral agreement, made more than 25 years before, was, where there is no written memorandum of any kind to show the conversation relied upon as stating the terms. But here, in the light of the testimony of the plaintiff himself, who gave the only evidence there was as to the terms of the agreement, and the evidence as to what was actually done by him in pursuance of the agreement, there can be no question as to just what, in substance, the agreement was.

On the evening of the day on which Caspar Gugolz was buried, December 29, or 30, 1881, Marie Gugolz and plaintiff and Adolph Aepli, who had come from Chicago for the funeral, were together at the residence of Mrs. Gugolz. They read the will, and Mrs. Gugolz expressed her dissatisfaction therewith. She said to them: "If you agree to make no opposition *and to have this will set aside, you and Adolph*, I will, right after it is defeated, make my will giving you each your quarter after my death. Emil, you can have your quarter, and Adolph shall have your quarter,

and the will will be made in the same division as Uncle had it." They both agreed, saying: "Yes; we will help you out; and if you will fulfill your promise and make your will the same as Uncle had it *we will help you out in every shape and form.*" The next day they all three went to the office of the lawyer who had drawn the will, and who had acted as one of the subscribing witnesses when it was executed December 18, 1881. This lawyer was told by them that "all three of us agreed together to have it [the will] set aside, and if it can be done to have it done." He told them it would be a "pretty hard matter to do it," but that, "of course, with a little scheming \* \* \* it can be accomplished." He directed them to return in a few days. On their return, January 4, 1882, they were taken by the lawyer before the probate judge, where plaintiff and Adolph Aepli signed a petition for the admission to probate of Caspar's will and the issuance to them of letters testamentary, and were sworn as to the truth of the allegations of the petition by said judge. A few days later the three went to the lawyer's office again, and Marie Gugolz signed a written opposition to the application for probate. On January 25, 1882, the three went with the lawyer to court, together with the lawyer's partner, who acted on the hearing as the attorney for Marie Gugolz. The two subscribing witnesses testified, being questioned only by the attorney appearing for Marie Gugolz. The deposition of the attorney who drew the will shows that the petitioning executors had no attorney on such hearing, did nothing after filing their petition to sustain the will, simply remained quiet at such hearing "and kept close to Mrs. Gugolz," and that "all went the other way by the persuasions, promises, and inducements of Mrs. Gugolz." This was in no way contradicted. When the hearing was completed, the attorney who drew the will, according to the testimony of plaintiff, came over to the three and said to the executors, "I have defeated that will in favor of your aunt." The deposition of this lawyer further shows that Caspar Gugolz was not mentally incompetent to execute a will, and that it was not true that the subscribing witnesses did not subscribe their names in the presence of the testator. Plaintiff himself testified that he was present at the execution of such will; that Caspar Gugolz signed the will in the presence of the subscribing witnesses, and that both subscribing witnesses attached their signature at the request and in the presence of the deceased; and that he stated it was his will. This uncontradicted testimony covers all the grounds of the contest made. There appears to be no reason to doubt that the will was in fact valid, and that plaintiff knew it to be valid. The record sufficiently shows that none of the other beneficiaries under the will were in Colorado at the time, or knew anything about the proceedings. On January 25, 1882, the alleged



will was denied probate, and, as a result, all of the property of Caspar Gugolz was subsequently distributed to Marie Gugolz, as sole heir.

Going back to the language used by plaintiff in his testimony as to the terms of the contract, we see that the proposition made by Marie Gugolz to the two executors was to leave them each one-fourth of her estate if they would agree, not only to make no opposition to her contest, but also "to have this will set aside"; and that they in response said that if she would make such a disposition of her property "we will help you out in every shape and form." This implied not only passive acquiescence in anything she might do in the matter of a contest, but also such active participation on their part, even as executors, as might be essential to bring about the setting aside of the will; and the conduct of the executors thenceforth to the time of the making of the order denying probate of the will clearly shows their understanding that such was the nature of their undertaking. We may concede that the contract as alleged and found cannot be held, in view of the authorities, to be void as against public policy, or to be based upon an illegal consideration.

[1] But the contract shown by the evidence is a very different contract from the one alleged and found. The contract shown was one between the executors named in the will, on the one hand, and the sole heir of deceased, on the other, by which its executors agreed to actually join with such heir in having the will set aside, regardless of its validity, and in violation of the rights of the legatees other than themselves, who were entitled, under the will, to one-half of the estate, subject to the life interest of Marie Gugolz, to use the office to which they were appointed by the will to accomplish this result, as executors named in the will to institute a proceeding for its probate and the issuance of letters testamentary to themselves, for the sole purpose of enabling the heir to contest the same, and to allow such contest to prevail by default on their part, regardless of the merits thereof, all in consideration of the promise on the part of the heir to bequeath to each of them by her last will one-fourth of her estate. This, of course, was, as said by counsel for appellants, not a mere agreement "for the relinquishment of a valid right," or "a matter which concerns the parties only." It appears to us that a mere statement of the terms of the real contract is enough to clearly show that the contract is opposed to public policy, and is based upon an illegal consideration.

[2] The absence of sound objection on this ground to a contract having for its sole purpose the disposition of property in a manner different from that proposed by a testator, even where the contract contemplates the rejection of the will when offered for pro-

bate or its setting aside when admitted to probate, when it is entirely free from fraud, and is made by all the parties in interest, may be freely conceded. As has often been substantially said, the public generally has no interest in the matter of the probate of a will; and only those interested in the estate under the will or otherwise are affected by such a contract. If they all agree upon some course to be followed, and their contract is otherwise free from contemplated fraud or violation of any law, no one else has any such interest as warrants complaint. Such was the character of contract involved in *Spangenberg v. Spangenberg* (App.) 126 Pac. 379, especially relied on by plaintiff here, where the contract purported to affect only such property of the deceased as should in fact be received by the parties thereto. In *Estate of Garcelon*, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134, another case much relied on by plaintiff, a contract by an heir to refrain from contesting a will was involved. It was said that the contract was one that concerned the parties alone, and one that did not appear to be against public policy. The contract here involved concerned, not only the parties thereto, but also all the other legatees under the will of Caspar Gugolz, none of whom, the record sufficiently shows, were present, or had any actual notice of what was being done. Such other legatees were all entitled, if the will stood, to receive the amounts given them, subject to the life interest given to Marie Gugolz. This interest given them was free from any power of disposition on the part of said Marie Gugolz. The setting aside of the will involved the absolute destruction of this right conferred on them thereby, and the vesting of the whole of their interest in Marie Gugolz, to do with as she saw fit. The purpose and effect of the contract were to accomplish this very result, to prevent the probate of the will in order to defeat the rights of the legatees thereunder, not, it may be conceded, merely to so deprive such legatees of their rights, but for the purpose of enabling Marie Gugolz to have all of the property, with absolute power of disposition. The only undertaking of Marie Gugolz was to leave such property as she possessed at the time of her death to the legatees named in her husband's will, in the proportions specified therein. In addition to this, the contract contemplated, and in its execution involved, not the mere omission of the executors named in the will to take any step looking to the defense thereof, but their active co-operation as executors in so presenting the matter to the court as to bring about the invalidation of the will, regardless of whether or not there was any legal objection thereto. We think no case can be found in which such a contract has been held to be valid. It has been expressly held that an agreement to resist the probate of a will and procure it

to be set aside, so as to cut off the interest of one who is not a party to the agreement, is against public policy; it being said that the object of such a contract was against public policy, as tending to thwart justice. See *Gray v. McReynolds*, 65 Iowa, 461, 21 N. W. 777, 54 Am. Rep. 16.

In *Cochran v. Zachery*, 137 Iowa, 585, 115 N. W. 486, 16 L. R. A. (N. S.) 235, 126 Am. St. Rep. 307, 15 Ann. Cas. 297, the heirs of the testator, who were given a life interest by the will, with remainder over to their issue, in order to obtain a fee-simple title, agreed with the person named as executor to pay him \$2,000, in lieu of the compensation he would be entitled to as executor and trustee if the provisions of the will should be carried out, if he, acting in conjunction with them, should secure the setting aside of the will of deceased. The executor did not even petition for the probate of the will; such petition being presented by the guardian of one of the heirs. The will was denied probate on the contest made thereto. The question of the executor's right to recover the \$2,000 agreed to be paid him was presented, and the contract was held to be against public policy, and recovery thereon was denied. It was said that by the contemplated adjudication that the will was not valid the rights of the issue entitled to the remainder were to be absolutely defeated, and, citing *Gray v. McReynolds*, supra, that such an agreement to cut off the interest of one who is not a party is against public policy. It was further held that the agreement there involved was against public policy, in that it contemplated the violation by defendant of the trust reposed in him by his father in naming him as an executor to carry out the provisions of the will, although he had not assumed any obligation as such; the court saying that it believed it to be in violation of public policy that he should speculate on the advantages which would accrue to him, as executor and trustee, should the will be admitted to probate, and make the relinquishment of those advantages the consideration for an agreement to secure a pecuniary consideration. It was further said that any contract which involves a fraud on the rights of others is against public policy.

In *Ridenbaugh v. Young*, 145 Mo. 274, 46 S. W. 959, the agreement of one heir to pay another \$10,000, if a proceeding for the setting aside of the will of the deceased, instituted by the promisor, should be successful and the will set aside, was involved. The effect of such a conclusion of the proceeding was to cut off the rights of a devisee who was not a party to the agreement. It was said that under the facts appearing the contract was entered into by two apparent adversary parties, without the consent of a codefendant of one of them; and that the participating defendant was to be paid a

money consideration by the contestant if he was successful. It was said by the court that the contract showed that it was entered into for the purpose of defrauding the devisee not a party to the agreement, and of imposing upon the court, under the pretense by the promisee that she was acting in concert with her codefendant in resisting the suit to set aside the will, while at the same time she was conniving with the plaintiff to bring about a different result, for all of which she was to receive a consideration.

It is to be noted that by the agreement there involved the contestant agreed with the promisee to transfer to the devisee who was not a party all his interest in certain lands devised by the will to such devisee, thus making a promise for his benefit, just as, in the case at bar, Marie Gugolz made such a promise for the benefit of those not parties to the agreement between herself and the executors. What was said by the Supreme Court of Missouri as to the contract involved in the case referred to, as stated above, is applicable here. The contract here, by the very terms, was a fraud upon the other legatees, and must be held to have been entered into for the purpose of defrauding them. It further must be held to have contemplated an imposition upon the probate court, the inauguration of a proceeding in which the parties appearing were to be apparently adversary, while in fact they were all actively engaged in seeking the same result—the setting aside of the will of deceased, as invalid, absolutely without regard to the merits of the contest. Of the agreement involved in the case referred to, the Supreme Court of Missouri said: “If such an agreement is not inconsistent with the full and impartial course of justice, then we are at a loss to know what is. It was not only a fraud upon one of the parties to the suit, but it was an imposition on the court, its general tendencies fraudulent and against public policy. No such contract can or should be enforced; it is at war with honesty of purpose and the correct and fair administration of justice. In such circumstances the law will leave the parties where it finds them.” It is said in the note to *Cochran v. Zachery*, 16 L. R. A. (N. S.) 237, that, where the contract is not made by all the parties in interest, and the purpose and effect of it are to prevent or defeat the probate of a will, thereby to defeat the rights of certain legatees or devisees therein, not parties thereto, the courts passing upon the question are unanimous in holding it violative of public policy and void. We have found no reason to doubt the correctness of this statement. So far as the obligation of one named as executor in a will to oppose a contest is concerned, the statements in *Estate of Hite*, 155 Cal. 455, 101 Pac. 448, and *Estate of Higgins*, 158 Cal. 356, 111 Pac. 8, relied upon by learned counsel for plaintiff, correctly declare the law as it



exists in this state. But there is nothing in either of these cases which countenances the willful use by such person of the rights accruing from the fact that he is named as executor to carry out the provisions of the will, for the purpose of overtarrowing it and having it declared null and void. As suggested in a somewhat similar case, to approve such action would be to approve a continuance in his trust by an executor, for the very purpose apparently of better betraying it. See *Miller's Appeal*, *Wilhelm's Appeal*, 30 Pa. 478, 495. We are satisfied that such a contract as is shown by the evidence should be held to be against public policy and based on an unlawful consideration.

It appears from what we have said that the difference between the contract shown by the evidence and the contract found by the trial court is material to such an extent as to require the conclusion that the findings in regard to the terms of the contract are not sustained by the evidence. It also appears from what we have said that the finding of the trial court, to the effect that the promise of Marie Gugolz to plaintiff was based upon a good, valid, and adequate consideration, is not supported by the evidence.

[3] It is earnestly urged that the parties to this agreement were not in *pari delicto*, and that the plaintiff should be allowed to enforce the same in equity, notwithstanding there may be well-founded objections thereto on the ground of public policy and illegality of consideration. Of course, the complaint was not drawn upon any such theory. The theory of the complaint was that the contract was in all respects valid, and no attempt was made to allege facts showing that plaintiff was entitled to relief upon any other theory. It was incidentally alleged that plaintiff was then a minor, and that Marie Gugolz was as a mother to him, and had a mother's influence over him. But it was alleged that, "if he had made opposition to the contest, \* \* \* he believes that the same would have been sustained; and \* \* \* that if it had not been for the promise of his said aunt that she would provide for him in the same manner in her will that he would have opposed the said contest on her part of the said last will of the said Caspar Gugolz;" and "that the said contest went by default on the part of plaintiff, by reason of the said promise made to him by his said aunt." The trial court found, outside of any issue made by the pleadings, that at the date of said promise and agreement said plaintiff was inexperienced and ignorant as to the law, law courts, and court procedure, and in making said promise said plaintiff was controlled and influenced by his said aunt. There is nothing in the evidence contained in the record now before us to indicate on the part of Marie Gugolz anything in the nature of op-

pression, duress, threats, undue influence, or the taking advantage of necessities, weaknesses, and the like, as a means of inducing plaintiff to enter into this contract. Apparently what he did was done in all respects freely and voluntarily. He was 21 years of age on the day the hearing was had in the Colorado probate court, and, so far as appears, was fully as conversant with law, law courts, and court procedure as was Marie Gugolz, if not a great deal more so. Eliminating the finding that may be claimed to tend to show undue influence on the part of Marie Gugolz, namely, the finding that plaintiff was controlled and influenced by his said aunt, and the further finding as to plaintiff's ignorance of the law, etc., it is manifest that the judgment cannot be sustained upon the theory that the contract, although void as being against public policy and based upon an illegal consideration, may nevertheless be enforced by plaintiff, or that some relief may be granted on account thereof, because he was not in *pari delicto* with Marie Gugolz. The findings, in so far as they are sufficiently sustained by evidence, obviously do not present such a case as may properly be held to be within any exception to the general rule that neither party to such a contract will be granted relief by the courts; and that the law leaves such parties where it finds them. The exceptions to such rule, based on the theory that the parties are not in *pari delicto*, are well stated in a general way in section 942 of *Pomeroy's Equity Jurisprudence* (3d Ed.). Certainly such findings in the case at bar as are sufficiently sustained by the evidence do not bring this case within any of the exceptions to the general rule.

The fact that certain material findings are not sufficiently sustained by the evidence makes a reversal necessary.

The judgment and order denying a new trial are reversed.

We concur: HENSHAW, J.; MELVIN, J.; SLOSS, J.; SHAW, J.; LORIGAN, J.

164 Cal. 607

NATHAN v. DIERSSEN. (Sac. 1,979.)

(Supreme Court of California. Jan. 25, 1913.  
Rehearing Denied Feb. 24, 1913.)

1. EJECTMENT (§ 128\*)—MESNE PROFITS—RECOVERY—NECESSITY OF POSSESSION.

At common law, an action for mesne profits could not be maintained against a wrongful disseisor, except by a plaintiff who had regained actual possession of the premises.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 438-440, 442, 443, 454, 456; Dec. Dig. § 128.\*]

2. EJECTMENT (§ 17\*)—GROUNDS OF ACTION—DISPOSSESSION.

Ejectment can be maintained by an owner who has been wrongfully dispossessed and is still kept out of possession.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 63, 64; Dec. Dig. § 17.\*]

### 3. JUDGMENT (§ 252\*)—PRAYER FOR RELIEF— STATUTORY PROVISIONS—MESNE PROFITS.

Under Code Civ. Proc. § 427, authorizing a plaintiff, unlawfully dispossessed, to unite a claim to recover real property and for damages for its withholding and for the rents and profits, and section 580 empowering the court, on answer filed and issues raised, to grant plaintiff any relief consistent by the complaint and within the issue, the court, in an action in which the complaint charged that defendant dispossessed plaintiff and still withheld possession, after answer filed, could render a judgment for possession, with recovery of rents and profits, though there was no prayer for restitution of possession in the complaint.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 441, 442; Dec. Dig. § 252.\*]

### 4. EJECTMENT (§ 128\*) — POSSESSION BY PLAINTIFF—JUDGMENT FOR MESNE PROFITS.

In an action where a judgment for restitution and for rents and profits might have been rendered under the issues, the fact that plaintiff came into possession of the premises after the commencement of the action, so that the judgment did award restitution, did not deprive him of his right to a judgment for mesne profits.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 438-440, 442, 443, 454, 456; Dec. Dig. § 128.\*]

### 5. EJECTMENT (§ 130\*)—JUDGMENT FOR RENTS AND PROFITS—INTEREST.

Interest upon the rents and profits recovered may be allowed when necessary to a complete indemnity.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 448; Dec. Dig. § 130.\*]

### 6. EJECTMENT (§ 135\*)—RENTS AND PROFITS— EVIDENCE AS TO RENTS.

In an action for the rents and profits of land, damages may be established either by showing the rents and profits actually received, or by proving the annual rental value of the land.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 459, 460; Dec. Dig. § 135.\*]

### 7. DISMISSAL AND NONSUIT (§ 60\*)—DELAY— STATUTORY PROVISIONS.

Code Civ. Proc. § 583, which directs a dismissal where there has been a delay of five years after filing of answer, expressly excepts cases where the parties have stipulated in writing that the time may be extended.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140-152; Dec. Dig. § 60.\*]

### 8. EXECUTORS AND ADMINISTRATORS (§ 453\*)— ACTION AGAINST EXECUTRIX — FORM OF JUDGMENT.

Under Code Civ. Proc. § 1504, a judgment against an executrix, upon a demand against the estate of her testator, should be stated to be only payable in due course of the administration.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1884-1908; Dec. Dig. § 453.\*]

Department 1. Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by Charles P. Nathan against George E. Dierssen, continued after his death against Eda B. Dierssen, as executrix. Judgment for plaintiff, and defendant appeals. Judgment modified and affirmed.

Devlin & Devlin, of Sacramento, for appellant. D. E. Alexander, of San Francisco, and White, Miller & McLaughlin, of Sacramento, for respondent.

SLOSS, J. The action was brought by Charles P. Nathan against George E. Dierssen to recover the rents, issues, and profits of a tract of land in Yolo county, alleged to have been unlawfully withheld from plaintiff by defendant. Pending the action, the original defendant died, and Eda B. Dierssen, as executrix of his last will, was substituted in his stead. A supplemental complaint alleged the presentation of a claim by the plaintiff to the executrix. Upon a trial without a jury, the court rendered judgment in favor of the plaintiff for \$2,592.75, and from this judgment, and an order denying her motion for a new trial, the defendant appeals.

The present action was commenced in May, 1902. It appears from the bill of exceptions that in July, 1898, the plaintiff Nathan had commenced a former action against Dierssen and another to quiet his title to the land in question, and for restitution of the possession thereof, and that on April 22, 1902, a judgment in accordance with plaintiff's prayer had been entered in said action. An appeal was taken to this court, and the judgment was affirmed on the 23d day of February, 1905. Nathan v. Dierssen, 146 Cal. 63, 79 Pac. 739. It appeared, further, that pending said appeal, to wit, on November 1, 1902, Dierssen surrendered possession of the premises to the plaintiff. Such surrender, it will be noted, took place after the commencement of the present action. The appellant contends that, under this state of facts, the plaintiff was not entitled to maintain an action for rents and profits, for the reason that he was not, at the date of the filing of his complaint, in possession of the land.

[1] It was without doubt the established rule at common law that an action against a wrongful disseisor, for mesne profits, could not be maintained except by a plaintiff who had regained actual possession of the premises (15 Cyc. 213, 215; Stancill v. Calvert, 63 N. C. 616; Caldwell v. Walters, 22 Pa. 378; Ainslie v. Mayor of New York, 1 Barb. [N. Y.] 168; Alt v. Gray, 55 App. Div. 563, 67 N. Y. Supp. 411; Young v. Downey, 145 Mo. 261, 46 S. W. 962), or, at least, had recovered a judgment in ejectment. Shipley v. Alexander, 3 Har. & J. (Md.) 84, 5 Am. Dec. 421; Brewer v. Beckwith, 35 Miss. 467; Winkley v. Hill, 6 N. H. 391. See Locke v. Peters, 65 Cal. 161, 3 Pac. 657. As we have seen, the plaintiff did not have actual possession. And even a holding that the rule is satisfied by a prior recovery of judgment for possession would not avail plaintiff here, since the complaint fails to allege, and the findings to state, that there had been any recovery in ejectment. The position of the



respondent is, however, that the doctrine requiring a plaintiff, before suing for mesne profits, to retake possession, or to establish his right of possession by a judgment in ejectment, has been abolished by the provisions of our Codes, and that in this state the action may be maintained by any one who has wrongfully been kept out of a possession to which he was entitled. It is unnecessary to pass upon the merits of this broad contention.

[2, 3] Whatever may be the right of one out of possession to sue for mesne profits alone, without setting up possession or the recovery of judgment in ejectment, section 427 of the Code of Civil Procedure unquestionably authorizes a plaintiff, unlawfully dispossessed, to unite in one and the same action a claim "to recover specific real property" with one for "damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same." The appellant concedes that, under this section, a demand for mesne profits may be enforced without prior possession or judgment in ejectment, when the demand is made in the very action of ejectment itself.

We think the present action may properly be regarded as one for the recovery of possession, as well as for rents and profits, and that it therefore comes within the permissive provision of section 427. The complaint contains every allegation necessary in an action of ejectment. It alleges ownership in plaintiff; that defendant wrongfully entered and dispossessed him; and that he still keeps him out of possession. No further averment was required. *Payne v. Treadwell*, 16 Cal. 220; *Salmon v. Symonds*, 24 Cal. 261; *Johnson v. Vance*, 86 Cal. 128, 24 Pac. 863; *F. A. Hihn Co. v. Fleckner*, 106 Cal. 95, 39 Pac. 214. There was therefore a statement of every fact necessary to entitle the plaintiff to a judgment for possession of the premises, together with the facts essential to a demand for rents and profits. It is true that the complaint contains no prayer for the restitution of the premises. If the defendant had defaulted, judgment for such possession could not properly have been rendered. But when an answer has been filed and issues raised, the court may grant plaintiff any relief "consistent with the case made by the complaint and embraced within the issue." Code Civ. Proc. § 580; *Walsh v. McKeen*, 75 Cal. 519, 17 Pac. 673; *Johnson v. Polhemus*, 99 Cal. 240, 33 Pac. 908; *Kent v. Williams*, 146 Cal. 3, 11, 79 Pac. 527; *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786. The moment the answer was filed, therefore, the case became one in which the court, regardless of the prayer of the complaint, would have been authorized to grant any relief consistent with the plaintiff's averments. Such relief could properly have included a judgment for the restitution of the possession with the recovery of the rents and prof-

its. *Evans v. Schafer*, 119 Ind. 49, 21 N. E. 448. The fact that no judgment for restitution was in fact given is of no consequence. There was no occasion for any such judgment, in view of the fact that, during the pendency of the action, possession had been restored to the plaintiff. For the same reason, the court was not required to make findings establishing the plaintiff's right to a restitution of possession.

[4] If the action was one in which, under the issues framed, a judgment for restitution and rents and profits might properly have been rendered, the fact that the plaintiff came into possession of the premises after the commencement of the action did not deprive him of his right to a judgment for mesne profits. *Crispen v. Hannovan*, 86 Mo. 160; *McChesney v. Wainwright*, 5 Hammond (5 Ohio) 452; *Venner v. Underwood*, 1 Root (Conn.) 73; *Price v. Sanderson*, 18 N. J. Law, 426.

[5] The findings declared that the value of the rents, issues, and profits of the premises during the period of the withholding was \$1,733.33. The court further found that the plaintiff was entitled to interest on this amount from the 1st day of November, 1902, the date of the restitution of the possession, to the date of judgment. The appellant contends that the allowance of interest was not justified. But the contrary has been directly held by this court. In *Furlong v. Cooney*, 72 Cal. 322, 14 Pac. 12, the court, in defining the measure of damages in a case like this, states that "interest also may be allowed when necessary to a complete indemnity."

[6] We see no error in allowing evidence to show the rental value of the property. The appellant concedes that the damage, in cases of this kind, may be established either by showing the rents and profits actually received or by proving the annual rental value of the land. The latter course was the one followed here, and we think the testimony offered by plaintiff fairly tended to show the reasonable rental value. The answers of some witnesses, with respect to this point, are criticised; but the objections go rather to the weight of their testimony than to its admissibility.

[7] The answer was filed June 19, 1902. The case was not tried until June 15, 1909. The defendant moved to dismiss the action upon the ground that five years had elapsed after the filing of defendant's answer. But section 583 of the Code of Civil Procedure, which directs a dismissal where there has been such delay, makes an exception of cases where "the parties have stipulated, in writing, that the time may be extended." There was ample evidence here to justify the court in holding that stipulations to this effect had been made. There was no error in denying the motion.

[8] Finally the appellant contends that the judgment, being against the executrix upon

a demand against the estate of her testator, should have been made payable in due course of administration. Code Civ. Proc. § 1504. This contention seems to be well founded, and the judgment will be modified accordingly. The judgment is modified by adding thereto, after the words, "as executrix of the last will and testament of George E. Dierssen," the words, "the same to be paid in due course of administration of the estate of said decedent"; and, as so modified, the judgment is affirmed.

The order denying a new trial is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

(164 Cal. 613)

JOSE REALTY CO. v. PAVLICEVICH.  
(S. F. 5,971.)

(Supreme Court of California. Jan. 27, 1913.  
Rehearing Denied Feb. 26, 1913.)

1. QUIETING TITLE (§ 43\*)—EVIDENCE—ADMISSIBILITY UNDER PLEADINGS.

In an action to quiet title, where defendant claimed title under a sale by the trustee under a deed of trust, proof of fraud sufficient to avoid the trustee's sale and deed was admissible in avoidance of the defense, although fraud was not pleaded in the complaint.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 84-87; Dec. Dig. § 43.\*]

2. NEW TRIAL (§ 130\*) — SPECIFICATION OF ERRORS—INSUFFICIENCY OF EVIDENCE.

In an action to quiet title against a purchaser from a trustee under a deed of trust, where the court found that interest on the secured note was not paid, but that the payor of the note had sufficient funds at the place of payment for the purpose of paying the interest, and that the mortgagee never demanded payment of the interest, and on this finding concluded that there was no default, and that the declaration by the mortgagee that the principal was due because of a default, and the sale and deed in pursuance thereof were fraudulent and void, and also found that plaintiff was the owner of the land, subject to the deed of trust, and that the interest claimed by defendant, in addition to his rights under the deed of trust, were without right, a notice of motion for a new trial, specifying that the evidence was insufficient to justify the findings that plaintiff was the owner, that defendant's interest was without right, and that the money for the payment of the interest on the note was at all times ready at the place of payment, although not in the customary form for such specifications, sufficiently presented the question whether the finding on the subject of default was sustained by the evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 257-262; Dec. Dig. § 130.\*]

3. MORTGAGES (§ 374\*)—SALE UNDER POWER—DEED—CONCLUSIVENESS.

Where a deed of trust, containing a power of sale, provided that the recital in the trustee's deed, under the power of any matter of fact, including the fact that default had been made in the payment of interest, should be conclusive proof thereof against the mortgagor, his heirs and assigns, such a recital was conclusive in the absence of fraud of which the purchaser at the trustee's sale had notice.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1118-1123; Dec. Dig. § 374.\*]

4. MORTGAGES (§ 369\*)—SALE UNDER POWER—FRAUD.

Proof that a mortgagee under a deed of trust, knowing that there had been no default in the payment of interest, declared the whole amount due, and caused the trustee to make a sale under the power of sale by falsely informing him that there had been a default, and purchased the property himself at the trustee's sale, the owners of the property, not having been informed of the sale, given notice, or having any knowledge thereof, was sufficient to set aside the trustee's sale.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1093-1100; Dec. Dig. § 369.\*]

5. MORTGAGES (§ 300\*)—PAYMENT—TENDER.

Where a mortgagee, under a deed of trust providing that the interest was payable monthly at the office of B., testified that he demanded payment from B. in his office, and went repeatedly to the office to collect the interest, but failed to get it, and that B. never offered to pay it, B.'s testimony that he or some other person in the office had money to pay the interest if it had been demanded, without any showing that the money belonged to the debtor, that it had been provided or placed there by him or any other person for the purpose of paying the interest, or that B. or any person in the office was willing to pay it on the interest, or had been authorized or instructed or intended to do so if the interest had been demanded, did not show that the debtor was able and willing to pay it at B.'s office within Civ. Code, § 3130, providing that, if the maker of a negotiable instrument is able and willing to pay it at the place of payment at maturity, such ability and willingness are equivalent to an offer of payment.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 876-883; Dec. Dig. § 300.\*]

6. TENDER (§ 13\*) — PROVIDING FUNDS AT PLACE OF PAYMENT.

Under Civ. Code, § 3130, providing that it is not necessary to make a demand of payment on the principal debtor in a negotiable instrument in order to charge him, but that if the instrument is by its terms payable at a specified place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to the offer of payment, mere passive ability and willingness are insufficient, but such ability must be manifested by providing funds at the place of payment in the hands of some person authorized to pay such funds on the debt and willing to do so.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 29-32; Dec. Dig. § 13.\*]

Department 1. Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Action by the Jose Realty Company against V. Pavlicevich. From a judgment for plaintiff, and orders refusing to vacate the judgment and denying a new trial, defendant appeals. Judgment vacated and order denying new trial reversed.

W. B. Hardy and Chas. Clark, both of San Jose, for appellant. Will M. Beggs and R. C. McComish, both of San Jose, for respondent.

SHAW, J. The defendant presents three appeals: One from the judgment; a second from a ruling refusing to vacate the judgment for plaintiff and enter judgment for defendant on the findings; and a third from an order denying defendant's motion for a



new trial. It will be necessary to consider only the appeal from the order denying a new trial.

The plaintiff's action was to quiet its alleged title to a parcel of land; the complaint being in the usual form, alleging ownership in plaintiff and an unfounded claim by the defendant. The proof showed that on November 30, 1909, one J. A. Cottle, being then the owner of the land subject to a deed of trust by him previously made, conveyed it to one A. E. House, and that on September 21, 1910, said House executed a deed purporting to convey the land to the plaintiff. The defendant for answer alleged that on November 30, 1909, Cottle executed a deed conveying the land to a trustee, with power of sale, to hold the same as security for the payment of a note from Cottle to Pavlicevich, dated October 18, 1909, payable one year after date, for \$3,300, with interest at 7 per cent. per year, payable monthly, and providing that, if the interest was not so paid, the payee might declare the whole sum due, of which declaration the maker waived notice; that no interest was paid for the months of May, June, July, or August, 1910, whereupon the defendant declared the whole sum due, and the trustee, at defendant's written request, and in the manner prescribed by the terms of the power of sale, offered the land for sale for nonpayment of debt, sold it to Pavlicevich, and in pursuance thereof, on September 20, 1910, conveyed the land to Pavlicevich by deed, which was duly recorded on the same day, whereby defendant became the owner of the premises.

The note declared that it was payable at the office of Will M. Beggs, in San Jose. The deed to the trustee provided that, in any deed made by the trustee under the power of sale, the recital in such deed of any matter of fact, including the fact that default had been made in the payment of the note or interest thereon, when due, should be conclusive proof of such fact against Cottle, his heirs and assigns. The deed executed by the trustee to Pavlicevich recited that the interest on said note was on August 24, 1910, overdue and unpaid, and that Pavlicevich had elected to consider the principal as immediately due and payable, and had directed the trustee to proceed, and that the first publication of the notice of sale was on August 25, 1910. The plaintiff, on the trial, did not controvert any of these statements, except the statement that the interest on the note, or any part of it, was overdue at or prior to the giving of said notice of sale. Its contention is that it had bought the title of Cottle, and had assumed the payment of the note; that it was able and willing to pay it at the office of Beggs at the time the respective monthly payments became due; and consequently that, under the provisions of section 3130 of the Civil Code, it was not in default. It also claimed that the trustee's sale was fraudulently procured by Pavlice-

vich; the fraud consisting of his conduct in giving the direction to the trustee to sell the land for default in payment of interest, when, by reason of plaintiff's ability and willingness to pay the interest at the time it fell due at the place of payment, there was no default.

[1] It was not necessary for plaintiff to plead fraud in its complaint. The trustee's sale was set up by the defendant as a defense to the action of the plaintiff. In such a case, proof of fraud, sufficient to avoid the trustee's sale and deed, was admissible without further pleading; it being matter in avoidance of the defense set up in the answer. *Moore v. Copp*, 119 Cal. 433, 51 Pac. 630; *Brooks v. Johnson*, 122 Cal. 570, 55 Pac. 423; *White v. Stevenson*, 144 Cal. 112, 77 Pac. 828; *Wendling Co. v. Glenwood Co.*, 153 Cal. 415, 95 Pac. 1029; *Peck v. Noee*, 154 Cal. 354, 97 Pac. 865.

[2] The court found that no interest was ever paid on the note for any month after April, 1910, but that, at all times since that date, "the payor of said note has had sufficient funds at said office for the purpose of paying said interest," and that the defendant had never demanded the payment of said interest. Upon this finding, it made a conclusion of law that there was no default in the payment of interest, and that the declaration by Pavlicevich that the principal was due, and the sale and deed made in pursuance thereof, were fraudulent and void. There was also a general finding that the plaintiff was the owner of the land, subject to the deed of trust executed by Cottle, and that the interest which the defendant claims, in addition to the rights conferred by said deed of trust, is without right. The defendant gave notice of intention to move for a new trial, stating that the motion was to be made on the minutes of the court. The notice in effect specified that the evidence was insufficient to justify the following findings: (1) That plaintiff is the owner of the premises; (2) "that the interest which defendant has in the premises is without right;" (3) "that the money for the payment of the interest on said note was at all times ready at the place of payment." Although these are not in the customary form for such specifications of insufficiency, we think they are sufficient to present the question whether or not the finding on the subject of the default in the interest payments is sustained by the evidence.

[3] If the recital in the trustee's deed is conclusive on Cottle and his successors in interest, it would follow that this finding is contrary to the evidence. That such recital is conclusive, where the deed of trust empowers the trustee to make it, in the absence of fraud of which the purchaser at the trustee's sale had notice, appears to be settled by the decisions of this court. *Simson v. Eckstein*, 22 Cal. 593; *Carey v. Brown*, 62 Cal. 374; *Mersfelder v. Spring*, 139 Cal. 595, 73 Pac. 452.

[4] Respondent, however, claims that by showing that Pavlicevich, knowing that there had been no such default, declared the principal and interest due, and caused the trustee to make a sale under the power by falsely informing him that the payor was in default, and that Pavlicevich himself bought the property at the trustee's sale, and that the owners of the property were not informed of the sale or of the notice given thereof, and had no knowledge of it, it has established the proposition that the sale and deed were procured by fraud, and that this is sufficient to let in proof of the falsity of the recital in the deed of the trustee, and set aside the sale made by him. We are of the opinion that, if these facts were shown, the fraud claimed would be sufficiently established. But we think the proof was lacking so far as the facts of there having been no default in payment of interest and of knowledge by Pavlicevich are concerned.

[5] It is admitted that the interest for the four months above specified has never been paid. It is not claimed that Pavlicevich knew, or ever was informed, that the plaintiff, or any other person, had funds in the hands of Beggs, or with any other person at his office or elsewhere, with which to pay the interest, or that any money had been placed there for that purpose. Pavlicevich testified that the loan to Cottle was made for him through the agency of Beggs, to whom he had intrusted the money for that purpose; that he demanded from Beggs in his office, about the 1st of June, 1910, the payment of the interest due on May 18, 1910; and that during the months of May, June, July, and August, 1910, he went repeatedly to Beggs' office to collect the interest, but failed to get it, and that Beggs never offered to pay it. This, clearly, was ample evidence of the existence of a default. In rebuttal, Beggs testified that he was the president of the Jose Realty Company, and that in February, 1910, he told Pavlicevich that said company had succeeded to the interest of Cottle in the property, and was to look after the payment of the note and interest. He further testified that he had advanced \$8.50 for Pavlicevich to pay costs in a justice court suit, in which he was attorney for Pavlicevich, and that Pavlicevich, in January, 1910, agreed that this advance might be adjusted the next time the interest fell due on the note; that no interest was paid from that time until May 5th, when he paid to Pavlicevich \$57.75, being interest for three months ending April 18th; that the \$8.50 was not then adjusted or deducted; that Pavlicevich, shortly afterwards, asked Beggs to find a purchaser for the note, saying that he needed the money; that Beggs tried to do this, and that there were several conversations between them about it; and that Pavlicevich never demanded payment of the interest from him, or from anybody else in his pres-

ence, or to his knowledge. There is no testimony that any person ever offered to pay such interest. Beggs was then asked the question, "Did you have funds at your office, or had any of the persons in charge of your office, sufficient to pay the interest at any time had it been demanded?" to which he answered, "Yes, sir." This was all the evidence tending to show that the plaintiff was able and willing to pay the interest at the office of Beggs.

[6] The purpose of this evidence was to bring the case within the provisions of section 3130 of the Civil Code, which reads as follows: "It is not necessary to make a demand of payment upon the principal debtor in a negotiable instrument in order to charge him; but if the instrument is by its terms payable at a specified place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to an offer of payment upon his part." Under this section, no demand was necessary in order to create a default in payment. The latter clause of the section manifestly refers to section 1500 of the Civil Code, which provides that: "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this state, of good repute, and notice thereof is given to the creditor." Under this section it has been uniformly held that although such an offer, when not followed by an immediate deposit, does not pay the debt, or extinguish the obligation to pay it, yet, if the mere offer is duly made, the effect is that there is at that time no breach of the promise to pay. *Randol v. Tatum*, 98 Cal. 399, 33 Pac. 433; *O'Connor v. Braly*, 112 Cal. 37, 44 Pac. 305, 53 Am. St. Rep. 155; *Knowles v. Murphy*, 107 Cal. 115, 40 Pac. 111; *Wolff v. Canadian Co.*, 123 Cal. 543, 56 Pac. 453; *Montgomery v. Tutt*, 11 Cal. 318, 327. Section 3130, of course, cannot be complied with by a mere passive ability and willingness. There must be an ability to pay, manifested by providing funds at the place of payment in the hands of some person there present, who is authorized to pay it on the debt and is willing to do so. If, therefore, the plaintiff had placed sufficient money in the office of Beggs, to be applied to the payment of this interest, in charge of some person there who was authorized and directed to use it for that purpose, when demand was there made, or if it had been in attendance there by its agent, with sufficient money and authority to pay such interest, and had been able and willing thereafter to pay it on demand, it would not have been in default for nonpayment of interest, although the obligation to pay it would remain. *Montgomery v. Tutt*, supra, 11 Cal. 318.

But the evidence does not show this to be the case. It merely shows that Beggs, or



some other person in his office, had money enough to pay the interest at any time, had it been demanded. It does not show that the money belonged to the plaintiff, or that it had been provided or placed there by the plaintiff, or any other person, for the purpose of paying this interest, or that Beggs, or that any other person in his office, was willing to pay it out on the interest, or had been authorized or instructed to do so, or that any of them intended to do so if the interest had been demanded. There was therefore no proof that "the payor of said note has had sufficient funds at said office" to pay the interest, or that the payor had sufficient or any funds there "for the purpose of paying said interest" as the findings declare, or that the payor was "able and willing to pay it there," in the sense necessary to constitute the equivalent of an offer to pay under section 3130, aforesaid. The proof in rebuttal was not sufficient to overcome the positive proof of the defendant that the interest was not paid when due.

The judgment is vacated, and the order denying a new trial is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

164 Cal. 509

GORDON v. CADWALADER et al.  
(SOUTHERN PAC. R. CO., Intervener). (Sac. 1,955.)

(Supreme Court of California. Jan. 15, 1913.  
Rehearing Denied Feb. 14, 1913.)

1. DEEDS (§ 128\*)—ESTATES CREATED—APPLICATION OF RULE IN SHELLEY'S CASE.

A deed to land in this state executed June 3, 1872, is subject to the rule in Shelley's Case, which was abolished by Civ. Code, § 779, effective January 1, 1873.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 413-415, 419-421, 427; Dec. Dig. § 128.\*]

2. DEEDS (§ 128\*)—ESTATES CREATED—APPLICATION OF "RULE IN SHELLEY'S CASE."

The rule in Shelley's Case is that where land is devised or granted to a person for life, with remainder after his death to his heirs or the heirs of his body, whether these words, or words having the same legal effect, are used, the first grantee takes a fee simple absolute, or qualified fee, dependent on whether the conveyance is to him and his heirs or to the heirs of his body, and the heirs take no estate or interest, and therefore the first grantee may dispose of the land as if the deed or will contained no words purporting to transfer less than a fee to him, or, as it is usually stated, the words "heirs" or "heirs of his body" are words of limitation, and not of purchase.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 413-415, 419-421, 427; Dec. Dig. § 128.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6272, 6273.]

3. DEEDS (§ 128\*)—ESTATES CREATED—APPLICATION OF RULE IN SHELLEY'S CASE—"HEIRS."

The reason for the rule in Shelley's Case is that it was considered that the words, "and

to his heirs" or "to the heirs of his body," following a grant purporting to be of an estate for life, implied that the heirs should take by inheritance, and not directly from the grantor, which they could not do unless the grantee took an estate of inheritance, and that the word "heirs" was used to denote the whole inheritable blood of the life tenant, the life tenant and not those being his heirs at his death being the original stock of inheritance, and where the deed contains modifying or qualifying words indicating that the grantor did not intend to describe the whole inheritable blood of the life tenant, but intended to point out the proper persons who should take the estate upon his death, and to make of them a new root of inheritance, the rule does not apply.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 413-415, 419-421, 427; Dec. Dig. § 128.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3241-3265; vol. 8, pp. 7677-7678.]

4. DEEDS (§ 128\*)—ESTATES CREATED—APPLICATION OF RULE IN SHELLEY'S CASE—"DESCEND."

A deed granted to the party of the second part certain land "for and during the term of his natural life, and after his death then to descend to his heirs and assigns forever," and recited, after the description, that it was conveyed to the grantee for and during his natural life for the final use and benefit and behoof of the children or other lawful heirs of his body who might survive him. The habendum clause read, "to have and to hold unto the said party of the second part, his heirs and assigns forever," and the warranty, "to the said party of the second part, his heirs and assigns." Following the attestation clause was a clause explaining an interlineation and erasure in the granting clause, showing that, as first written, it granted the land to the grantee "and to his heirs and assigns forever," and had been changed by the interlineation and erasure to read as first quoted. Held, that the rule in Shelley's Case did not apply, and the grantee took only a life estate, since, while the interlineation in the granting clause would not have avoided the effect of that rule, the recital was manifestly inserted to state the intent more accurately than it had been previously expressed, was the significant part of the deed, and showed that the intention was to give a remainder to the surviving children or grandchildren directly by the deed, and not by inheritance, they to constitute the new stock of inheritance, the granting clause, notwithstanding the use of the word "descend," which, although literally denoting a passing by inheritance, is often used as a word of transfer, contained a sufficient grant of the remainder, and the defendant's intention was not defeated by the habendum and warranty clauses, the conflict between which and the granting clause and recital had apparently not been observed, and not been changed because of inadvertence.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 413-415, 419-421, 427; Dec. Dig. § 128.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2012-2014.]

Beatty, C. J., dissenting in part.

Department 1. Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by Joseph Gordon against George Cadwalader and others, in which the Southern Pacific Railroad Company intervened. From a judgment in favor of plaintiff and the intervener, defendants appeal. Reversed. Rehearing denied; Beatty, C. J., dissenting.

Geo. Clark, of San Francisco, W. A. Anderson, of Sacramento, and Black & Clark, of San Francisco, for appellants. Hudson Grant, of Woodland, for respondent. D. V. Cowden, Frank Thunen, and Wm. Singer, all of San Francisco, for intervener and respondent.

SHAW, J. The defendants' appeal from the judgment was taken within 60 days after its rendition. The evidence is brought up in the record.

[1] The plaintiff sued to quiet title to land. All the parties claim under a certain deed conveying the land, executed by William Gordon to John Gordon on June 3, 1872. The rule in Shelley's Case was in force in this state until January 1, 1873, when it was abolished by section 779 of the Civil Code. The said deed was therefore subject to that rule, and the sole question is whether or not it comes within the rule.

[2] The rule is that where a will devises or a deed grants land to A. for life and the remainder after his death to his heirs, or to the heirs of his body, using these words or words having the same legal effect, the effect is to vest in A. a fee simple absolute if the remainder is to his "heirs" or a qualified fee, if it is to the "heirs of his body." The heirs of A. in such a case take no estate or interest in the land during the life of A. and he may dispose of it as if the deed or will contained no words purporting to transfer to him less than a fee. As it is usually stated, the words "heirs" or "heirs of his body," or whatever other words of like effect are used, "are words of limitation and not of purchase." The plaintiff claims one-sixth of the land as an heir of John Gordon, upon the theory that said deed vested the fee in John. Upon the same theory the intervener claims a part of the land under a conveyance from John in his lifetime. The defendants claim the plaintiff's interest under and by virtue of an execution sale and sheriff's deed upon a judgment against the plaintiff; the sale and deed having been made during the lifetime of John Gordon and upon the theory that said deed to John vested in John a life estate only and vested in Joseph at its date, as one of his six children, a present one-sixth interest in the remainder in the land in fee after the death of John. It will be observed, therefore, that if the rule in Shelley's Case controls the effect of the deed of William Gordon to John, thereby vesting the fee in John, there would be no interest vested in Joseph at the time of the sale on execution against him and the defendants obtained none thereby.

It is not necessary to state the Gordon deed in full. It names William Gordon as grantor and John Gordon as grantee. The clauses which it is necessary to consider are the granting clause, a recital following the description of the land, the habendum, the warranty, and the final clause following the

attestation clause and explaining an interlineation and erasure. These are as follows:

Granting clause: "Does grant (etc.) unto the said party of the second part for and during the term of his natural life, and after his death then to descend to his heirs and assigns forever."

Recital: "The said land being conveyed to the said John Gordon for and during his natural life, for the final use, benefit and behoof of the children or other lawful heirs of his body, who may survive him."

Habendum: "To have and to hold \* \* \* unto the said party of the second part, his heirs and assigns forever."

Warranty: To " \* \* \* the said party of the second part, his heirs and assigns."

Final clause: "The words 'for and during the term of his natural life, and after his death then to descend to' interlined, and the words 'and to' erased, before the execution of these presents."

The final clause evidently refers to changes in the granting clause. It shows that the granting clause was first written thus, "unto the said party of the second part and to his heirs and assigns forever," making an unequivocal grant of the fee, and that, when this was perceived and the repugnancy between it and the subsequent recital noticed, the words "and to" were erased, and the words referring to a life estate substituted therefor.

[3] The fundamental reason for the rule in Shelley's Case is that at common law it was considered that the words "and to his heirs," or "and to the heirs of his body," following a grant purporting to be of an estate for life, necessarily implied that the heirs mentioned should take by inheritance from the life tenant, and not directly by the deed, or directly from the grantor, and, as this could not be so unless the life tenant had an estate of inheritance to pass at his death, it followed as a necessary conclusion that the deed must be understood to pass the fee to him as well as the life estate. In the phrases quoted, when the rule in Shelley's Case applies, the word "heirs" is used in the broad sense, to signify the persons who take the estate by succession from generation to generation forever, or, as it is sometimes expressed, the whole inheritable blood of the life tenant, so that such life tenant, and not those who may be his heirs at his death, is the original stock of inheritance. It is a rule of positive law, and defeats even the declared contrary intent if, notwithstanding such declaration, it appears that the words "heirs" was used in this technical sense. *Norris v. Hensley*, 27 Cal. 446. But the primary question is always the one whether or not it was so used.

The rule being founded upon these reasons, it is plain that if the deed contains words which modify or qualify these phrases to such an extent that a reasonable interpretation of the grant is that the grantor did not use the words to describe the whole line of



succession from the life tenant, or his whole inheritable blood, but on the contrary, intended thereby to point out and designate the particular persons who should take the estate upon the death of the life tenant and to describe them as the persons then to take the estate direct from the grantor and by virtue of the grant, constituting of them a new root of inheritance, the implication as to the meaning of said phrases, upon which the rule is founded, would not exist and the rule would not govern the grant. This distinction is thoroughly established, and it is recognized by all the authorities. 2 Wash. Real Prop. §§ 1614, 1615, 1616; 1 Jones, Real Prop. § 617; 2 Devlin, Real Prop. §§ 846a-846c; 2 Pingree, Real Prop. § 1019; Note to Carpenter v. Van Olinder, 11 Am. St. Rep. 102; Norris v. Hensley, supra. Many illustrations could be given. A few will serve to illustrate the application and effect of the distinction. The words, "and upon his demise to the heirs of *him surviving, share and share alike*," show that the word "heirs" was used to describe particular persons, and not the line of succession and the rule was held inapplicable. *Burges v. Thompson*, 13 R. I. 714. A deed to a husband and wife as joint tenants, for their lives, and to the survivor during the life of the survivor, with remainder to the issue and heirs of their two bodies *and the heirs of such issue forever*, creates only estates for life in the husband and wife and gives to their issue, upon their death, the fee. The addition of the words, "and the heirs of such issue forever," was held sufficient to make the distinction, and take the deed out of the rule. *Montgomery v. Sturdivant*, 41 Cal. 297. So, also, of the words: "And at her death to be equally divided among her children or legal heirs" (*Hall v. Gradwohl*, 113 Md. 297, 300, 77 Atl. 483, 29 L. R. A. [N. S.] 954); "to the children and lawful heirs" (*Reilly v. Bristow*, 105 Md. 326, 66 Atl. 262); "shall be inherited by the surviving issue of my said niece, *share and share alike*" (*Hill v. Giles*, 201 Pa. 215, 50 Atl. 758); "and at her death to the issue of her body *then living*" (*Gadsden v. Desportes*, 39 S. C. 131, 17 S. E. 706); "heirs at law and next of kin" (*Martling v. Martling*, 55 N. J. Eq. 790, 39 Atl. 208); "to the heirs of his body begotten if there be any such heirs *him surviving*" (*Granger v. Granger*, 147 Ind. 95, 44 N. E. 189, 46 N. E. 80, 36 L. R. A. 186, 190); "heirs of his body *living at the time of his death*" (*Moore v. Parker*, 34 N. C. 127); "to the heirs of her body *begotten*" (*Ault v. Hillyard*, 138 Iowa, 242, 115 N. W. 1030). In these decisions it was conceded that the word "issue" alone would be considered as the equivalent of "heirs," and would not take the case out of the rule. The words we have italicized were those which were held to have that effect.

[4] The deed here involved contains modifying words of like effect to those above

mentioned. The recital and the granting clause are parts of the same sentence, and both must be considered in determining the true meaning. The grant as a whole must be understood as if it read: "To John, for and during his natural life, and after his death to the children or other lawful heirs of his body, who may survive him, for their final use, benefit and behoof." The deed was evidently drafted upon a form in common use for a conveyance in fee simple, and the granting clause, as it first stood, granted such an estate. The interlineation described John's estate as for his life only, but it would have been ineffectual to escape the rule in *Shelley's Case*, if not further qualified. The words added by the recital were manifestly inserted for the purpose of stating the intent more accurately than it was expressed in the first part of the sentence. The recital is therefore the significant part of the deed, and it should control the interpretation as far as possible. Under the decisions above cited, it is clear that the word, "children," and the words, "who may survive him," qualifying the phrase, "lawful heirs of his body," and in connection with the declaration that the conveyance is for the "final use, benefit and behoof" of such survivors, were intended and used to show that the grant to John was for his life only, and that the remainder was to go to the surviving children, or grandchildren, directly by the deed, and not by inheritance, and that they, and not John, were to constitute the new stock or root of inheritance of the estate. The use of the expression "who may survive him" or similar terms shows that the mind of the grantor was directed to the particular persons surviving at the death of John and not to his posterity generally. The words, "or other lawful heirs of his body," make it plain that grandchildren would take, in the event that any of John's children should die before his death and leave children surviving. They were evidently inserted for that purpose and were not used in the technical sense above stated.

It is further contended by the respondents that the granting clause itself is devoid of words constituting a grant of the remainder. If the words "descend to" were omitted therefrom, the intent to grant the remainder would be clear, although, under the authorities, in the absence of the recital, the operation of the rule in *Shelley's Case* would override and defeat that intent. *Norris v. Hensley*, supra; 2 Devlin on Deeds (3d Ed.) §§ 846, 846c. The clause declares a life estate in John, "and after his death then to descend to his heirs and assigns." The word "descend," although literally denoting a passing by inheritance, is often used as a word of transfer. In the connection in which it here occurs this is its usual signification. *Doren v. Gillum*, 136 Ind. 139, 35 N. E. 1101; *Taney v. Fahnley*, 126 Ind. 91, 25 N. E. 882; *Aydlett v. Swope* (Tenn.) 17 S. W. 209; *Stratton*

v. McKinnie (Tenn. Ch. App.) 62 S. W. 640; Tate v. Townsend, 61 Miss. 319; Keim's Appeal, 125, Pa. 487, 17 Atl. 463; Halstead v. Hall, 60 Md. 213; Dennett v. Dennett, 40 N. H. 501; Harrington v. Gibson, 109 Ky. 752, 60 S. W. 915. Under these authorities, this passage is to be read as if it declared that after John's death the land should "go to," or "vest in" his heirs, the latter word being used, as before stated, as a description of the persons to whom the remainder is transferred, and not to indicate a taking by the law of inheritance.

The habendum and warranty clause are of little importance. They are in the usual form, and were evidently printed, if a printed form was used, or copied mechanically, if a form book was used. The incongruity between them and the granting clause, as changed, and as modified by the recital, was apparently not observed when the changes were made, and the failure to change them also may reasonably be attributed to inadvertence.

The conclusion is that the decision of the court below that the deed conveyed the fee to John was erroneous.

The judgment is reversed.

We concur: SLOSS, J.; ANGELLOTTI, J.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause, and from the judgment.

In this state the rule in Shelley's Case governs the construction of all deeds of conveyance made prior to January 1, 1873. Norris v. Hensley, 27 Cal. 439; Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049. It is, as to such deeds, a rule of property. I cannot distinguish this case from Norris v. Hensley, where the terms of a devise were held to bring it within the rule. I think it can be distinguished from Montgomery v. Sturdivant, 41 Cal. 297. These are our only authorities. The decisions in other states are conflicting. We should follow our own, however questionable, when essential to the protection of vested rights.

20 Cal. App. 690

HUNT v. SHARKEY. (Civ. 1,207.)

(District Court of Appeal, Second District, California. Dec. 20, 1912. Rehearing Denied by Supreme Court Feb. 18, 1913.)

1. BANKRUPTCY (§ 284\*)—CORPORATIONS—STOCKHOLDERS' LIABILITY—PLEADING AND PROOF.

Where a corporation becomes bankrupt, payment upon unpaid subscriptions for capital stock cannot be enforced, unless an assessment has been made by the proper court, or under its direction, ratably distributing the liability of the bankrupt estate among the subscribers.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 284.\*]

2. APPEAL AND ERROR (§ 1061\*)—HARMLESS ERROR—DISMISSAL—STATUTES.

The granting of a nonsuit for "insufficiency of the complaint," instead of "failure to

prove a sufficient case," as prescribed by Code Civ. Proc. § 581, subd. 5, providing that an action could be dismissed for failure to prove a sufficient case for the jury, was not prejudicial error under Code Civ. Proc. § 475, providing that no judgment should be reversed except for errors whereby substantial injury was suffered, where no facts existed which would enable plaintiff to amend or supply the evidence entitling him to recover.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4137, 4209-4211; Dec. Dig. § 1061.\*]

Appeal from Superior Court, Los Angeles County; Franklin J. Cole, Judge.

Action by F. W. Hunt against E. Sharkey. Judgment for defendant, and plaintiff appeals. Affirmed.

Murphey & Poplin, of Los Angeles, for appellant. Grant Jackson, of Los Angeles, for respondent.

SHAW, J. This is an appeal by plaintiff from a judgment of dismissal, entered in favor of defendant upon an order granting his motion for nonsuit, and also from an order denying his motion for a new trial.

It appears from the complaint that on February 4, 1908, defendant in writing subscribed for 20 shares of the capital stock of a corporation known as the Duquesne Brewing Company, for which he agreed to pay the sum of \$1,000 as follows: One hundred dollars on February 4th, and one hundred dollars on the 4th day of each month thereafter until the whole sum was paid. On October 5, 1909, at which time defendant had paid the sum of \$300 on account of his contract, the corporation was, in accordance with the laws of Congress, adjudged a bankrupt by the United States District Court. A trustee of the estate of the bankrupt was duly appointed, and the referee to whom the matter was referred authorized him to sell at public auction the assets of said bankrupt. Thereupon the trustee proceeded as directed to sell the property of said bankrupt estate, which consisted of certain real estate, promissory notes, and contracts of subscription whereby the subscribers had agreed to purchase and pay for the shares of the capital stock of said corporation, among which was the contract of defendant, which was designated as: "Parcel 13. E. Sharkey, balance stock subscription, dated February 4, 1908, face amount, \$700"—and which contract the trustee, prior to the bringing of the suit, by deed of conveyance, assigned and transferred to plaintiff as the purchaser thereof for the sum of \$40. By his answer defendant admits the making of the contract of subscription, admits that only \$300 had been paid thereon, but denies that \$700 or any sum was due on account thereof.

At the close of plaintiff's evidence, defendant's motion for nonsuit, upon the ground



that the complaint did not state a cause of action, was granted, followed by judgment of dismissal. Two questions are presented for solution: First, whether or not an unpaid balance due upon a subscription for shares of capital stock of a corporation adjudged a bankrupt is, in the absence of a proceeding wherein the equitable liability of the subscriber is fixed, a subject of sale and assignment, collection of which can be enforced by the assignee; and, second, whether the fact that the complaint failed to state a cause of action was, under the circumstances presented, a ground for granting the motion for a nonsuit.

[1] Defendant's agreement to take and pay for stock in the corporation was based upon an implied consideration that the money so contributed should be used in conducting the business for which it was incorporated. By reason of the adjudication in bankruptcy the corporation wholly abandoned its business. Hence, being unable to perform its implied obligation to defendant as a subscriber for its stock, and having no use for such capital other than for the winding up of its business, the extent to which the contract for the purchase of stock could be enforced was the pro rata share of the amount required for such purpose after exhausting the tangible assets of the bankrupt's estate. Vol. 1, Morawetz on Corporations, § 152. As a prerequisite to maintaining an action to enforce such obligation among those liable upon subscriptions to stock, it must be made to appear, by appropriate allegations and proof, that the court had jurisdiction of the proceedings in bankruptcy, or that by its order or direction the amount necessary to be raised to pay any deficiency in the sum required has been ratably and equitably distributed among them. Vol. 2, Morawetz on Corporations, § 822; Remington on Bankruptcy, vol. 1, § 977; *Burke v. Maze*, 10 Cal. App. 209, 101 Pac. 438, 440; *In re Crystal Spring B. Co.* (D. C.) 96 Fed. 945; *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Perkins v. Cowles*, 157 Cal. 625, 108 Pac. 711, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158. In *Covell v. Fowler* (C. C.) 144 Fed. 535, the court, in discussing a similar question, says: "A stockholder might have an ultimate liability of only a few dollars, and at the same time be made to rest under a decree sufficient to wipe out his entire fortune, thus working great injury and perhaps ruin to him." It may be noted that in the case at bar the aggregate liability of the stockholders was \$30,050, an assessment of less than 50 per cent. of which, if collected, would have been sufficient to liquidate the indebtedness of the bankrupt, yet it appears that plaintiff purchased the entire amount for the nominal sum of \$630. Where a

corporation is adjudged a bankrupt the trustee of the bankrupt estate cannot enforce payment of the stockholders' liability upon unpaid subscriptions for capital stock, unless it be made to appear by both allegation and proof that an assessment has been made by the proper court, or under its direction, ratably distributing the liability of the bankrupt estate among the subscribers to its stock. In the case at bar such fact is neither alleged nor proven. On the contrary, it is clear that no such action was ever had, and hence the complaint did not state facts upon which to base a judgment for plaintiff, as assignee of the contract.

[2] The motion for nonsuit specified as the grounds therefor the insufficiency of the complaint, in that it did not appear therefrom that the assessment required as a prerequisite to the bringing of the suit had been made. Subdivision 5 of section 581 of the Code of Civil Procedure provides that an action may be dismissed "upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury." Conceding the form in which the motion was made failed to comply strictly with the provisions of the statute, in that it did not specify failure of proof rather than insufficiency of the complaint to state a cause of action, nevertheless, the want of proof is disclosed by the record, from which it is apparent that no facts existed which could enable plaintiff to amend his complaint or supply the evidence entitling him to recover. Hence, had the motion been denied, judgment upon the merits must necessarily have followed for defendant. This being the case, plaintiff was not prejudiced by the judgment of dismissal. "No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed." Section 475, Code Civ. Proc. No good purpose could be subserved by reversing the case for the alleged technical error of which appellant complains, when it clearly appears that further proceedings therein must necessarily result in a like disposition of the case.

There is no merit in appellant's contention that the court erred in adjudging defendant entitled to his costs expended in the trial.

The judgment and order denying plaintiff's motion for a new trial are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

(20 Cal. App. 521)

**CONWELL v. VARAIN. (Civ. 975.)**

(District Court of Appeal, Third District, California. Dec. 5, 1912. Rehearing Denied by Supreme Court Feb. 3, 1913.)

**1. STIPULATIONS (§ 18\*)—ISSUES—NEW TRIAL—GROUNDS.**

Where parties by stipulation agreed that only a single issue of fact should be submitted, the question whether the evidence was sufficient to show the other facts material to recovery could not be considered on motion for new trial.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 41-54; Dec. Dig. § 18.\*]

**2. APPEAL AND ERROR (§ 979\*)—NEW TRIAL—DISCRETION OF COURT.**

An order granting a new trial on the ground of the insufficiency of the evidence will not be disturbed, unless it clearly appears that the trial court abused its discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873; Dec. Dig. § 979.\*]

**3. NEW TRIAL (§ 72\*)—GROUNDS—INSUFFICIENCY OF EVIDENCE.**

The trial court should grant a new trial where it believes that the preponderance of the evidence is opposed to the findings.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146-148; Dec. Dig. § 72.\*]

**4. APPEAL AND ERROR (§ 979\*)—NEW TRIAL—DISCRETION.**

Where the parties to an action for commission for selling mining property stipulated by their attorneys that the action should be submitted for decision on the single question whether the contract had been altered by the insertion of a word, and that the court should have the aid of a handwriting expert of its own choice, the granting of a new trial on the ground of the insufficiency of the evidence to support the findings, based on the opinion of the expert, was an exercise of the trial court's discretion, which the appellate court will not disturb, even conceding that the stipulation was within the general authority of the attorneys within Code Civ. Proc. § 283, subd. 1.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873; Dec. Dig. § 979.\*]

**5. STIPULATIONS (§ 18\*)—STATEMENT OF GROUNDS—INSUFFICIENCY OF EVIDENCE.**

Where the parties by their attorneys stipulated that the decision of the case should be determined by the decision of a single question, a statement for a new trial on the ground of the insufficiency of the evidence to sustain the findings, which sets forth even an accurate résumé of the evidence on other issues, should be stricken out.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 41-54; Dec. Dig. § 18.\*]

**6. EVIDENCE (§ 570\*)—OPINION EVIDENCE—WEIGHT OF EXPERT TESTIMONY.**

The testimony of experts is entitled to such weight as it appears in each case to be justly entitled to.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2395; Dec. Dig. § 570.\*]

**7. STIPULATIONS (§ 11\*)—AGREEMENTS BY COUNSEL—VALIDITY.**

A stipulation by the attorneys of the parties that an action involving valuable property rights, or a large sum of money, should be submitted to the court for decision on a single question involving an issue of alteration of an instrument, and that the court in passing on the issue shall have the aid of a handwriting

expert of its own choice, whose evidence and photographs should be conclusive, should not be tolerated.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 23; Dec. Dig. § 11.\*]

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by F. H. Conwell against Mary E. Varain. From an order granting a new trial after judgment for plaintiff, he appeals. Affirmed.

John A. Wall, of Mariposa, for appellant. R. B. Stolder, of Mariposa, and J. B. Curtin, of Sonora, for respondent.

HART, J. This action was brought by the plaintiff to recover the sum of \$2,000, alleged to be due the plaintiff from the defendant under a contract whereby, it is alleged, the latter employed the first named to procure for her a purchaser of certain mining property, situated in Mariposa county. Judgment passed for the plaintiff in the sum sued for. In due time, the defendant moved for a new trial, and the court granted the motion. This appeal is by the plaintiff from the order granting said motion.

The grounds upon which the motion for a new trial was pressed were (1) that the evidence was insufficient to justify the decision, findings, and judgment; (2) that the decision and judgment are against law; and (3) errors of law occurring during the trial and excepted to by the defendant.

The instrument upon which the plaintiff declares is in the form of a power of attorney, and it purports to confer upon one S. Carlon full power "to grant, bargain, sell, remise, release, convey and quitclaim to whom and upon such terms as our attorney may deem best, all of our right, title and interest, estate, claim and demand, both in law and equity, as well in possession as in expectancy of, in or to" the following mines: The Big Bonanza, the Gillett mine, Maunella gulch, and No. 2 and the Blue Lead.

It appears that the defendant, although, as seen, purporting by said power of attorney to confer upon said S. Carlon the authority to act as her attorney in fact for the purpose of selling the mines designated in said instrument, in reality intended thereby to confer such authority upon the plaintiff, but it seems the latter, being the notary public before whom the acknowledgment of the execution of the power was to be taken, entertained serious doubt whether such an instrument would be valid where it is acknowledged before the person as a notary public in whom rights thereunder are thereby to be vested. It is, however, further made to appear that said instrument was delivered by the defendant to the plaintiff, and that no objection was raised at the trial that the contract or power of attorney was not to vest in the latter the authority of an attorney in



fact for the purposes specified in said instrument. To the contrary, as we shall presently see, the trial was conducted by both sides upon the assumption or the theory that the contract was between the plaintiff and the defendant, and that said Carlon was in no way connected therewith.

The power of attorney does not itself provide for compensation to be paid to the plaintiff for his services in selling the property described therein, but the complaint alleges that the defendant agreed to allow and pay to plaintiff, as his compensation for procuring a purchaser of the Big Bonanza mine, any sum of money for which he might be able to sell said mine over and above the sum of \$8,000, and that plaintiff succeeded in finding, in the person of one George E. Stayton, a purchaser of said mine able, ready, and willing to pay the sum of \$10,000 therefor, and that Stayton did, in fact, purchase said mine at said price. But it appears that the defendant claimed at the trial that the Big Bonanza mine was not mentioned or written in the power of attorney at the time of the execution and delivery thereof to the plaintiff, but that, after the execution and delivery of the power, some one, without her authority, sanction, or consent, inserted the name of said mine therein. And this contention, it seems, involved the sole and only point of controversy between the parties at the trial. In other words, the single point upon which the parties were widely divergent was whether the plaintiff was in truth and in fact authorized by the defendant, under the terms of said instrument as it was signed and delivered by the latter to him, to find a purchaser of the Big Bonanza mine.

The plaintiff testified that the words, "Big Bonanza Mine" were written in the instrument, just above the words, "The Gillett Mine," at the time the defendant signed and delivered it to him; that no change whatsoever was made in the writing contained in said instrument after it was so signed and delivered into his possession. Mrs. Varain, the defendant, testified, as above indicated, that the words "Big Bonanza Mine," were not written or contained in the power of attorney when she signed and delivered that instrument to the plaintiff, and that said words were not therein inserted upon authority from her or with her consent. She further testified that the instrument did contain the name of the Gillett mine when she delivered the document to the possession of the plaintiff.

The foregoing constituted, in substance, all the direct testimony upon that point, and manifestly there thus arose thereon a sharp conflict between the witnesses. It was therefore conceived by the court and counsel to be the more satisfactory course to invoke the services of a professional expert in handwriting, and to his opinion submit the question whether there was evidence on the face of

the instrument itself of the insertion therein of the words, "Big Bonanza Mine," after the power had been signed by the defendant.

"Whereupon," quoting from the record, "the respective counsel for the parties stipulated and agreed, in open court, that the cause he submitted to the court for decision upon the one single question of fact as to whether the loop in the 'z' in the name 'Big Bonanza Mine' in said Plaintiff's Exhibit A (the power of attorney) was above or beneath the line crossing the two 'ts' in the name 'Gillett Mine,' which is immediately under the name 'Big Bonanza Mine' in said 'Exhibit A,' thus:

*Bonanza  
Gillett*

"It was further stipulated and agreed that the court should have the assistance of a professional expert in handwriting, of the court's own choice, without the knowledge of either of the parties hereto. The written opinion and photographic exemplars made by said expert in handwriting to the court should be received in evidence in the cause on behalf of both the respective parties hereto. \* \* \* It was further stipulated and agreed that, if it appeared by the expert's opinion that the loop of the 'z' in the word 'Bonanza' was under the line crossing the two 'ts' in the word 'Gillett,' this would be conclusive proof that the name, 'Big Bonanza Mine,' was in the paper at the time defendant signed the same and delivered it to plaintiff, and then that plaintiff had proven all the allegations of his complaint, and plaintiff was entitled to judgment against defendant for the sum of \$2,000 under either cause of action set forth in the complaint, and that judgment for plaintiff against defendant in the sum of \$2,000 should be awarded plaintiff, free and clear of any and all objections or exceptions of any kind or nature whatsoever by defendant or on behalf of any person."

In accordance with the foregoing stipulation, the court submitted the power of attorney to Theodore Kytka, a professional expert in handwriting, for examination, and a report of the result thereof as to the proposition with reference to said instrument as set forth in said stipulation. Kytka, having subjected the instrument, or that portion thereof pertinent to the terms of the stipulation, to an examination by means of the tests usually employed by experts in handwriting, in due time returned to the court a written report in which he expressed an unqualified opinion that the letter "z" in the word "Bonanza" lay underneath the line crossing the two "ts" in the word "Gillett." Thereafter, and acting upon the stipulation above referred to, the court rendered and entered its judgment in favor of the plaintiff for the

sum of \$2,000, as prayed for in the complaint. Upon the record as thus made up, the question presented here for decision is whether the court below abused its discretion in granting the order from which this appeal is prosecuted.

[1] The stipulation above referred to assumed, and, indeed, in effect conceded, that all the material allegations of the complaint, except in so far as they implied that the Bonanza mine was included in the contract with plaintiff and to which point the stipulation solely related, were satisfactorily proved. The effect of the stipulation, in other words, was to eliminate from the controversy the evidence as to all the material facts but the single one to which it related. It therefore follows that the specifications of the insufficiency of the evidence to support other material findings than the one deduced from the evidence resulting from said stipulation cannot be considered or reviewed.

[2] One of the grounds upon which a new trial was asked in this case is, as before shown, that the evidence is insufficient to support the findings, and it is well settled that, where a new trial is granted on such ground, the order will stand unless it is made clearly to appear that the trial court, in granting it, has abused its discretion.

[3] Indeed, where the court is of the opinion that the weight or preponderance of the evidence is opposed to the findings, it is its duty to grant a motion for a new trial. *Bledsoe v. Decrow*, 132 Cal. 313, 64 Pac. 397; *Clark v. Rauer*, 2 Cal. App. 259, 83 Pac. 291; *Central Trust Co. v. Stoddard*, 4 Cal. App. 348, 88 Pac. 806; *Thompson v. Wheeler*, 5 Cal. App. 196, 89 Pac. 1065; *Hughes Bros. v. Rawhide Mining Co.*, 16 Cal. App. 297, 116 Pac. 969; *Bjorman v. Fort Bragg Redwood Co.*, 92 Cal. 500, 28 Pac. 591.

[4] While upon the face of the record in the case at bar it might well be held that the court, in granting defendant's motion for a new trial, transcended the discretion committed to trial courts in such case, there are certain considerations presented here which inspire in this court a disinclination to interfere with the action of the court below in ordering a new trial. In his brief, counsel for the respondent, who was not at first connected with, and therefore did not participate in, the trial of the cause, states that, after the rendition and entry of judgment, he was employed by the defendant to prepare and press a motion for a new trial. He further declares that the testimony received at the trial was not taken down by a shorthand reporter or at all, and that, upon being retained as above stated, he procured from the clerk of the court in which the action was tried a statement of that official's recollection of the testimony as it was given. From the testimony so obtained, said attorney prepared a proposed statement for a new

trial, filed the same, and served a copy thereof on the attorney for the plaintiff. In due time the latter served a proposed amendment to said statement, which said amendment consisted in a motion to strike out the whole of the proposed statement, and to substitute in lieu thereof the statement of the testimony which now, so far as the evidence is concerned, constitutes the record upon which the order granting the new trial was predicated.

[5] It is claimed by counsel for the appellant that the proposed statement of plaintiff was stricken out because it involved an incorrect synopsis of the evidence. This may be true, but under the stipulation referred to above and which constitutes the most important part of this record, even if the proposed statement had contained a strictly accurate résumé of the evidence, it would have been the duty of the court to have stricken it out as wholly immaterial, so far as it related to points other than that upon which the stipulation provided that the decision of the cause should hinge. We have thus given briefly that part of the history of the trial which is de hors the record, but which is disclosed by the briefs of counsel, the verity of which, however, is not disputed, merely to illustrate the uniqueness of the situation presented here, and perhaps in discovering to some extent the precise motive influencing the judge of the court below, upon reflection, in the exercise of the discretion confided to trial courts in the matter of allowing or disallowing new trials, to order a retrial of the issues presented by the pleadings in this action.

Now, one of the points made by counsel for the respondent is that the stipulation into which the parties entered and upon which the decision of the issues was made to depend was void, or not binding upon the defendant, because it neither appears that the latter filed an agreement with the clerk authorizing his attorney to make such stipulation, nor that such an agreement was entered in the minutes of the court. Section 283, subd. 1, Code Civ. Proc. But we are not prepared either to affirm or deny, nor, for the purposes of this case, is it deemed necessary to decide, the proposition whether the stipulation referred to constitutes one of "the steps of an action or proceeding" in order to take which an attorney must first obtain from his client special authority evidenced in the manner prescribed by the section of the Code above cited, or whether it constitutes an act within the scope of the general authority of an attorney at law over his client's cause during the progress of the trial thereof; for, even assuming that the attorney had the authority to make the stipulation as one of the ordinary acts within the scope of his general agency or authority, we regard the stipulation as most unusual in its nature and so improvident in its scope



that it is manifest that the trial court, upon further consideration of it after the judgment was rendered and entered, reached the conclusion that it would be unjust to compel the defendant to be bound by its terms, and therefore, in the interest of justice, granted his application for a new trial.

It is not an unusual practice, nor one beyond the general authority of an attorney, to stipulate, during the progress of a trial, that a certain absent witness, if present at the trial, would give certain testimony essential to his adversary's case or defense, or to agree to the recitals of a deed or some public record which it might be impossible, for any reason, or inconvenient to produce in court; but it is, as before declared, and it should be, a most unusual practice for an attorney to stipulate that the unsworn statement of a person as to a fact without the proof of which the plaintiff could not sustain his action or the defendant his defense should be accepted as conclusive evidence of the truth of all the material allegations of the complaint or of the answer. And the more startling is such a stipulation where, as is true of the one in the case at bar, it involves an agreement that, as to the all-important fact to which it relates, the mere opinion of a person, although an expert on such subjects, shall be conclusive of its verity, provided such opinion coincides with the plaintiff's theory of the case.

[6] We have no disposition to indulge in a general animadversion upon opinion testimony. Such evidence often becomes absolutely necessary in the proof of an essential fact, and it is always to be given such weight as it appears in each case to be justly entitled to; but it ought not to be necessary to say that, when that character of testimony is relied upon or becomes necessary in the proof of a fact which goes to the very gist of the main point of controversy in an action at law, it should make its appearance in the record in the highest garb known to the law and under such circumstances as that it may be rebutted, if it can be, or its accuracy tested by the methods usually invoked for that purpose.

[7] Therefore, no such stipulation or agreement by counsel as the one involved here should be tolerated in any case, much less one involving valuable property rights, or, as here, a large sum of money. A trial thus conducted is in effect more in the nature of an arbitration than a trial, but even less satisfactory than the former method of settling disputed questions of fact. It is obviously the first duty of the courts to see that litigants shall have their rights judicially determined only after a fair and impartial trial according to the mode prescribed by law. To place a litigant's rights in a trial thereof at the mercy, so to speak, of the ex parte opinion of any person, however well qualified such person may be to speak on the

subject to which his opinion relates, is not to give such litigant's rights a fair and impartial trial according to the recognized or prescribed forms by which only issues of fact are authorized to be tried.

We doubt not that the court below, after that careful reflection which is afforded to trial courts by a motion for a new trial, reached the conclusion that the scope of the stipulation was entirely too far-reaching, and calculated to prevent a fair and proper consideration of the merits of the case. At all events, it is manifest that the judge regarded it as not involving the proper way in which to try important questions of fact, and considered it to be in the interest of justice to submit those questions to a retrial in the usual and proper mode. We have not been cited to, and are unable, after some independent investigation, to find any case in California, or from other jurisdictions, which, in its facts, is precisely similar to this, but in *Harvey v. Thorpe*, 28 Ala. 250, 65 Am. Dec. 344, where the attorney for the defendants signed an agreement admitting certain material facts in the case, and from the consequences of which agreement the defendants succeeded in relieving themselves at the trial, the court said: "Conceding, so far as the present case is concerned, that attorneys may bind their clients by such admissions as were here made, it is only necessary to observe that, where they are made improvidently and by mistake, the court, by means of its coercive powers over its own officers, has authority to relieve against the consequences of the admission, regulating its action in this respect with a just regard for the rights of both parties, which it can do by setting aside the agreement upon terms which will meet the justice of the particular case"—citing 1 Greenl. on Ev. § 206. It is true that in that case the court was dealing with an objection to the action of the trial court in permitting the defendants to introduce evidence in opposition to their agreement or admissions; but upon the point under consideration we are unable to draw any distinction in principle between that case and this. The stipulation in the case here did not, and could not, have the effect of binding the trial court or concluding it in the exercise of its right to nullify the effect of the agreement by allowing the defendant to introduce proof in opposition thereto. And, had the court refused to accept as conclusive proof of the allegations of the complaint, the opinion of the expert and have allowed the defendant to introduce counter expert or other proof upon the question submitted to the arbitrament of the expert, such action on the part of the court could not upon any just reason be held to have constituted an abuse of its discretion in such case. It would be difficult to mark any reasonable line of distinction between the action of the trial court in that respect during the trial

and its action, bringing about exactly the same result, in granting a new trial after a review of the case upon a motion for that purpose.

Our conclusion is that the order granting a new trial was but the result of the exercise of that power over causes and the action of the parties thereto which it is intended that trial courts shall possess and judicially dispense on all proper occasions in order that fair and impartial trials of issues of fact may be had. In other words, it has not been made to appear that the granting of the order was in excess of a sound judicial discretion.

The order is, therefore, affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(20 Cal. App. 655)

**DIECKMANN et al. v. MERKH et al.**  
(Civ. 1,013.)

(District Court of Appeal, Third District, California. Dec. 17, 1912. Rehearing Denied by Supreme Court Feb. 15, 1913.)

**1. APPEAL AND ERROR (§ 1040\*)—PLEADING (§ 252\*)—AMENDMENT—EFFECT—HARMLESS ERROR.**

Where the complaint was amended to conform to the proof, the original complaint was superseded, and rulings on demurrers to it are immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040; Pleading, Cent. Dig. §§ 736-743; Dec. Dig. § 252.\*]

**2. NEW TRIAL (§ 97\*)—SURPRISE—AMENDMENTS—DILIGENCE.**

Defendants, who did not ask for continuance on the ground of surprise, cannot afterwards complain that a trial amendment, permitting the plaintiff to conform his complaint to the proof, was allowed.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 195-198; Dec. Dig. § 97.\*]

**3. TRUSTS (§ 44\*)—ESTABLISHMENT—EVIDENCE—SUFFICIENCY.**

In an action to establish an express trust by parol, under a conveyance absolute in its terms, evidence held sufficient, despite the rule that in such cases it must be clear, satisfactory, and convincing.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 66-68; Dec. Dig. § 44.\*]

**4. TRUSTS (§ 43\*)—ESTABLISHMENT—EVIDENCE.**

In an action to establish a trust by parol, under a conveyance absolute on its face, where the property had been transferred by a father to his daughter to be divided after his death, evidence of statements by the daughter that she would do right and share with the others equally, though made before the conveyance, is admissible.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 62-65; Dec. Dig. § 43.\*]

**5. TRUSTS (§§ 17, 18\*)—ESTABLISHMENT—PAROL TRUSTS.**

Where a father conveyed property to his daughter with the parol agreement that she should divide it among his other children, the trust may be established, under Civ. Code, §§ 2216, 2224, despite sections 847, 852, and 857, providing that no trust in relation to real

property is valid unless created by writing or operation of law, and forbidding the creation of express trusts for the conveyance of land to third persons; the trust arising out of the personal confidence reposed in, and voluntarily accepted by, one for the benefit of another.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 15-24; Dec. Dig. §§ 17, 18.\*]

Appeal from Superior Court, City and County of San Francisco; C. W. Norton, Judge.

Action by Frederick H. Dieckmann and others against Marie E. Merkh and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Louis Ferrari, of San Francisco, for appellants. Fabius T. Finch and Paul F. Fratesa, both of San Francisco, for respondents.

CHIPMAN, P. J. It appears from the complaint that plaintiffs and defendant Marie E. Merkh are the children of Johann D. Dieckmann, who died on April 12, 1910, in the city and county of San Francisco; that on February 10, 1910, he was the owner of the premises in question and, on that day, executed and delivered to defendant Marie E. Merkh a deed conveying said property to her; that it was agreed between Johann and his daughter Marie at the time, that she should hold the title to said land during his life, and at his death "to divide said land and premises in equal shares between herself and said plaintiffs"; that, though frequently requested to convey to plaintiffs their share of said property, defendant Marie refused, and still refuses, to convey the same; that defendant Albert G. Merkh is the husband of Marie, and claims some interest in the land, but without right. The prayer is for judgment that defendant Marie be compelled to execute a conveyance to each of plaintiffs of a one-fourth interest in said land. A demurrer to the complaint was interposed for insufficient facts; also on the ground of misjoinder of parties defendant; also that the complaint is uncertain for the reason that it cannot be ascertained therefrom whether the agreement pleaded was oral or in writing. The demurrer was overruled, and defendants answered, admitting the facts set out in the complaint except as to the alleged agreement, which are denied. By way of cross-complaint, defendant Marie alleges ownership of the land, avers that plaintiffs, without right, claim some interest therein, and asks that her title be quieted. It appears from the transcript that the cause was brought to trial July 14, 1911, and findings and judgment entered July 23, 1911. On July 19, 1911, plaintiffs served notice of a motion to amend the complaint, which was heard and allowed on July 21, 1911, and on that day an amended complaint was filed, and on July 24, 1911, defendants filed their answer to said amended complaint, four days before findings and judgment were entered



and filed. The amendment to the complaint is found in paragraph 4 and is as follows: "That on February 10, 1910, said Johann D. Dieckmann was, and for more than one month prior thereto he had been sick in body and feeble in mind—he was then 68 years of age—and at the time of the execution and delivery of said deed he had and reposed in his said daughter Marie E. Merkh implicit confidence and trust. For the purpose and with the intention and desire of dividing equally between his said children (the plaintiffs and defendant Marie E. Merkh), and upon the advice and solicitation of defendant Marie E. Merkh, said Johann D. Dieckmann executed and delivered said deed to defendant Marie E. Merkh only because he did then and there rely upon and believed the statements and assurances of said Marie E. Merkh that she would hold said real property in trust as aforesaid, and convey an undivided one-fourth interest in said property to each of said plaintiffs herein without charge, upon the death of said Johann D. Dieckmann." The answer to the amendment is a denial of its averments. The motion stated, among other grounds for seeking to amend the complaint, that it was "to conform to the proofs on the trial of said action," from which we may assume that it was allowed after the testimony was submitted. The court found all of the allegations contained in the amended complaint to be true, and the averments of the answer to be untrue. Judgment went in favor of plaintiffs, directing defendant Marie to execute deeds as prayed for. Defendants appeal from the judgment; also from the order permitting plaintiffs to amend their complaint; also from the order overruling defendants' demurrer to the original complaint; also from the order denying defendants' motion for a nonsuit; also "from the orders refusing to sustain defendants' objections to testimony introduced at the trial." The Code makes no provision for appeals from the orders above mentioned, but as the appeal was taken within 60 days after the entry of the judgment, the alleged errors may be reviewed on appeal from the judgment accompanied by statement of the case or bill of exceptions.

[1] There was no demurrer to the amended complaint; issues were joined on it by answer. The original complaint was thus superseded, and the ruling on the original complaint is immaterial. *Rooney v. Gray Bros.*, 145 Cal. 753, 79 Pac. 523. This is equally true, we think, where the complaint is amended to conform to the proofs.

[2] It is urged that the court abused its discretion in allowing the amendment. Defendants say in their brief: "We do not challenge the right of the court to have permitted the amendment if the issues be retried, but we do challenge the right \* \* \* to take away from appellant the right to try the new issues and to have his day in court upon them." The record is silent as to what

occurred upon granting the motion. All that appears is that defendants filed an answer to the amended complaint, traversing the new facts therein set out. We must assume that no objection was made to the motion, and that defendants were content to submit the issues thus presented on the evidence already before the court. If defendants desired further time to meet these issues by evidence, or were surprised in any way, entitling them to terms or to delay, it was their duty to make it known to the court. Certainly, the defendants were not entitled to have the entire cause retried. An examination of the record shows that there was evidence before the court on the very matters embraced in the amendment.

[3] It is contended that the findings are not sustained by the evidence. In brief: It appeared by the testimony that Johann Dieckmann, in January, 1910, was the owner of the property in question, then valued at \$1,600. His wife had previously died. He was 68 years old, and in failing health, bodily and mentally. There had been some estrangement between him and his said children, which was reconciled, and, in his then condition of mind, he desired to make disposition of the property. A conference was had between all of the parties, except his son Carl, at which he offered to deed the property to first one and then another, who declined to accept it for reasons given, and finally it was agreed that his daughter, defendant Marie, would take the title and hold it during his life, and at his death convey to the other children, plaintiffs, a one-fourth interest each. The testimony made it very plain that their father's intention was to carry out the object set forth in the amended complaint, and that his daughter Marie accepted the trust on the condition clearly stated by her father. During her father's life and for some time after his death she acknowledged her obligation to her brother and sisters to be as above stated, and her father died in the belief that he had made an equal division of the little property he owned. The children met, some time after their father's death, to adjust certain bills which had been paid by one of them, and to arrange for a disposition of the property. It was then agreed that plaintiff Dorothea—Dora as she was called—would take the property at the price of \$1,600. The bills then presented were to be paid from this money, and the balance was to be divided equally between them. Later it was discovered that one or two other bills, of no large amount, had been overlooked, and at a second conference, when these bills were presented, defendant Marie objected to their allowance, and thenceforward repudiated her trust, claimed the land as her own, and refused to convey any interest in it to plaintiffs. This is a brief outline of what appears in much detail of circumstance not necessary to be set out. The principles enunciated in *Cooney*

v. Glynn, 157 Cal. 583, 108 Pac. 506, apply equally strong here. In Bollinger v. Bollinger, 154 Cal. 695, 99 Pac. 196, the rule was stated that, to prove a trust by parol under conveyance absolute in its terms, the evidence must be clear, satisfactory, and convincing. It rarely happens that evidence so fully meets this rule as was the case here.

[4] Error is claimed because testimony was admitted relating to certain conversations touching the trust which took place two or three days before the deed was executed. It appeared that the subject of the trust was under consideration by the parties from day to day for three or four days, and, finally, when her father hesitated while signing the deed, Mrs. Merkh said to him: "Why do you act that way? Finish it up. You know I will do right. I will share with the others equally." There was no error in admitting any of these conversations, for they were all to the same purpose, and in the presence of the parties interested.

[5] The motion for nonsuit seems to rest on the failure to show the creation of a trust in writing, as required by section 852 of the Civil Code. The trust here arose out of the "personal confidence reposed in and voluntarily accepted by" Mrs. Merkh, "for the benefit of another." Civ. Code, §§ 2216, 2224. Such a trust resulting from conduct may be shown by parol, and sections 847 and 857, which forbid an express trust to convey land to a third person, have no application to trusts created by operation of law. The conduct of Mrs. Merkh, under the circumstances, constituted a constructive fraud sufficient to create a constructive trust. Lauricella v. Lauricella, 161 Cal. 61, 118 Pac. 430.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

(20 Cal. App. 603)

NASSANO v. TUOLUMNE COUNTY BANK  
et al. (Civ. 1,016.)

(District Court of Appeal, Third District, California. Dec. 12, 1912.)

**1. BILLS AND NOTES (§ 44\*)—NATURE OF INSTRUMENT—"NOTE."**

An instrument directed to a bank, in which the signer had money on deposit, authorizing it to pay out of the signer's funds, for a valuable consideration, \$500 to N., on presentation prior to the signer's death, if countersigned by him across the back, or, on notification of the signer's death, without such countersignature, did not contain a promise by the signer to "pay a specified sum of money," and was not therefore a "note" within Civ. Code, § 3244.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 52; Dec. Dig. § 44.\*

For other definitions, see Words and Phrases, vol. 5, pp. 4837-4839.]

**2. ASSIGNMENTS (§ 40\*)—BILLS AND NOTES (§ 15\*)—"CHECK"—DRAWER'S FUNDS—EQUITABLE ASSIGNMENT.**

A written instrument directed to a bank, in which the signer had a deposit account, directing the bank to pay a specified sum to the

payee if countersigned by the drawer and presented in his lifetime, and if presented after his death then to pay without being countersigned, would be regarded as a check, within Civ. Code, § 3254, defining a check as a bill of exchange drawn on a bank or banker or a person described as such on the face thereof, and payable on demand, without interest, and therefore did not operate as an equitable assignment of so much of the drawer's funds prior to presentation for payment.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 85-98; Dec. Dig. § 49;\* Bills and Notes, Cent. Dig. §§ 20, 21; Dec. Dig. § 15.\*

For other definitions, see Words and Phrases, vol. 2, pp. 1109-1112; vol. 8, p. 7600.]

**3. BILLS AND NOTES (§ 15\*)—"BILL OF EXCHANGE"—CHECK—DEATH OF DRAWER—EFFECT.**

An order on a bank directing it to pay the payee or her order a specified sum on presentation prior to the signer's death, if countersigned by him, or to pay after his death without such countersignature, constituted a bill of exchange which was not invalidated by the drawer's death before presentation, but constituted a binding obligation, which the payee was entitled to enforce against the drawer's estate.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 20, 21; Dec. Dig. § 15.\*

For other definitions, see Words and Phrases, vol. 1, pp. 784-787.]

**4. WILLS (§ 89\*)—FORM—BILL OF EXCHANGE.**

An order on a bank to pay a specified sum to a payee if countersigned by the drawer and presented in his lifetime, and if presented after his death then to pay without being countersigned, was not ineffectual, after the drawer's death, as an attempt to make a testamentary disposition of the drawer's property in a form unauthorized by law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 218; Dec. Dig. § 89.\*]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Action by Maria Nassano against the Tuolumne County Bank and N. T. McCown, as administrator of the estate of Louis Zanone, deceased. Judgment for defendants, and plaintiff appeals. Reversed.

A. H. Carpenter, of Stockton, for appellant. J. B. Curtin, of Sonora, and Geo. F. McNoble, of Stockton, for respondent.

CHIPMAN, P. J. It is alleged in the complaint that on November 18, 1911, Louis Zanone had on deposit in defendant bank \$1,100, subject to his order. On said date, Zanone, for good and valuable consideration, made and delivered to plaintiff "his promissory note, obligation, and order upon said defendant bank \* \* \* in words and figures as follows: 'Stockton, Calif., November 18, 1911. Cashier of Tuolumne County Bank, Sonora, Cal.: You are hereby authorized to pay out of the funds I now have in your bank and for valuable considerations, which I have received, five hundred dollars to Mrs. Maria Nassano, or her order, said sum to be paid upon the presentation of this order prior to my death, if countersigned by me across the back, or on due notification of my death without such countersignature. In



witness whereof, I hereby set my name on the day and at the place first mentioned above, in the presence of two witnesses. [Signed] Louis Zanone, G. Villiborghi, witness. Luigi Pomponio, witness." (Acknowledged before a notary.) "That said order was not presented to said defendant bank for payment in the lifetime of the said Louis Zanone;" that on or about February 10, 1912, plaintiff presented said order or caused the same to be presented to the said defendant bank for payment, together with due proof that said Louis Zanone had died on the 19th day of December, 1911; that said bank refused payment, although it "had then and there, and at all times, the full amount of the said Louis Zanone's money in its hands or under its control wherewith it could have fully paid said order"; that said Zanone died intestate about December 19, 1911, in the county of San Joaquin, and left an estate therein "of more than \$1,100 cash in the hands of the said Tuolumne County Bank," which "it held subject to his order therefor." It is further shown that on January 8, 1912, defendant McCown was duly appointed administrator of the estate of Zanone, deceased; that, within the time appointed for the presentation of claims against said estate, plaintiff presented to said administrator her written claim, duly verified by her oath, based on said "note, obligation, and order," and that said administrator disallowed payment thereof on the 15th day of April, 1912.

The claim presented to the administrator, as shown in the complaint, is in the following form:

"In the Matter of the Estate of Louis Zanone, Deceased. The undersigned, a creditor of Louis Zanone, deceased, presents her claim against the estate of said deceased, for approval, as follows, to wit:

Estate of Louis Zanone, Deceased, to Maria Masano, Dr.

To principal sum of order and agreement...	\$500 00
To interest on same, from November 18th, 1911, at seven per cent. per annum to date	12 50
	<hr/> \$512 50

"Said agreement and order was made and given, for a valuable consideration, on the Tuolumne County Bank, of Sonora, Cal., and was drawn against the funds on deposit therein, and is in words and figures as follows:" Then follows a copy of the instrument set out in the complaint—" [Signed] Maria Nasano.

"Subscribed and sworn to before me this 30th day of March, 1912. A. H. Carpenter, Notary Public in and for San Joaquin County, State of California. [Notarial Seal.]"

It is averred in the complaint that demand was made for "payment of said claim, note, obligation, or order, but the said defendants have at all times refused, and still continue to refuse, to allow or pay the same, \* \* \*

although said defendants have in their hands sufficient money belonging to said deceased, after deducting therefrom all the costs and expenses of administration of said estate, to more than pay the same; and the said note, obligation, order, or claim hereinbefore set forth, together with the interest accrued thereon, is disallowed, rejected, wholly unpaid, and due and owing to plaintiff from said defendants." It is also alleged that said Zanone "left no wife, child, father, mother, sisters, or brothers in the said county of San Joaquin or elsewhere, to the knowledge of plaintiff." The prayer is for "judgment against said defendants for the sum of \$500," together with interest to the entry of judgment.

The complaint was demurred to by defendant administrator on the grounds following: (1) That the court has no jurisdiction of defendant McCown as administrator of said estate; (2) that there is a misjoinder in this: That the Tuolumne County Bank alone, if any person, should be made defendant; (3) that the complaint does not state facts sufficient to constitute a cause of action, for the reason that "the instrument set out in the complaint \* \* \* shows on its face that it is an attempted testamentary disposition of property by means of an improperly executed will"; (4) that the complaint is ambiguous and uncertain, because "it is impossible to determine whether said instrument is pleaded as a note, an obligation, or an order or either or all," nor can it be ascertained from the complaint "whether the said instrument is a promissory note, an obligation, or an order upon a bank for the payment of money."

It is stated, as grounds of demurrer by defendant bank, that it appears from the complaint that said instrument was not presented to said bank for payment "during the lifetime of Zanone, and that Zanone died on the 19th day of December, 1911, and that said check or order was presented to Tuolumne County Bank on the 10th day of February, 1912, and by reason of the death of said Louis Zanone said bank could not lawfully pay said check or order," and that said bank is improperly joined as a defendant in the action with the administrator of said estate, who "is entitled to the possession of all the estate of said deceased, and that defendant, the bank, could not pay any claim against said estate to any one." The demurrer was sustained without leave to amend, and judgment dismissing the action was entered, from which plaintiff appeals.

[1] In her complaint, the plaintiff seems unable definitely to characterize the instrument sued on, and therefore describes it as "a promissory note, obligation, and order on said bank." The instrument is not a promissory note, for the signer does not promise "to pay a specified sum of money." Section 3244, Civ. Code; Kendall v. Parker, 103 Cal.

319, 324, 37 Pac. 401, 402 (42 Am. St. Rep. 117). "A check is a bill of exchange drawn upon a bank or banker, or a person described as such on the face thereof, and payable on demand, without interest." Civ. Code, § 3254. "A bill of exchange is an instrument, negotiable in form, by which one, who is called the drawer, requests another, called the drawee, to pay a specified sum of money." Civ. Code, § 3171.

[2] The instrument resembles a check, when reduced to its essential elements. It is an order on the Tuolumne County Bank to pay a specified sum to the payee, "if countersigned across the back" by the drawer and presented in his lifetime; and, if presented after his death, then to pay without being countersigned. Regarding it as a check on the bank, it did not operate as an equitable assignment of so much of the drawer's funds as he had in the bank at that time, without being presented for payment. *Donohoe-Kelly Banking Co. v. S. P. Co.*, 138 Cal. 184, 71 Pac. 93, 94 Am. St. Rep. 28. In 138 Cal. 169, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19, in the case of *Pullen v. Placer County Bank*, the question is also very fully discussed. The rule enunciated in both cases is that a check does not operate as an assignment of the money for which it was drawn; and, until the check is presented, no property right in the fund passes to the payee by virtue of the check. In *Pullen v. Placer County Bank*, *supra*, and in like cases, there was no contract with, or promise made to, the payee and no consideration to support the instrument. The claim that the death of Zanone revoked the authority of the bank to pay the check is not supported by the *Pullen Case*, in which the check was a gift.

[3] We have seen that a check is a bill of exchange. "The rights and obligations of the drawer of a bill of exchange are the same as those of an indorser of any other negotiable instrument." Civ. Code, § 3177. "Every indorser of a negotiable instrument, unless his indorsement is qualified, warrants to every subsequent holder thereof, who is not liable thereon to him; \* \* \* fourth, that if the instrument is dishonored, the indorser will \* \* \* pay the same with interest. \* \* \*" Civ. Code, § 3116. Mr. Daniels cites several cases where it has been held that notes made payable "after a man's death," or "to be allowed at my decease," or a provision to pay "on demand after my decease," or "one day after date or at my death," are good negotiable notes. 1 Daniels on Neg. Inst. (5th Ed.) § 46. The instrument in question is negotiable in form, and comes under the classification of negotiable instruments, as mentioned in section 3095 of the Civil Code. It not only recites a consideration but "it is presumed to have been made for a valuable consideration," before its maturity, "and in the ordinary

course of business." Civ. Code, § 3104. In effect, there was here an obligation that the drawer's estate would pay, if the bank refused.

Mr. Daniels shows that the doctrine of the revocation of a check or bill by the death of the drawer is generally based on the English case of *Tate v. Hilbert*, 2 Ves. Jr. 118 (1793), 4 Brown Chy. Cas. 286; *Chitty, Jr.*, on Bills, 510. In *Tate v. Hilbert* it was held that the gift of a common check on a banker, payable to bearer, was not a valid *donatio mortis causa* or an appointment or disposition in the nature of it. Says Mr. Daniels: "It is quite true that authority to an agent is revoked, as a general rule, by death of the principal (*Story on Agency*, § 488); but this doctrine is qualified by the equally well-settled principle that, if the authority be coupled with an interest in the thing vested in the agent, the death of the principal operates no revocation. Now where a check is given to the payee for a valuable consideration (and the check imports value), the authority to the payee to collect the amount from the bank is coupled with a vested interest in the check. He can sue the drawer upon the check, if it be dishonored. \* \* \* The English case, above referred to, does not determine, as has been supposed, that, where a check is given for value, the authority of the banker to pay it is revoked. The death of the drawer of an ordinary bill of exchange does not revoke it, and we can discern no principle of law which allows the death of the drawer to affect the rights of a checkholder who has given value for it." The author cites volume 1 at page 498; *Chitty on Bills*, 282, 287; *Cutts v. Perkins*, 12 Mass. 206; *Edwards on Bills*, 454; *Parsons on Notes and Bills*, 287. The author further says: "The idea that the death of the drawer of a check, given to the payee for value, operates a revocation is, as it seems to us, a total misconception of the law. For a check is a negotiable instrument as often, if not more frequently, given for value than any other species of commercial paper. The drawer is deemed the principal debtor (section 1587); and it is anomalous to hold that his death in any wise lessens his obligations, or the right of the bank to pay it, when given for value." 2 Daniels on Neg. Inst. § 1618b.

Mr. Morse discusses the doctrine of revocation in volume 1, § 400, and contends that it is "a perversion of reason, whatever may be the view taken of the question of assignment." Among other reasons given, the author says: "It is inconsistent to hold that a general deposit is a debt, and that the bank is not an agent or trustee or bailee in respect to it, and then, just to bolster up this error, turn completely about and say the bank is an agent, and must be governed by the rules of agency"—that, even admitting that the rules of agency control, "an agency clearly intend-



ed to be good after death is so held"; that the personal representatives take the property of the deceased, subject to all proper claims against it; that the holder may sue the drawer on a check. It is a binding instrument, and this contract should not be lessened by death more than others.

In the present case, it is not necessary to determine the question definitely. If the bank has paid the money of deceased to the administrator, it can show the fact, and in that case the administrator seeks only to be guided as to the payment.

[4] The principal objection made to the claim is that the check was an ineffectual attempt at a testamentary disposition. On its face, the instrument cannot be so regarded. It is a valid and binding obligation on which plaintiff may recover. *Landis v. Woodman*, 126 Cal. 454, 58 Pac. 857. If there is any good defense to it, this may be shown by answer and at a trial. We think the demurrer should have been overruled, and defendants required to answer.

The judgment is therefore reversed.

We concur: HART, J.; BURNETT, J.

20 Cal. App. 686

#### HOLLAND v. FLASH. (Civ. 1,211.)

(District Court of Appeal, Second District, California. Dec. 19, 1912. Rehearing Denied Jan. 18, 1913; Denied by Supreme Court Feb. 17, 1913.)

#### 1. BROKERS (§ 43\*)—COMPENSATION—NECESSITY OF MEMORANDUM—SUFFICIENCY.

Under Civ. Code, § 1624, requiring an agreement authorizing or employing a broker to sell real estate for a compensation or commission, a memorandum in writing, to the effect that defendant as the owner of certain realty had listed same for sale or exchange with plaintiff's assignor, who had obtained an offer in writing from a certain person to exchange certain land therefor, in which event defendant would pay a certain sum, and that if such exchange was not made the agreement should be of no effect, was not an agreement generally employing or authorizing plaintiff's assignors to act as agents in selling the property, and, failing, such exchange did not include any subsequent sales or exchanges.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 44; Dec. Dig. § 43.\*]

#### 2. WORK AND LABOR (§ 10\*)—EXPRESS CONTRACT UNENFORCEABLE.

A broker who proves no contract of employment in writing as required by Civ. Code, § 1624, is not entitled to recover the reasonable value of services in effecting a sale.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. § 25; Dec. Dig. § 10.\*]

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action by Walter Holland against H. L. Flash. Judgment for defendant, and plaintiff appeals. Affirmed.

Ray Howard, of Los Angeles, for appellant. Lynden Bowring and Frank C. Hill, both of Los Angeles (Geo. S. Hupp, of Los Angeles, of counsel), for respondent.

ALLEN, P. J. Plaintiff by his complaint sought to state two causes of action: First, that defendant listed, by a written contract or memorandum subscribed by defendant, his property with plaintiff's assignors, who were real estate brokers, and agreed to pay plaintiff's assignors for their services in negotiating a sale thereof the sum of \$900, alleging that pursuant thereto they did procure such customer, and did negotiate a sale and exchange of the property in pursuance of said employment. Nonpayment was alleged, and the assignment of the cause of action to plaintiff. The second cause of action, in substance, declares upon the same written employment and listing of the property, but alleges an agreement thereby to pay the reasonable value of their services, which reasonable value is alleged to be \$900. The assignment of this cause of action is also alleged, and the nonpayment. The complaint was verified, as was the answer, in which it was denied that there was any listing of the property with plaintiff's assignors; denied that any written contract, note, or memorandum was subscribed by defendant for such listing, or for any other purpose or at all; denied that they procured a customer; denied any agreement to pay, as in the complaint alleged, and generally denied each and all of the allegations of the second cause of action. Upon the trial of the cause a judgment of nonsuit was entered, from which judgment plaintiff appeals upon a bill of exceptions.

This bill of exceptions discloses that the only memorandum or instrument in writing executed between the parties was one which, in so far as material in determining the questions here involved, was in these words: "Whereas, I, H. L. Flash, \* \* \* am the owner of that certain apartment house known as the St. Lelia Apartments, \* \* \* desire to dispose of said property and have listed the same for sale or exchange with N. M. Entler; and whereas, said N. M. Entler has by his efforts succeeded in obtaining an offer in writing from Dr. H. A. Atwood \* \* \* to exchange certain land situate in said Riverside county for my above-described property; provided that the mortgage of \$17,000 now about due can be refunded by me with a new loan of the same amount, to wit, \$17,000, for a term of three years, or thereabouts, at 7% per annum net; \* \* \* now, therefore, it is hereby understood and agreed between said H. L. Flash and said N. M. Entler that in said above-mentioned exchange is consummated, that said H. L. Flash will pay to said N. M. Entler the sum of \$1,500, said sum to constitute full compensation for all services rendered by said Entler to said H. L. Flash, and to include all expenditures for assistance of other agents and brokers in negotiating and obtaining said loan. \* \* \* Second. That if for any

reason the exchange above referred to is not consummated, then and in that case the above commission agreement shall be null and void; but if the loan of \$17,000 is actually negotiated or obtained by or through said N. M. Entler, said H. L. Flash will pay to said N. M. Entler the sum of \$510; \* \* \* In witness whereof," etc. The bill of exceptions further discloses that there was no deal or exchange consummated between defendant and said Atwood, and none was procured by plaintiff's assignors; nor was any loan of \$17,000, or any sum, effected through the instrumentality of plaintiff's assignors. It is true that defendant and one Levi were negotiating for an exchange of the same property, and that plaintiff's assignors procured Levi to increase his offer theretofore made to defendant in the exchange to the extent of \$500, and defendant and said Levi consummated an exchange of property, which involved the property described in the contract hereinbefore referred to.

[1, 2] The question thus presented upon this appeal is as to the sufficiency of the contract or memorandum under subdivision 6 of section 1624 of the Civil Code as an agreement authorizing or employing an agent or broker generally to purchase or sell real estate for compensation or a commission. We think it clear from a reading of the memorandum that it was dual in its character. The only listing or agreement upon the part of defendant for commissions, or authorizing or employing plaintiff's assignors as agents or brokers, was to carry out a certain specified exchange with a particular individual upon terms therein set forth, and it was expressly stated that if such exchange with that individual, under the terms specified, was not accomplished, then the commission agreement should be null and void. It was agreed, however, that there was a general employment as brokers to negotiate a loan of \$17,000 upon defendant's property at a specified rate of interest. There is no pretense, however, that this loan was ever negotiated; hence nothing was done by plaintiff's assignors under the written memorandum of agreement. We do not construe this agreement as one generally employing or authorizing plaintiff's assignors to act as agents to negotiate or sell this property, or to do any act or thing connected with its negotiation or sale, other than to procure if possible the Atwood exchange upon the terms specified. Failing in that regard, the contract by its terms was at an end, and did not cover, or purport to cover, any agreement with reference to subsequent deals, sales, or exchanges. Were it even conceded that the exchange with Levi was procured through the agency of plaintiff's assignors, nevertheless, there was no written memorandum or agreement authorizing their employ-

ment in that regard, and for such services, under subdivision 6 of the above-named section, no recovery could be had. The complaint affirmatively alleges that the listing of the property was under this written agreement, and to this agreement alone must we look, then, to determine what was meant by the term "listing"; and from that we find that it was but an agreement of the limited character hereinbefore stated, and that there was no general listing and no general employment contemplated between the parties, or with reference to which any written memorandum was made. It was incumbent upon plaintiff to show the employment under which the commission or compensation was earned to have been by written agreement or memorandum. This he failed to do. There being no contract of employment in writing, it is clear that plaintiff is not entitled to recover the reasonable value of the services under the second count of his complaint. This question has long been settled by the decisions of our Supreme Court. *Jamison v. Hyde*, 141 Cal. 113, 74 Pac. 695.

We see no error of the court in granting the motion for a nonsuit, and the judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

20 Cal. App. 668

QUAN QUOCK FONG et al. v. LYONS,  
Constable of Los Angeles Tp.,  
et al. (Civ. 1,204.)

(District Court of Appeal, Second District,  
California. Dec. 18, 1912.)

# 1. JUDGMENT (§ 155\*)—DEFAULTS—MOTION.

A notice of a motion to set aside a default, which stated that the grounds were based upon an affidavit attached to and forming a part of the motion, is sufficient under Code Civ. Proc. § 1010, providing that such notice shall state when the motion will be made, and the grounds upon which it will be made and the papers upon which it will be based, where the affidavit disclosed that the default had been taken during the time given defendants to answer over.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 306, 307; Dec. Dig. § 155.\*]

# 2. JUDGMENT (§ 160\*)—MOTION—AFFIDAVIT OF MERITS.

An affidavit attached to a motion to set aside a default, which only stated that affiant was fully advised of the facts and circumstances involved in the defense, is insufficient as an affidavit of merits.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 314-316; Dec. Dig. § 160.\*]

# 3. JUDGMENT (§ 158\*)—DEFAULTS—MOTIONS—AFFIDAVIT OF MERITS.

Where the court under Code Civ. Proc. § 473, extended the time in which defendant was required to answer, the enlarged time is as complete a protection from default as the original time given defendants, and a default wrongfully entered where the clerk refused to file defendant's answer may be set aside without an affidavit of merits.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 311; Dec. Dig. § 158.\*]



#### 4. APPEAL AND ERROR (§ 529\*)—RECORD—CONSTRUCTION—MOTION.

A motion being a viva voce application to grant an order, plaintiff cannot complain on appeal that the record shows no motion actually made to set aside a default where the order appealed from recited that it was granted upon defendant's motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2389-2393; Dec. Dig. § 529.\*]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Quan Quock Fong and another against George W. Lyons, as constable of Los Angeles township, of Los Angeles county, Cal., and others. From an order vacating a default entered against defendants, plaintiffs appeal. Affirmed.

Paul W. Schenck and Roland G. Swaffield, both of Los Angeles, and John G. Munholland, of Long Beach, for appellants. C. W. Stahl and W. S. Baird, both of Los Angeles, (C. H. Sayles, of Los Angeles, of counsel), for respondents.

ALLEN, P. J. This appeal is by plaintiffs from an order vacating a judgment and setting aside a default theretofore made and entered against defendants.

An action, the character of which, or the sufficiency of the complaint to state a cause of action, is not disclosed, was commenced on December 13, 1911, by plaintiffs against defendants, and on December 21st defendants entered their appearance, one of the defendants filing a general demurrer to the complaint, and the other defendants filing a notice of motion to require plaintiffs to state more specifically certain matters generally alleged. The demurrer was on January 8, 1912, overruled, and on the same day the motion of the other defendants was denied. On January 10, 1912, the default of the defendants, other than the demurring defendant, was entered, and on January 22d the court ordered a judgment to be entered against all of the defendants, except the demurrant. On January 19th the defendants, other than the demurrant, served notice of a motion to vacate the judgment and default, the same to be heard January 29th, which notice of motion stated that the same would be based upon the following grounds, to wit: First, on the affidavit of C. W. Stahl, a copy of which was attached to and made a part of the motion; second, on the verified answer duly served on plaintiff's attorneys January 17th, and then in the possession of the clerk of the superior court of Los Angeles county; and, third, upon the pleadings, files, and record of the cause. The affidavit of Stahl alleged that at the hearing of the demurrer and motion on January 8th the court, when it overruled the demurrer and denied the motion, made and announced from the bench and entered upon the court calendar an order giving the defendants 10 days in which

to prepare and file their answer, which answer was prepared and offered for filing within the time specified, and the same was delivered to the clerk, who refused to mark the same as filed because of the entry of a previous default. Service of the answer of the demurring defendant was admitted. The record shows that the hearing of the motion to vacate was by stipulation continued to February 19, 1912, upon which date the same came on for hearing, and upon which hearing only the affidavit of Stahl was received and presented to the court and the court vacated the judgment and set aside the default of defendants. From this order plaintiffs appeal upon a bill of exceptions which discloses the matters hereinbefore stated.

[1] Appellant's first contention is that the notice of motion stated no grounds upon which the same would be based, as required by section 1010 of the Code of Civil Procedure. This section requires that the notice shall state when the motion will be made, the grounds upon which it will be made, and the papers, if any, upon which it will be based. We think a fair construction of the notice of motion may be said to state the grounds of the motion. It stated that the grounds were based upon the affidavit attached to and forming a part of the motion. This affidavit disclosed that the court had announced from the bench and entered upon the court calendar an order giving defendants until January 19th in which to answer. We think that reading this motion and affidavit together they state in a manner plainly to be understood that the motion would be based upon the grounds that the entry of default was made prematurely and within the time allowed by the court for answering.

[2, 3] It is next contended that the affidavit of merits was insufficient. This we think apparent. Such affidavit only stated "that affiant was fully advised of the facts and circumstances involved in the defense." This could not be considered an affidavit of merits. *Cooper-Power v. Hanlon*, 7 Cal. App. 724, 95 Pac. 678, and cases cited. We are then confronted with a question as to the necessity of an affidavit of merits where the motion is based upon facts showing a premature entry of default and judgment. We may assume that, when a motion is for relief under section 473 of the Code of Civil Procedure, an affidavit of merits is necessary. Under that section, the parties are seeking relief on account of mistake, surprise, or excusable neglect. That section confers power upon the court to enlarge the time for answer. When such power has been exercised and an order made from the bench enlarging such time, it was the ministerial duty of the clerk to have entered such order in the minutes, and a party defendant who answers and tenders for filing the answer within such enlarged time is not guilty of any

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

mistake or neglect, excusable or otherwise; and, when the attention of the court is called to the failure of the clerk to enter the proper minute order and the entry of default on account thereof and the rendition of judgment based upon such unauthorized default, it possesses the power, and it is the duty of the court, to vacate such unwarranted proceeding, and restore the record to the condition in which it would have been had the proper order of the court been recognized and obeyed. In the case at bar the court had before it the grounds of motion stated in the affidavit. It could, and it will be presumed that it did, verify the same from its calendar, and, finding the fact to be that the default and subsequent proceedings were in disobedience of the original order, properly vacated such default and judgment. The enlarged time given defendant by a court to answer is as complete a protection from default as is the original time given to answer, as specified in the summons, in which latter case no affidavit of merits is requisite. *Foster v. Vehmeyer*, 133 Cal. 459, 65 Pac. 974; *Norton v. Atchison, etc., R. R. Co.*, 97 Cal. 390, 30 Pac. 585, 32 Pac. 452, 33 Am. St. Rep. 198; *Waller v. Weston*, 125 Cal. 203, 57 Pac. 892.

[4] It is further insisted by appellants that the record does not disclose that any motion was actually made to vacate the default and judgment. A motion being an application *viva voce* to grant an order, it appears from the order of court that such motion was made. The order reads: "It is ordered that defendants' motion to set aside," etc., "be and the same is hereby granted." Here is a declaration by the court that a motion was made and granted. We see no merit in the contention that the motion was not actually made.

We perceive no error in the action of the court in vacating the judgment and default, which was in line with what we conceive to have been its plain duty under the circumstances of the case.

The order is affirmed.

We concur: JAMES, J.; SHAW, J.

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20 Cal. App. 800

**DREYFUS v. RICHARDSON.**

(Civ. 1,142.)

(District Court of Appeal, Second District, California. Dec. 31, 1912. Rehearing Denied by Supreme Court Feb. 28, 1913.)

**1. BROKERS (§ 10\*) — EMPLOYMENT — SOLE AGENCY — RIGHT OF OWNER.**

An owner, who makes a real estate broker his sole agent for an indefinite period to procure a purchaser, may revoke the employment, unsupported by any other consideration than the mutual covenants implied in the contract of employment, at any time before a purchaser has been secured, and negotiate a sale himself, though, during the existence of the contract, he may not place the property in the hands of another broker for sale.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 11; Dec. Dig. § 10.\*]

**2. BROKERS (§ 46\*) — COMMISSIONS — WHEN EARNED.**

An owner making a real estate broker his sole agent to procure a purchaser sold the property to a purchaser who learned of the property from a third person, and who, without the knowledge of the agency, called at the office of the broker to procure a map, when he was for the first time told that the broker was the agent to procure a purchaser. The purchaser was adverse to dealing with the broker, and dealt directly with the owner. *Held*, that the broker was not the procuring and efficient cause of the sale, and could not recover commissions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 47; Dec. Dig. § 46.\*]

**3. BROKERS (§ 49\*) — COMMISSIONS — WHEN EARNED.**

A broker employed to procure a purchaser of real estate, who procures one who agrees to forfeit \$2,000, unless he consummates a purchase for \$40,000, does not thereby make a sale; for the contract is but the sale of an option to purchase.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 70-72; Dec. Dig. § 49.\*]

**4. BROKERS (§ 49\*) — COMMISSIONS — WHEN EARNED.**

Where an owner employing a broker to procure a purchaser made a sale before a customer procured by the broker submitted any offer, the broker had not earned commissions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 70-72; Dec. Dig. § 49.\*]

Appeal from Superior Court, Santa Barbara County; Samuel E. Crow, Judge.

Action by Louis G. Dreyfus against Julia M. Richardson. From a judgment for defendant, plaintiff appeals. Affirmed.

II. P. Starbuck and Canfield & Starbuck, all of Santa Barbara, for appellant. John J. Squier, of Santa Barbara, for respondent.

**SHAW, J.** This action was instituted to recover compensation for services alleged to have been rendered by plaintiff for defendant in the sale of certain real estate.

Plaintiff bases his right to recover upon three grounds, each of which, as a cause of action, is separately stated in the complaint. The first cause of action is based upon an exclusive agency given plaintiff, whereby defendant, in writing, authorized him to procure a purchaser for certain real estate own-

ed by her, it being alleged therein that plaintiff did procure two persons, to wit, Ellen C. Bothin and A. L. White, each of whom was ready, able, and willing to purchase the property at the price for which it was sold; that while the agreement was in force defendant employed another agent through whom she sold the property to said Bothin, all to plaintiff's damage in the reasonable value of the services rendered by him. It is alleged in the second cause of action that plaintiff, at the special instance and request of defendant, rendered services to defendant in procuring for defendant a purchaser for the real estate at the price of \$35,000, to whom and for said price defendant sold said property, in consideration of which she undertook and agreed to pay plaintiff the sum of \$1,750, alleged to be the reasonable value of the services performed. The third cause of action is founded upon an allegation that plaintiff, at the special instance and request of defendant, procured one A. L. White, who was ready, able, and willing to purchase the real estate at the price of \$35,000, in consideration of which defendant promised to pay plaintiff the sum of \$1,750, which was the reasonable value of the services rendered.

At the close of plaintiff's evidence defendant moved that a nonsuit be entered as to the third cause of action, upon the ground that there was no evidence tending to show that A. L. White was ever procured as a purchaser for the property at any price, or at all, or that he was at any time ready, able, and willing to buy the property at the price named, or at any price whatsoever. This motion was granted.

The jury called to try the case, and to whom the issues joined upon the first and second causes of action were submitted, rendered a verdict for defendant. Plaintiff appeals from the judgment entered in accordance therewith, and from an order of court denying his motion for a new trial.

Appellant's sole contention is that the verdict is not supported by the evidence. The facts which the evidence tends to establish, in so far as necessary to a determination of the question, are substantially as follows: Defendant, who resided in Riverside, Ill., owned a country place in Santa Barbara county, known as "Piranhurst." In October, 1908, she, by letter, authorized plaintiff to secure a purchaser therefor at the price of \$75,000. About a year later, no sale having been made, plaintiff wrote to defendant, suggesting that she reduce the price of the property to \$45,000 and make him her sole agent for the purpose of securing a purchaser thereof. Defendant, by letter dated October 14, 1909, assented to both propositions, thereby, as claimed by appellant, making him her sole and exclusive agent for the sale of the property. Plaintiff immediately caused to be put up at the place a sign announcing that



the property was for sale by him as sole agent, and otherwise advertised the sale of the property, and thence on until the consummation of the sale in March, 1910, endeavored, without success, to find a purchaser. The fact that the property was on the market was, and had been for a long time, a matter of general knowledge in the community. In February, 1910, while H. E. Bothin and wife were temporarily guests of a hotel in Santa Barbara, his attention was attracted to the property by Mrs. Biddle, likewise a guest of the hotel. Thereupon he and his wife, with Mrs. Biddle, visited the property, and he concluded that he would buy it if it could be had at a satisfactory price; but learning from Mrs. Biddle and the gardener in charge of the place that it was held at \$45,000 he abandoned the idea and returned to his home in San Francisco. Later, about March 8th, he and his wife were again in Santa Barbara, when they called upon Mrs. Eaton, an old friend living near Piranhurst, and Mrs. Eaton, stating that she would like them for neighbors, asked why they did not buy Piranhurst. The party walked over and inspected the property, at which time Mr. Bothin asked Mrs. Eaton if she knew the defendant well enough to submit an offer of \$35,000, to which she replied that she did not, but spoke of Mr. E. P. Ripley as an old friend of defendant. Thereupon, by request of Mr. Bothin, she telephoned Mr. Ripley, without giving Mr. Bothin's name, asking if he thought defendant would accept a bona fide cash offer of \$35,000 for Piranhurst, and requested him, as an old friend of defendant, to transmit the offer, which Mr. Ripley did, receiving from defendant an acceptance of the offer, pursuant to which, through Mr. Ripley, the deal was closed. Plaintiff never saw or talked with Bothin, except on one occasion when, after Mr. Bothin had learned from Mrs. Biddle that the property was for sale, and without knowing the plaintiff was the agent therefor, but by reason only of the convenient location of his real estate office, he entered and asked for a map of the Montecito Valley, during which visit, not to exceed two minutes in duration, a son of plaintiff mentioned two or three places in the Montecito, among them Piranhurst, the location of which on a wall map he endeavored, without success, to point out to Bothin, who, disclaiming interest therein, got his map and, as plaintiff says, "moved out rapidly after that." The only offer which plaintiff ever secured was one made by A. L. White, whereby he offered to give \$2,000 for an option to purchase the property at the price of \$40,000, the option to be exercised in six months or a year; otherwise the \$2,000 to be forfeited. He could not say whether, under the circumstances, he would have paid \$35,000 cash for the property.

Upon these facts appellant claims, first, that defendant's sale of the property through

Mr. Ripley was a breach of her contract with plaintiff for an exclusive agency; second, that plaintiff was the procuring cause of the sale to Bothin, the purchaser of the property; and, third, that defendant's sale of the property to Bothin, without notice to plaintiff, prevented plaintiff from selling it to Mr. White.

[1] We attach little importance to the fact that defendant, without other consideration than the mutual covenants implied in the contract, made plaintiff her sole agent for an indefinite period. She not only had the right to revoke such agency at any time before he had secured a purchaser, since the agreement did not purport to give plaintiff an exclusive right of sale (*Golden Gate Packing Co. v. Farmers' Union*, 55 Cal. 606), and conceding that during the existence of the contract she was prohibited thereby from placing the property in the hands of another agent with authority to sell the same (*Dole v. Sherwood*, 41 Minn. 535, 43 N. W. 569, 5 L. R. A. 720, 16 Am. St. Rep. 731), she, as owner, however, could, without revoking the contract, negotiate the sale thereof, or accept an offer to purchase the same. Mr. Ripley was not defendant's agent. As he states, with commendable modesty, he was an employé of the Atchison, Topeka & Santa Fé Railway Company, and, as he correctly says, was for the time acting merely as a messenger boy in transmitting to defendant an offer of a party to him at the time unknown. He possessed no authority from defendant to negotiate a sale of the property, or bind her by an agreement for a sale at any price, or even, so far as shown by the record, sign, as agent of defendant, the papers closing the deal, which act, however, was ratified by her. Had the purchaser hired a boy to deliver his offer to defendant at her hotel, it might with equal reason be claimed that the boy so employed was defendant's agent and the sale made through him. The sale was made directly by defendant, in accordance with her right so to do.

[2] The most that can be said in favor of appellant's contention that plaintiff was the procuring cause of the sale is that the evidence touching the question is conflicting. The first information that the property was for sale was obtained by Bothin from Mrs. Biddle. That he learned of the price at which the property was for sale through Mrs. Biddle or the caretaker, and not from plaintiff, must be accepted as true. After he had thus ascertained through others than plaintiff the facts necessary to enable him to determine whether he wished to acquire the property, he, without knowing of the relation existing between plaintiff and defendant, called at the former's office to procure a road map, when he was for the first time told that plaintiff was agent for this as well as other properties in the vicinity. This information imposed no obligation upon Bothin

to deal with defendant through plaintiff; indeed, it fairly appears that Bothin was averse to dealing with plaintiff, and the jury might well have concluded that he would not have made the purchase at all if required to conduct negotiations through plaintiff. While the fact that the property was for sale appears to have been a subject of conversation between plaintiff and Mrs. Biddle during social calls made by him, it does not appear when, where, from whom, or in what manner, Mrs. Biddle first obtained the information imparted to Bothin. Moreover, it conclusively appears that upon learning the price asked for the property he abandoned all idea of buying it. Several weeks thereafter, through the efforts of Mrs. Eaton, an old friend, he was induced to make to defendant direct an offer, which she accepted. The facts presented are not unlike those involved in the case of *Sibbald v. Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441, and the recent case of *Cone v. Keil*, 18 Cal. App. 675, 124 Pac. 548, both of which constitute authority for holding that, under the facts in the case at bar, the jury were fully justified in concluding that appellant was not the procuring and efficient cause of the sale made by defendant.

[3, 4] There is not even a conflict of evidence upon the third cause of action, that by defendant's act in selling the property the plaintiff was prevented from selling the same to White, and as to which the court granted defendant's motion for a nonsuit. An option given to a person, whereby he agrees to forfeit the sum of \$2,000, unless he consummates a purchase of the property at a price of \$40,000, is by no means a sale of the property, but the sale of an option to purchase. *Pehl v. Fanton*, 17 Cal. App. 247, 119 Pac. 400. Moreover, defendant possessed the right to make the sale, and did make it, before any offer of White was submitted to her; hence, such act being in the exercise of her legal rights, it could not be deemed unlawful, even conceding that the offer of White to purchase an option was submitted to defendant, which it was not, and that, as suggested, he would have bought the property if he had known it could be had at the reduced price.

The judgment and order denying plaintiff's motion for a new trial are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

<sup>20</sup> Cal. App. 733

SHERMAN v. AYERS et ux. (Civ. 1,220.)  
(District Court of Appeal, Second District, California. Dec. 28, 1912. Rehearing Denied Jan. 27, 1913.)

#### 1. SALES (§ 178\*)—PERFORMANCE.

There was no acceptance, within a provision of a contract of sale, providing that operation of certain machinery should constitute an acceptance, where the operation was merely

to procure information as to existing defects and determine whether the machine could be operated.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 451-455; Dec. Dig. § 178.\*]

#### 2. APPEAL AND ERROR (§ 1051\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in admitting in evidence, in an action on a contract to install machinery to recover the price, declarations by plaintiff's employes that certain machines had been improperly installed, and could not be put into condition, was harmless where the evidence conclusively showed that such declarations were in fact true, so as to prevent recovery.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

#### 3. SALES (§ 358\*)—ACTIONS BY SELLER—ADMISSION OF EVIDENCE.

In an action on a contract to construct and sell a machine to recover the contract price, evidence as to the value of the plant installed in its uncompleted condition, the removal of which the purchaser had requested, was not admissible; plaintiff not being entitled to recover the value of the parts in the purchaser's possession.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1049-1055; Dec. Dig. § 358.\*]

Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by W. H. A. Sherman against C. W. Ayers and wife. From a judgment for defendants, and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Stutsman & Stutsman, of Los Angeles, for appellant. Henry T. Sale, of Los Angeles, and Charles del Bondio, of Taft, for respondents.

ALLEN, P. J. In the original complaint it was alleged that plaintiff's assignors undertook the construction and installation of a certain electric engine, under and by virtue of a contract with defendant which specified what should be furnished and installed in connection with the engine, the total price for all of which was \$550. The contract contained a warranty as to material and workmanship connected with the installation. The complaint alleged that pursuant to the contract there had been installed, as by the contract specified, the engine and its equipment, and that no part of the consideration price had been paid. The answer denied that said engine and equipment had ever been installed as by said contract provided, and alleged that the same was defective in many essential parts and wholly failed to perform the work for which it was intended, and for that reason refused to accept the same; that plaintiff's assignors undertook the work of reconstruction and curing defects, but wholly failed to do so, and left the engine in a dismantled condition, with its various parts dispersed about the floor of the building where it is situate, and that defendant had repeatedly requested plaintiff's assignors to remove said plant from the premises because of its inferior character and



their failure to carry out the contract. Under these issues theretofore framed the action proceeded to trial on the 23d day of March, 1911, before the court, a jury being waived. Thereafter in April an amended complaint was filed, which set forth various changes in the equipment to be furnished, and through which the contract price was increased to \$575. This amended complaint, filed after the trial, seems to have been filed by leave of court, presumably that the pleadings might conform to the proof. The court upon the trial found that the original contract was made as set forth in the complaint, but that the same had thereafter been altered and amended as in the amended complaint declared; that plaintiff's assignors did not furnish and install, in accordance with the written contract or the modification thereof, in a good and workmanlike manner, the engine and other equipment; that the same was wholly insufficient for the purposes intended; that plaintiff's assignors, after repeated efforts to put the plant in working order, abandoned the installation of the same, and took down the machinery and appliances and scattered the various parts about the building and premises; that by reason of their failure to perform the contract they were not entitled to recover judgment. There was a second cause of action about which there seems to be no serious controversy on this appeal, and need not be noticed. After the entry of judgment for costs in favor of defendant, plaintiff moved for a new trial, which was denied, from which judgment and the order denying a new trial plaintiff appeals.

The principal points raised upon the appeal relate to the insufficiency of the evidence to support the findings of the court. An examination of the record clearly shows that there was ample testimony adduced upon the trial tending to show that plaintiff's assignors never furnished and installed, as by their contract they were bound to do, the engine and equipment specified; that the equipment furnished and provided was defective and insufficient to perform the offices for which they were intended; that at no time after the same was placed in position did it perform the work which, by the guaranty in the contract, it was agreed should be performed; that plaintiff's assignors made repeated efforts at defendant's suggestion to try to cure the defects and to change and alter its installation in such a way as to produce favorable results. In this they seem to have wholly failed, and never did carry out the terms of the contract upon which the suit is brought.

[1] It is contended by appellant that a clause in the contract provided that operation should constitute acceptance, and that the use by defendant for a short time of the engine was tantamount to an acceptance. It is true that such contract did provide that operation should constitute acceptance, but

it certainly appears that no operation after a complete performance of the contract is shown. On the contrary, the whole of the operation, either by the employes of plaintiff's assignors, or by defendant after they left, was in an effort to procure, if possible, information as to any existing defects, and to determine whether or not the same could be made to operate. The evidence does not disclose such an operation as, under the authorities cited, constitutes an acceptance. The case of *Jackson v. Porter Land & Water Co.*, 151 Cal. 32, 90 Pac. 122, relied upon by appellant in support of the proposition that the operation was equivalent to an acceptance, is not an authority under the circumstances of this case. In that case the party had contracted for an engine of certain horse power; it was installed with lesser horse power; the purchaser had knowledge of that fact, and with such knowledge commenced and continued the operation of the pumping plant during an entire irrigating season, and then for the first time raised the question as to the horse power which should have been furnished. In the case at bar the defects were apparent, were recognized, and the attention of plaintiff's assignors was called to them. The operation was not one, under the circumstances, after completion and was not such as would justify a court in saying that the machinery had ever been operated, or that the attempt at operation was the equivalent of acceptance.

[2] Objections were made to the introduction of certain evidence as to the declarations of servants sent by plaintiff's assignors to repair defects, the effect of which declarations was that the machine had been improperly installed, and could not be put in condition. Conceding the error of the court in permitting the introduction of such testimony, nevertheless the case was tried to the court, and evidence is so complete and convincing to the effect that these declarations were true in fact, and that plaintiff's assignors did not comply with the contract, that no prejudicial error could result under the circumstances of the case by reason of the admission of such declarations.

[3] We see nothing in the evidence warranting the contention that the engine was ruined through any act, abuse, or neglect upon the part of the purchaser. The action being based upon an express contract, which the court finds was never performed upon the part of plaintiff's assignors, we see no error in refusing to allow plaintiff to show the value of the plant installed in its uncompleted and imperfect condition. It is true that defendant at the time of the trial still had possession of the parts, scattered about the building, but he had, shortly after discovering that it could not be made to work, and the failure upon the part of plaintiff's assignors to make it work, notified them to remove it. This they failed to do, and we do not conceive it to be the law that they could

recover in this action, under the pleadings, the value of any of these materials or parts so in defendant's possession. A careful examination of the record satisfies us that the findings of the court have ample support from the evidence, and that the judgment is supported by the findings.

The judgment and order are therefore affirmed.

We concur: JAMES, J.; SHAW, J.

20 Cal. App. 708

McTIGUE v. ARCTIC ICE CREAM SUPPLY CO. et al. (Civ. 1,103.)

(District Court of Appeal, First District, California. Dec. 27, 1912. Rehearing Denied Jan. 24, 1913. Denied by Supreme Court Feb. 25, 1913.)

**1. CORPORATIONS (§ 375\*)—LEASE OF PROPERTY—VALIDITY.**

A lease of the entire business of a private corporation authorized by resolution adopted at a meeting of stockholders, representing more than two-thirds of the capital stock, was valid under the express provisions of Civ. Code, § 361a.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1525-1529; Dec. Dig. § 375.\*]

**2. CORPORATIONS (§ 379\*)—"PARTNERSHIP"—REQUISITES—SHARING PROFITS AS RENT.**

A lease by a corporation of its business and property for a period of five years, providing for the payment as rental of a sum equal to 25 per cent. of the profits, to be estimated by deducting the necessary cost of manufacturing and marketing the products of the business from its gross returns, and expressly providing that it should not be construed as creating a partnership or tenancy in common, but that the division of profits should be construed merely as a method of ascertaining the rental, did not create a partnership between the corporation and the lessee, within Civ. Code, § 2395, defining a "partnership" as an association of two or more persons for the purpose of carrying on business together and dividing the profits between them, notwithstanding section 2404, providing that an agreement to divide profits implies an agreement for a corresponding division of the losses, since there was no agreement to divide profits, and no intention to create a partnership.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1538; Dec. Dig. § 379.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5191-5202; vol. 8, pp. 7746, 7747.]

**3. PAYMENT (§ 82\*)—RECOVERY—ACTIONS—PARTIES.**

Where a purchaser of a business refused to complete the purchase unless property in possession of a livery stable keeper, and upon which the keeper claimed a lien, was delivered, and, in order to consummate the sale, the seller authorized the purchaser to pay such claim from the purchase money, a recovery of the payment by the seller could not be denied on the ground that the payment was not made by it; the payment having, in effect, been made by it through the purchaser.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 254-266; Dec. Dig. § 82.\*]

**4. LIVERY STABLE KEEPERS (§ 8\*)—CARE OF HORSES AND VEHICLES—LIEN.**

Under Civ. Code, § 3051, providing that every person who, while lawfully in possession of an article of personal property, renders any

service to the owner thereof, by labor or skill, for its protection, improvement, safe-keeping, and carriage, has a lien thereon, dependent on possession, and that livery, boarding, or feed stable proprietors have a lien dependent on possession for their compensation in caring for, boarding, and feeding horses, a livery stable keeper had no lien, as against the owner, on horses and wagons, in his possession, for his services in caring for and keeping them under a contract with a lessee thereof, where he knew of the existence of the lease, and that under it the lessee had no authority to incur debts against the lessor or its property.

[Ed. Note.—For other cases, see Livery Stable Keepers, Cent. Dig. §§ 7-10; Dec. Dig. § 8.\*]

**5. PAYMENT (§ 82\*)—RECOVERY—"VOLUNTARY PAYMENT"—WHAT CONSTITUTES.**

Where a purchaser of a business refused to complete the purchase unless property in the possession of a livery stable keeper, and upon which he claimed a lien, was delivered, and the seller, to prevent a failure to consummate the sale, which would have resulted in great loss and damage to it, paid the livery stable keeper's claim under protest, it was not a "voluntary payment," and, where the claim was unfounded, could be recovered back, since the general rule that, if a person knowingly submits to an illegal demand by paying it, the payment will be deemed voluntary, is subject to the qualification that where the person making the demand has obtained possession of the other's property, without any resort to judicial proceedings to test the validity of his demand, payment under protest will be considered compulsory, if the demand be unlawful, and if the delay necessarily incident to the recovery of the property, by legal process, would have resulted in serious loss.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 254-266; Dec. Dig. § 82.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7352-7354.]

Appeal from Superior Court, City and County of San Francisco; John Van Nostrand, Judge.

Action by Joseph W. McTigue against the Arctic Ice Cream Supply Company and others. From a judgment in favor of the defendant named, and an order denying a new trial, plaintiff appeals. Affirmed.

Wm. P. Hubbard, of San Francisco, for appellant. Wm. J. Hayes and S. J. Hankins, both of San Francisco, for respondent.

LENNON, P. J. In this action the plaintiff sought to recover from the defendants Arctic Ice Cream Supply Company, a corporation, and George W. Morse, the sum of \$921.35, claimed to be due to the plaintiff under the terms of an oral agreement alleged to have been entered into with the plaintiff by the defendants Arctic Ice Cream Supply Company and Morse jointly, for the care, feed, and treatment of 12 horses belonging to the corporation, and which it was claimed were used by it in the transaction of its business at the time the indebtedness here sued on was incurred. Seven of the stockholders of the corporation defendant were joined as defendants in the action, but the demurrers of five of them, viz., Eggers,



Powers, Parker, Harbour, and Kellum, were sustained by the lower court; and subsequently, at the request of the plaintiff, the action as to these particular defendants was dismissed. The record does not show that the defendants Bingley and Parry appeared in the action, or that any judgment was rendered for or against either of them. The defendant Grace D. Ohnimus, sued as a stockholder, joined in the answer of the defendant corporation.

The trial was commenced March 30, 1910, and upon May 26th of the same year the defendant George W. Morse filed his consent to a judgment against him in the sum of \$921.35. Judgment was rendered and entered accordingly; and, after a trial of the action against the defendants Arctic Ice Cream Supply Company and Grace D. Ohnimus, judgment was rendered and entered on April 26, 1911, that the plaintiff take nothing by his action, and that the corporation defendant recover from the plaintiff on a counterclaim the sum of \$350.

Plaintiff's complaint alleges that the plaintiff was a livery stable proprietor, and, among other things, "that on or about the 26th day of July, 1908, plaintiff made and entered into an agreement with the defendant Arctic Ice Cream Supply Company, a corporation, and George W. Morse, wherein and whereby the plaintiff, as such livery stable proprietor, agreed with said defendants to keep, care for, feed, treat, and generally provide for all horses to be furnished by the defendants at the rate of \$20 per month; that under and by virtue of the terms of said agreement, between the 25th day of April, 1908, and the 24th day of July, 1909, the defendants furnished, and the plaintiff kept, cared for, fed, treated, and generally provided for, 12 horses;" and that for such services "there now remains due and unpaid from said defendants the sum of \$921.35." The defendants Arctic Ice Cream Supply Company and Grace D. Ohnimus by their answer denied these allegations, and every other material allegation of the plaintiff's complaint.

Upon the trial of the case, it was not disputed that the plaintiff had rendered the services sued for, relating to the care and keeping of the horses; and, upon this phase of the case, the sole defense of the defendants Arctic Ice Cream Supply Company and Grace D. Ohnimus was framed upon the theory that the corporation was under no legal obligation to pay plaintiff's claim, because the services sued for were rendered after the execution of a lease of the corporation's business to the defendant Morse. In support of this defense, there was offered and received in evidence a contract of lease made and entered into by the corporation defendant and the defendant George W. Morse, which lease it was shown was duly executed by the officers of the corporation, with the

consent, expressed by vote at a stockholders' meeting, of stockholders holding of record more than two-thirds of the issued corporate capital stock. By this lease the corporation demised and let unto the said George W. Morse, for the term of five years, the real and personal property and the ice cream business of the corporation. The lease provided that said George W. Morse should pay to the Arctic Ice Cream Supply Company as rental, on the 1st days of January, April, and October through each year of the life of the lease, a sum equal to 25 per cent. of the profits of the business. Such profits were to be estimated by deducting from the gross returns of the business the necessary cost of manufacturing and marketing its products. Although there was no agreement, expressed or implied, that the corporation should share the losses, if any, of the business, the lease concluded with the clause that: "Nothing herein shall be so construed as to constitute the business into a partnership or tenancy in common of said business; but the division of the profits hereinbefore provided shall be construed merely as the method of ascertaining the rental to be paid."

The evidence adduced at the trial, in addition to the lease above referred to, was practically without conflict, and fully supports the findings of the court made upon the main issues, which were to the effect that the plaintiff did not at any time enter into an agreement with the corporation defendant, or with said defendant and defendant Morse jointly, for the care and keep of said corporation's horses; that on or about the said 24th day of June, 1908, the corporation defendant leased its business and all of its personal property, including the horses mentioned in plaintiff's complaint, to the defendant George W. Morse for the period of five years, who thereupon went into the possession, use, and occupation of said business and personal property, and continued in such possession, use, and occupation until about the 1st day of February, 1909; that it was provided in said lease that said Morse would be responsible for all of the debts contracted by him in carrying on said business; that at no time did the defendant Morse, as such lessee, have any authority, under the terms of said lease or otherwise, to incur debts of any kind for and on behalf of the corporation defendant; that the plaintiff attended a meeting of the stockholders of the corporation defendant on the 16th day of June, 1908, and with other stockholders, representing more than two-thirds of the issued corporate capital stock, voted in favor of a resolution authorizing the directors of the corporation defendant to execute the lease in question to the defendant Morse; that the plaintiff at all times had full knowledge of the terms and conditions of said lease, and had full knowledge that the defendant Morse was in possession of said business and said

personal property as lessee, pursuant to the terms and conditions of said lease, and had no authority whatsoever to incur debts of any kind for or on behalf of the defendant corporation. No claim is made here that the evidence adduced at the trial does not support these findings. The only point relied upon by the plaintiff for a reversal of the judgment rendered in favor of the defendants, upon the issues raised by the complaint and the answer, involves the construction and validity of the contract entered into by the corporation defendant and the defendant Morse.

It is the contention of the plaintiff that the contract in controversy, although designated a lease, and containing covenants of forfeiture and re-entry and all of the usual covenants of a lease, was not in fact a lease, but was in its legal effect an agreement of copartnership. Plaintiff further contends that, whether such contract be construed as a lease or an agreement of copartnership, it is in either event void as an ultra vires act of the corporation. From this it is argued that the defendant Morse, in his dealings with the plaintiff, was, in the absence of a valid agreement to the contrary, merely acting in the capacity of an agent of the corporation, and therefore Morse's contract with the plaintiff, for the stabling of the horses, was the contract of the corporation.

[1] None of these contentions is tenable. It is the rule of law in this state that an ordinary private corporation may lease its entire business whenever such a course is necessary for the best interests of the corporation stockholders and creditors. The only legislative restriction placed upon the execution of such a lease is that the consent of the holders of at least two-thirds of the issued corporate capital stock must be first procured, and that such consent shall be expressed either in writing and acknowledged by such stockholders and made a part of the lease, or by vote at a stockholders' meeting called for the purpose of considering and consenting to such lease. Civ. Code, § 361a; *South Pasadena v. Pasadena Land, etc., Co.*, 152 Cal. 579, 93 Pac. 490; *Graham v. Pasadena Land & Water Co.*, 152 Cal. 596, 93 Pac. 498.

The evidence in this case shows that the lease in question was executed in conformity with the statutory requirements. In this connection it will be noted that the plaintiff does not claim that he was in ignorance of the existence and the scope and effect of the lease, or that his dealings with the defendant Morse were those of a creditor induced to give credit upon the strength of a real or an ostensible partnership. In the absence of such a claim, and in the presence of a decided preponderance of the evidence showing that the plaintiff relied solely upon the obligation and credit of the defendant Morse, we are not called upon to consider

the means and methods employed in the conduct of the business of the Arctic Ice Cream Supply Company, prior to and subsequent to the execution of the lease, in order to determine what would be the rights of a creditor of Morse, who was not informed as to the real relation of the parties to the lease. It may be conceded, as counsel for the plaintiff contends, that the decided weight of authority is to the effect that a corporation cannot lawfully enter into a copartnership agreement with another corporation, nor with an individual, unless expressly empowered to do so by the terms of its charter.

[2] The rule in this behalf, however, need not be further discussed or considered, because we are satisfied that the contract in question here has none of the essentials of a partnership agreement, and is in our opinion just what it plainly purports to be, viz., a lease. The fact that the lease provided that the rent reserved should be a sum equal to 25 per cent. of the net profits of the business did not, in and of itself, establish a partnership relation between the corporation defendant and the defendant Morse. *Smith v. Schultz*, 89 Cal. 527, 26 Pac. 1087.

A partnership is defined to be "an association of two or more persons for the purpose of carrying on business together and dividing the profits between them" (Civ. Code, § 2395); and it is true, generally, that, in the absence of a stipulation to the contrary, "an agreement to divide the profits of a business implies an agreement for a corresponding division of the losses." Civ. Code, § 2404. In the present case, however, there was no agreement to divide the profits, and consequently there was no corresponding obligation to share the losses of the business. In the absence of such an obligation, express or implied, it cannot be said that a partnership agreement existed in the general or in any sense of the term. Moreover, a convincing and conclusive test of the existence of a partnership agreement is usually to be found in the intention of the parties, as gathered from the instrument itself, which it is claimed creates the partnership. Nowhere in the instrument under discussion is there to be found any intimation or suggestion that the corporation defendant was to be a general partner of the defendant Morse. On the contrary, that instrument expressly declares that nothing therein shall be construed as constituting a partnership, and, upon the whole, clearly indicates that a partnership was neither contemplated nor created. The instrument in question was in form and effect a lease for a definite term of years; and, as was said in the case of *Smith v. Schultz*, supra, "the idea of a permanent lease for a definite term of years is at war with the notion of such an indeterminate and fitful relation as a partnership."

In addition to its answer, the defendant corporation pleaded a counterclaim against



the plaintiff, in effect, for moneys had and received in the sum of \$350. The allegations of the counterclaim were, in substance and effect, these: On or about the 1st day of February, 1909, the corporation defendant, apparently with the consent of the defendant Morse, entered into an agreement to sell its business and all of its personal property to one C. O. Swanberg for the sum of \$5,000. Prior to and at the time of the sale, the plaintiff had and held in his possession certain personal property belonging to the corporation defendant, which was included in the sale to Swanberg. Plaintiff refused to relinquish the possession of the property unless he was paid the sum of \$350, which he claimed was due to him for its care and keep from the corporation defendant. Swanberg refused to complete the sale unless this particular property was delivered to him. The failure to consummate said sale would, it was alleged, have resulted in great loss and damage to the corporation defendant; and, to save itself from such loss and damage, it was "compelled, \* \* \* under protest, to permit said C. O. Swanberg to pay to plaintiff the sum of \$350, and deduct the same from the price originally agreed upon for the sale." In brief, the counterclaim is founded upon the theory that the plaintiff obtained the \$350 in question from the corporation defendant by "duress of goods." The lower court accepted this theory, and accordingly rendered judgment on the counterclaim in favor of the corporation defendant in the sum of \$350.

Upon the issue raised by the counterclaim, it was the finding of the lower court, in substance, that the corporation defendant was compelled, in order to save itself from loss and damage, and "under protest, to permit" one C. O. Swanberg to pay over to the plaintiff the sum of \$350. Upon this phase of the case, the record shows the evidence to be, in effect, as follows: On the day of the sale hereinbefore referred to of the corporation defendant's business to Swanberg, it so happened that four horses and several wagons used by Morse in carrying on the business of the Arctic Ice Cream Supply Company, and previously stabled with the plaintiff under a contract with Morse, were not put to work, and consequently remained in the stable. The plaintiff held this particular property, which was valued at \$350, under a claim of lien for services rendered in its care and keep, and refused to deliver it either to Swanberg or the corporation defendant, except upon payment of a sum of money equal to the value of the property, on account of the entire sum which plaintiff claimed was due to him under his agreement with the defendant Morse. The plaintiff refused to recede from this position, and Swanberg threatened to abandon the purchase of the corporation defendant's business and assets, unless the particular property in question was immediately released and delivered to

him. Thereupon the corporation defendant consummated the sale to Swanberg by permitting him, under protest, to pay plaintiff's claim and deduct the amount thereof from the purchase price of the property previously agreed upon between them.

The sufficiency of the evidence to support the findings of the trial court, upon this phase of the case, is assailed by counsel for plaintiff. In this behalf it is contended that plaintiff's claim was satisfied by Swanberg, and not by the corporation defendant; that, in either event, the payment of plaintiff's claim was a voluntary payment; and, finally, that the plaintiff, in retaining possession of the property in question, and making demand for a partial payment of the debt due to him from Morse, was simply exercising the right, given him by section 3051 of the Civil Code, of claiming and maintaining a lien upon property lawfully in his possession for services rendered in the care thereof.

[3] The first of these contentions may be disposed of with the statement that the evidence shows clearly that the payment of the plaintiff's claim by Swanberg was for and on account of the corporation defendant, and was therefore, in effect, a payment by the corporation defendant.

[4] Upon the facts of the present case, plaintiff was not entitled to a lien upon the property in question, as against the corporation defendant. While it is not disputed that the plaintiff rendered the services upon which his claim of lien was founded, the evidence upon the whole case shows, without conflict, that plaintiff's contract for the care and keep of the horses and other property, upon which a lien was claimed, was made solely with the defendant Morse. Plaintiff was fully informed of the existence of the lease from the corporation defendant to the defendant Morse, and knew that, under the terms of the lease, Morse had no authority to incur debts against the corporation defendant or its property. That the plaintiff knowingly gave credit solely to Morse, and did not look to the corporation defendant or its property for the payment of the claim in controversy, is evidenced by plaintiff's statement to that effect, which was made at a stockholders' meeting of the corporation, when the subject of Morse's care and keep of the corporation property was under discussion. Plaintiff's knowledge of the fact that Morse was only the lessee of the property in question, without authority to incur debts against the corporation or to create a lien against its property, brings the present case squarely within the rule declared in the case of *Lowe v. Woods*, 100 Cal. 408, 34 Pac. 959, 38 Am. St. Rep. 301, where it was said, in effect, that the lien provided by section 3051 of the Civil Code can be created only by the act of the owner of the property sought to be charged, or by the act of a person duly authorized to act for the owner.

[5] The contention that the satisfaction of plaintiff's claim constituted a voluntary payment is founded upon the theory that the corporation defendant, if it had been so disposed, might have contested plaintiff's right to a lien in an action at law, not only for the recovery of the possession of the property, but for damages, as well, for the detention thereof. From this it is argued that, inasmuch as the corporation did not see fit to stand upon its legal rights, but yielded to the demand of plaintiff, it brought itself within the general rule of law that, if a person knowingly submits to an illegal demand by paying that which is demanded, instead of invoking the remedy which the law affords against such demand, such payment will be deemed to be voluntary. This general rule, however, is subject to the qualification that in cases where the person making the demand obtains possession of the property of another, without first having had resort to judicial proceedings to test the validity of his demand, payment under protest will be considered compulsory, and the money so paid can be recovered back, if the demand be unlawful; and the delay necessarily incident to the recovery of the property by legal process would result in serious loss to the owner of the property. *Fergusson v. Winslow*, 34 Minn. 384, 25 N. W. 942; *State v. Nelson*, 41 Minn. 25, 42 N. W. 548, 4 L. R. A. 300; *Mearkle v. County, etc.*, 44 Minn. 546, 47 N. W. 165; *De Graff v. Board*, 46 Minn. 319, 48 N. W. 1135.

In the present case, the evidence shows that the situation of the corporation defendant was such that, if it had failed to secure an immediate release of the property in question, it would have sustained serious, perhaps irreparable, loss, which could not have been avoided or remedied by resorting to an action at law, and therefore it cannot be held that the satisfaction of the plaintiff's demand constituted a voluntary payment.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; HALL, J.

20 Cal. App. 751

PETERSEN v. CALIFORNIA COTTON MILLS CO. (Civ. 1,000.)

(District Court of Appeal, Third District, California. Dec. 30, 1912. On Rehearing, Jan. 28, 1913. Rehearing Denied by Supreme Court Feb. 28, 1913.)

1. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

In a servant's action for personal injuries by being caught in revolving machinery, while standing on a ladder applying a compound on a revolving belt, evidence held to make it a jury question whether plaintiff was guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.\*]

2. MASTER AND SERVANT (§ 229\*)—CONTRIBUTORY NEGLIGENCE—ORDINARY CARE.

In determining whether a servant exercised ordinary care, all of the circumstances of his situation when injured, including his physical surroundings, the apparent risk, the demands of his duty, and his superior's orders, should be considered.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 674, 683; Dec. Dig. § 229.\*]

3. MASTER AND SERVANT (§ 289\*)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

A servant is not necessarily negligent in acting upon the presumption that his employer has discharged, and will discharge, his duty toward him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.\*]

4. MASTER AND SERVANT (§ 153\*)—WARNING SERVANT.

A master must give suitable warning and instructions to a minor employé as to any danger which is not sufficiently obvious to one of such employé's intelligence or experience, who is in the exercise of ordinary care, especially where the minor is ordered to work in a new situation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 314-317; Dec. Dig. § 153.\*]

5. NEGLIGENCE (§ 136\*)—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

Where reasonable men may differ as to the proper inference to be drawn from the facts, the question of contributory negligence is for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.\*]

6. TRIAL (§ 365\*)—SPECIAL FINDINGS—CONSTRUCTION.

Special findings should be construed, if possible, so as to harmonize them with each other and with the general verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 871-874; Dec. Dig. § 365.\*]

7. TRIAL (§ 359\*)—SPECIAL FINDINGS—INCONSISTENCY WITH GENERAL VERDICT.

Special findings will not be allowed to control over the general verdict, unless they exclude every theory which sustains the verdict, and are inconsistent therewith only when, as a matter of law, they authorize a judgment different from that authorized by the verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 857-860; Dec. Dig. § 359.\*]

8. MASTER AND SERVANT (§ 297\*)—ACTION FOR PERSONAL INJURIES—SPECIAL FINDINGS—CONFLICTING FINDINGS.

An answer to a special interrogatory, finding positively that the master was negligent, would not be affected by another answer, involving the same question, "The preponderance of the evidence answers affirmatively," or, "We believe so," nor could a categorically negative answer be affected in the same way.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1195-1198; Dec. Dig. § 297.\*]

9. TRIAL (§ 350\*)—SPECIAL INTERROGATORIES—QUESTIONS OF LAW.

A special interrogatory as to what was the proximate cause of the accident was improper as involving a question of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 828-833; Dec. Dig. § 350.\*]



**10. TRIAL (§ 359\*)—SPECIAL FINDINGS—CONTROL OF GENERAL VERDICT.**

All presumptions favor a general verdict for plaintiff if there is evidence to support it, unless it is absolutely irreconcilable with the special verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 857-860; Dec. Dig. § 359.\*]

**11. MASTER AND SERVANT (§ 296\*)—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.**

The court properly authorized the jury, in a servant's injury action, to consider on the question of the degree of care required to be exercised by plaintiff the fact that the servant was acting under the direct order of his employer; such instruction not relieving the servant from exercising due care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.\*]

**12. TRIAL (§ 191\*)—INSTRUCTIONS—ASSUMPTION OF FACTS.**

In an employe's injury action, the court instructed that, if the jury found that the task at which plaintiff was working was one of special danger, then such knowledge of danger as plaintiff may have acquired at the usual tasks of his employment does not necessarily raise the presumption that he knew of the special danger; that a servant directed to undertake work outside of his ordinary employment was not presumed to be aware of its peculiar risks, and if his employer does not fully explain them before putting him to such new work, the servant may assume that it has no greater risk than the risks of his regular work. *Held*, that the instruction was not erroneous as assuming that there was any special danger in the new work, or that plaintiff's only source of knowledge was that acquired from his usual work, or that the employer was required to fully explain the danger regardless of any knowledge had by the servant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.\*]

Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by Christian Petersen against the California Cotton Mills Company. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

C. H. Wilson, of San Francisco, and Geo. E. De Golia, of Oakland, for appellant. Snook & Church, of Oakland, for respondent.

**BURNETT, J.** While in the employ of defendant, plaintiff was injured as a result of being caught by certain revolving machinery. His action for damages resulted in a verdict by a jury in his favor for the sum of \$4,000. The appeal by defendant is from the judgment and an order denying its motion for a new trial.

It is alleged in the complaint that plaintiff was ordered and directed by one Peter MacDougald, the foreman in the machine shop, to apply some compound on a belt which was revolving at a high rate of speed between pulleys attached to a beam at a height of about 16 feet from the floor; that the foreman placed a ladder against said beam, and directed plaintiff to mount it for the purpose of applying said compound; that

the task was very dangerous, since the ladder was not supplied with hooks to hold it firm, and it was but little over 16 feet long, so that when placed against said beam it stood almost perpendicular to the floor of the shop; that the foreman and defendant knew that it was not a proper or safe ladder with which to perform said task; that the plaintiff was not acquainted with and had no knowledge of the danger in mounting said ladder, and neither said foreman nor said defendant warned or instructed him that said ladder was unsafe or dangerous; that plaintiff obeyed the said order of the foreman, and, while applying the compound to the belt, the ladder slipped and slid sideways, without any fault of plaintiff, and thereby he was precipitated against a revolving shaft which was propelled by the said belt, and he was whirled about the shaft with great violence, and serious injury resulted; that the shaft was in two parts, and was coupled together by means of a collar fastened by set screws which projected about three-fourths of an inch from the surface; that the coupling was unsafe and dangerous by reason of said projecting screws; that this was known to defendant and unknown to plaintiff; and that defendant well knew that plaintiff was a minor of the age of 17 years or thereabouts and had never been employed as a machinist or mechanic, and did not know or appreciate the danger or risk in the use of, or contact with, the machinery in said shop or in the use of or handling of the appliances or tools in said shop, and well knew that the plaintiff was ignorant of the hazard and danger connected with said employment.

The plaintiff testified that he had been continuously at work for defendant for seven months; that he worked in the machine shop, that he was just a "roustabout"; and that he did everything that he was asked to do, "such as running errands, carrying tools, doing oiling, and other things like that." He said that immediately prior to the accident he was doing a job on the lathe, getting the center on some truck wheels. He described the accident as follows: "The accident occurred about 11 o'clock in the morning. As I was working at the lathe the first thing I heard was Mr. MacDougald yelling at me, and he asked me if I didn't hear that belt squeaking, and as soon as he yelled at me I ran over to see what he wanted, and he says, 'Get some compound, and put some compound on it,' and I did that; it was laying right near me, and I got the compound. Mr. MacDougald was the foreman of the shop, and had been the foreman during the seven months that I had worked there immediately prior to the accident. I had been in the habit of doing as he directed in the shop. There was a little noise in the shop. I was about six feet from him

when he spoke to me. I then took the compound, as he told me to do, and went up the ladder and reached through to apply the compound onto the belt, and somehow or other the ladder slipped and I was thrown over onto the coupling, and my clothing was caught and I was whirled around and became unconscious. The foreman, MacDougald, placed the ladder there about ten minutes prior to the accident. I saw him place it there. The ladder was placed almost perpendicularly, the upper portion projecting slightly over the beam." He stated further that the belt was revolving at a high rate of speed; that he had never been up on that ladder before, or on any ladder to apply compound to that belt or shaft; that he had never examined the shaft or noticed how it was joined; that his usual work was confined to the floor; that the foreman did not caution him as to any danger; that his attention was never directed to the hazardous risk of any task he was performing in the shop; that when he mounted the ladder he did not know that he was in an unsafe position, or that it was dangerous to be in proximity to the shaft.

Considering the distance from the floor to the belt, the rapidity with which the latter was moving, the close proximity of the shaft, and the projecting screws, and also the position of the ladder, it is unquestionable that he was in a perilous position when he had ascended to the belt in obedience to the command of the foreman. It is equally undeniable, and it is not denied, that he should have been cautioned or warned of the danger by the foreman, unless he appreciated the situation and needed no such admonition. But, while admitting that "it was the duty of the defendant to instruct the plaintiff, if he were ignorant, as to the risks and dangers of his employment," it is insisted by appellant that "the law does not require a useless act," and that by reason of "instruction, observation, and prior experience" the plaintiff had knowledge of the danger, and therefore he is deemed in law to have assumed the risk, or, in other words, he "was guilty of contributory negligence in encountering a known danger." In support of this position quotation is made from the cross-examination of plaintiff, in which he described fully his work and experience in the shop, and displayed such knowledge of the mechanism as we might expect from one engaged as he was and for the stated length of time. To show that he was familiar with the danger incident to the operation of the various contrivances, such questions as the following were asked, to which we also give the answers: "What oiling did you do for the defendant? A. Only the oiling that was customary for the boys around the place to do; that is all I did. Q. Well, you oiled the bearings of the machines? A. Yes, sir. Q. Now, when you left the employ of the defendant, on the 7th of April, 1902, what

was the cause of your leaving? You had an accident? A. Yes, sir. Q. What was that accident? A. I had got my arm hurt. Q. The same arm? A. Yes sir. Q. How did it happen? A. I was down in the basement putting water on some bearings that were running hot, and they instructed me to stay there and watch them and put water on them all the time, and they placed—Mr. Rat-tray placed—a ladder so that I could climb up and reach, and, of course, that is the way I got hurt. Q. That ladder slipped, did it? A. Yes, sir. Q. Was it placed against a beam? A. No, sir; it was a stepladder. Q. This accident was the result of your being caught either by the pulley or belt or shaft, the first accident? I understand you to say you don't know how it occurred? A. I was unconscious. Q. But it happened by reason of your being caught on either the shaft or pulley or belt? A. Yes, sir." Referring to the accident complained of, which occurred nearly two years after the first accident, the witness testified as follows: "Q. You knew that you couldn't stop that pulley by your hand, by holding it? A. I did. Q. You knew, also, that you couldn't stop the shaft that was revolving? A. Yes, sir. Q. And you knew that if you attempted to stop it you would be hurt? A. Yes, sir. Q. And you knew if your clothing or anything got attached to the belt, it would pull your clothing, didn't you? A. Yes, sir. Q. And if you got attached to the shaft it would pull your clothing, too? A. Yes, sir. Q. And that you would get hurt? A. Yes, sir." We find similar questions and answers in reference to the pulley and set screws. He testified also that he knew how a ladder ought to be placed, and that if it was placed right it would not slide.

[1] This examination took place more than four years after the accident, and it is quite likely that the added knowledge and wisdom of the intervening time is somewhat reflected in the answers of the witness. Regardless of this, however, it would be surprising if he had shown ignorance of these things. He did not need the painful experience of the former accident to teach him that it was dangerous to come into contact with the pulley or the belt or the screws or the shaft, or that a ladder not properly placed is likely to slip. To obtain this knowledge the ordinary boy of 14 or 15, or even younger, would require much less time in the shop than was spent there by plaintiff. Indeed, most active boys of that age, enjoying the advantages of observation and education afforded in our cities, are cognizant of these mechanical devices, and of the simple elements of physics that are involved in their use and operation. We would be surprised to find upon the street a boy of 14 who would declare that he did not know that if he mounted a long ladder that was placed almost perpendicularly, and not braced, he was likely to fall, or that if, by the sliding of the ladder, he



was thrown upon a belt or shaft moving with great rapidity, injury would probably result to him. The Socratic method of the examination was admirable, and it revealed an intelligent and candid witness, but the conclusion that his answers required the withdrawal of the question of negligence from the jury is opposed to the principle enunciated in well-considered cases and is the result of a failure to give due prominence to certain significant features of the occasion. These circumstances, briefly stated, are the complexity of the situation, the fact that plaintiff was a minor, and presumably without the judgment of an adult; that he was ordered by his superior to do the work which was outside of and more hazardous than his usual employment; that he was expected to, and did, obey promptly; and that he had a right to assume that the ladder was placed with due regard for his safety. In view of these incidents, we think it cannot be said as a matter of law that no other rational inference can be drawn than that plaintiff was guilty of contributory negligence.

[2, 3] In determining the question what is ordinary care on the part of an individual, of course "all the circumstances of his position should be regarded, including, in cases like the present, the servant's orders, the demands of his duty, the apparent risk to be met, and the purpose of his action, no less than his physical surroundings." And, as further stated by Labatt, § 4400: "A second principle, which is especially important in cases where the servant was injured as a result of his compliance with a direct order, and which naturally suggests itself as a material element under such circumstances, is that a servant is not necessarily negligent where he acts upon the presumption that his employer, and his employer's agents have done, are doing, and will do, their duty. \* \* \* The juridical theory is that the order, having a natural tendency to throw the servant off his guard, may properly be considered to excuse him from the exercise of the same degree of care as would have been incumbent on him if the case had not involved this factor."

[4] All the authorities, also, emphasize the importance of the distinction between adults and those of immature judgment. Referring to minors, Thompson, in his work on Negligence (section 4093), says: "The master is here, as in every other case, bound to act reasonably and justly, and this rule requires him to give suitable warning and instructions to a minor employé in regard to any danger, whether open or concealed, where the danger is not sufficiently obvious to the intelligence or experience of the employé, in the exercise of ordinary care on his part; this care being measured by the maturity of his faculties and the amount of his experience." And, in section 4094: "This rule ap-

plies not only so far as to require the employer to give general warnings and instructions to minor employés as to the dangers attending the duties they are expected to perform, but there is also a special duty resting upon the employer of giving instructions as to any new dangers whenever he orders the minor employé into a new situation which, without such warning and instruction, may be dangerous to him."

[5] It is, no doubt, true, as the learned author says, that "We meet with confusing and contradictory ideas growing out of the opposing tendencies of the minds of judges," and he cites a large number of cases from various jurisdictions illustrating this difference, but the apparent want of harmony arises rather from the application of the law to the peculiar facts than from disagreement as to the law itself. All the courts are in concord as to the doctrine that where reasonable men may differ as to the proper inference to be drawn from the facts, a case is presented for the determination of the jury. While the circumstances, of course, are variant, the action of the lower court in holding that the question of negligence was one for just and candid disputation is, we think, within the rationale of the decisions of the appellate courts of this state.

In *Ingerman v. Moore*, 90 Cal. 410, 27 Pac. 306, 25 Am. St. Rep. 138, it was held that: "Where it appears that an employé in a sawmill was seriously injured while running a scantling machine and saw, in attempting to remove slivers from under the saw, by reason of his sleeve catching on a concealed set screw fixed upon and projecting from a shaft below the saw, the fact that he had been employed in the mill for nearly two years, and had been working as assistant on the scantling machine, in putting the lumber in place to be cut by the saw, for about nine months, and had, during that time, in the absence of the foreman, run the machine for 18 days, does not warrant the appellate court in saying, as matter of law, that he was experienced in the work he was doing, and had knowledge of the set screw, and of the danger of placing his hand where he did while the machine was running, but his experience, and knowledge of the machine, is a question of fact for the jury." The concealed set screw was the controlling factor in that case, but the rule was approved as enunciated in *Coombs v. New Bedford Cordage Co.*, 102 Mass. 585, 3 Am. Rep. 506, as follows: "Whether it was possible for the plaintiff to have met with the accident from inadvertence or want of acquaintance with the danger of his position without being chargeable with a want of reasonable care we think is a question to be submitted to the jury. The facts that he saw, or might have seen, the machinery in motion, and might have known that it was dangerous to expose himself to be caught in it, are con-

siderations which should be regarded on one side. On the other, some allowance should be made for his youth, his inexperience in the business, and for the reliance which he might have placed upon the direction of his employers. It has been held in other cases that previous knowledge of a danger is not conclusive evidence of negligence in failing to avoid it."

In *Mansfield v. Eagle Box, etc., Co.*, 136 Cal. 622, 69 Pac. 425, the plaintiff was injured while operating a rip saw in a box factory. He was between 18 and 19 years of age, and had worked in the factory some 15 months before he was hurt, although having had little experience in running the rip saw—that was not his job—but when short of help the superintendent made the plaintiff run the saw on which he was hurt. He was engaged in cutting boards when the accident occurred. With his hand he was pushing a board on a table against and under the saw, which turned with a downward whirl towards him, when it seems the board slipped and his hand was caught by the saw. The court said: "Common prudence demanded that this inexperienced young man, commanded to work with a dangerous machine, with which he was not at all familiar, should have been fully and specifically instructed in the safest methods of doing the work. To put him to work without these instructions was negligence, and a jury might well have concluded from the facts in evidence that plaintiff's crippled hand was the proximate result of such negligence." No doubt, if categorically questioned, the plaintiff in that case would have answered that he knew a rip saw was a dangerous implement, and that if his hand came into contact with it while in motion he would get hurt, and, furthermore, that a board might slip or get caught in such a way as to throw his hand against the saw, as any intelligent youth of his age and experience would have some knowledge of these things, but the court properly held, under the circumstances, that it was proper for the jury to determine whether, on account of its failure to caution and instruct him as to the best method of operating the saw, defendant was legally liable for plaintiff's injuries.

In *Clark v. Tulare Lake Dredging Co.*, 14 Cal. App. 414, 112 Pac. 564, it was held by this court, in a case wherein a bright boy of 16½ years lost his life, that "the burden was upon the defendant to show that those in authority over the dredger, not only warned the boy of the danger attendant upon the discharge of the duties of a 'deck hand' having charge of the principal machinery of the dredger, but also to show that if such warning was given it was so given that the deceased fully appreciated and realized the danger by which he was surrounded." Therein many cases are cited, which may be consulted with profit, illustrating the principle

so aptly stated in *Foley v. California Horse-shoe Co.*, 115 Cal. 184, 47 Pac. 42, 56 Am. St. Rep. 87, that "the conduct of minors is to be judged in accordance with the limited knowledge, experience, and judgment which they possess when called upon to act, and it must, from the nature of the case, be a question of fact for the jury, rather than of law for the court, to say whether or not, in the performance of a given task, the child duly exercised such judgment as he possessed, taking into consideration his years, his experience, and his ability."

We deem it unnecessary to notice other citations of respondent, wherein, with no stronger showing than this, it was held that a case was presented for the jury. Indeed the number of circumstances here that might properly be considered factors in the perilous situation emphasized with peculiar force the imperative duty of defendant to warn and instruct plaintiff. Their relative importance we may not be able to determine—we cannot say how much each contributed to the injury—but it is reasonably certain that the fact that plaintiff, a minor and somewhat crippled from a prior accident, in an emergency was directed in a peremptory manner by his foreman to do a special perilous task outside of his ordinary employment, in a place rendered dangerous, not only by its location and the position of the ladder, but by the rapid movement of the machinery and the presence of the projecting set screws, presents a case quite unusual in its cumulative effect in favor of respondent's position.

[6, 7] Many special issues were submitted to the jury, and the answers to certain ones furnish to appellant the ground of an objection that some are indefinite and inconclusive, and that others are entirely inconsistent with the general verdict. In their construction the rule is undoubtedly as stated by Clementson in his work on Special Verdicts, pages 131 and 139: "Special findings should, if possible, be so construed as to harmonize them with each other and with the general verdict," and special findings will not control unless they exclude every theory which will sustain the verdict, and "are inconsistent only when, as a matter of law, they will authorize a judgment different from that which the verdict will permit."

[8] Respondent, in his brief, sets out all the special verdicts with categorical answers, from which it appears, as claimed by him, that the jury positively answered questions which covered all the material issues of the case, viz.: "That plaintiff was inexperienced; that he did not appreciate the dangers of his task; that his task was dangerous; that defendant did not instruct him as to the danger; that defendant failed to use ordinary care to instruct him as to such danger; that plaintiff's injury was caused by the negligence of defendant; that de-



fendant knew that plaintiff was inexperienced; that plaintiff was injured by the accident; that such injuries were permanent; and that plaintiff did not have sufficient intelligence and understanding, in view of all the facts of the case, to know the danger of his task." Other questions, covering a part of the same ground, were answered: "We believe so," "Not according to the evidence," "We think not," "The preponderance of the evidence answers affirmatively," and "No; we think not." The duplication arose from the fact that the court submitted questions proposed by both plaintiff and defendant. The court might better have rejected some of the questions, but it is perfectly apparent that thus far no inconsistency is shown, nor anything of which appellant can complain. In other words, the jury having answered positively that the defendant was negligent, the finding would not be affected, nor would either party be prejudiced, by the answer to another question of the same import that, "The preponderance of the evidence answers affirmatively," or, "We believe so." The same thing is manifestly true as to the questions answered in the negative. For instance, the jury gave the categorical answer, "No," to this question: "Did defendant instruct plaintiff as to the proper manner of safely applying compound on a belt, while mounted upon a ladder, in proximity to a revolving shaft with set-screw couplings?" And another similar question was answered, "Not according to the evidence."

[9, 10] Other questions and answers, to which appellant apparently attaches more importance, are as follows: (1) "Q. What was the proximate cause of the accident and injury complained of by plaintiff? A. The proximate cause of the accident and injury lay in the fact that the boy was ordered to do a duty outside of his regular work, and was caught by the revolving shaft and set screws." (2) "Q. Was plaintiff's injury due to the failure of defendant to warn or instruct plaintiff as to the danger of his employment? A. It seems to be due to the defendant's failure to warn plaintiff and the fact that he was doing something outside of his regular work." (3) "Q. Was the accident and injury complained of caused by the negligence of the defendant in furnishing a defective ladder for the use of plaintiff? A. We believe the ladder should have had spikes and hooks." (4) "Q. Was the accident and injury complained of caused by the negligence of defendant in operating the shafting and coupling described in the amended complaint with projecting screws? A. We so believe." As to the foregoing, it may be said generally that, considering the number and character of the questions submitted to the jury, it is surprising that the answers are not confusing, and it is clear that, when properly construed, they are entirely consist-

ent with the general verdict. No. 1 should not have been submitted, and it should be disregarded, as it involved a question of law. "To permit the jury to return conclusions of law rather than statements of fact would defeat the manifest purpose of the statute. Such conclusions are to be disregarded. They cannot be considered in determining the sufficiency of the verdict." Clementson, p. 116. Again, it is quite apparent that the jurors were not accustomed to the refinements of the law, and, being men presumably of average intelligence and disposed to look at a question from a practical, common-sense standpoint, they naturally concluded that various circumstances contributed to the injury, and they so expressed themselves. They very properly believed and substantially found that the fact "that the boy was ordered to do a duty outside of his regular employment," that "he was caught upon a revolving shaft with set screws," and "defendant's failure to warn plaintiff," should all be considered as important elements in determining the question of negligence. And the jurors were right in that. It is true that they did not make the distinction that is pointed out by Mr. Justice Henshaw, in *Merrill v. Los Angeles Gas & Elec. Co.*, 158 Cal. 503, 111 Pac. 536, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134, between "the proximate cause of the law" and "the proximate cause of the logician," or "the proximate cause in fact." As said therein: "Moreover, the proximate cause of the law is not the proximate cause of the logician, nor even always in strictness the proximate cause in fact, and a jury may easily be confused and misled by overniceties in these abstractions." The jury is not expected or required to make these fine distinctions. They are often difficult enough for the courts. Probably the responsibility of defendant for the injury is legally and primarily due to its failure to warn plaintiff of his danger, but there would have been no liability, of course, if no injury had occurred, and the jury were justified in finding that there would have been no injury had it not been for the other circumstances hereinbefore stated. The causal relation of these various facts and concepts is too apparent to require further comment. The situation will occasion no embarrassment if we keep in view and apply the rule that: "All presumptions are in favor of the general verdict for the plaintiff, which determines all issues in his favor, including the question of contributory negligence, where there is evidence to support it; and it must control, if the special verdict is not absolutely irreconcilable therewith." *Antonian v. Southern Pacific Co.*, 9 Cal. App. 732, 100 Pac. 877.

[11] The instructions seem to have covered every phase of the legal propositions involved in the case, and we find in them no substantial error. The concluding clause of

one, to which appellant objects, is as follows: "I charge you that, as to the degree of care to be exercised by the servant, you may consider the fact, if such be the fact, that such servant was acting under the direct order of his employer." This does not imply that the plaintiff was relieved of the duty to exercise care if he was acting under the direction of his employer. The circumstance of the order given by the foreman was a very important consideration, as we have already seen, and it had a just and legal bearing upon the degree of care required of the servant, and it was proper for the court to so instruct the jury. "The fact that the servant, at the time he was injured, was complying with a direct, specific, personal order of his master, or his master's representative, has, it is well settled, a material bearing upon the question whether he can hold the master responsible. Broadly speaking, the evidential significance of this fact will be found to be simply this: That as it goes to show that the servant's ignorance of the risk to which his injury was due is excusable, or that his action was not entirely voluntary, it tends to negative the availability of the various defenses which are essentially dependent upon proof that the servant voluntarily encountered a danger which was, or ought to have been, comprehended by him." Labatt on Master and Servant, § 433. "It is quite obvious that the fact that the servant has been ordered into a position of danger by his master or superior is an element to be considered in determining whether he has exercised ordinary care." Thompson on Negligence, § 5379. See, also, Labatt, § 439, and 26 Cyc. pp. 1221, 1245, and 1272.

[12] Objection is also made to the following instruction: "If you find that the task at which the plaintiff was working when the accident occurred was, under all the circumstances of the case, one of special danger, then I charge you that such knowledge of danger as plaintiff may have acquired at the usual tasks of his employment does not necessarily raise the presumption that he knew of such special danger. A servant directed to undertake work outside of that which he is engaged to do is not presumed to be aware of its peculiar risks, and therefore, if the master does not fully explain them to the servant before putting him at such new work, the servant is entitled to assume that it has no greater risk than those which attach to his regular work." This manifestly does not assume that there was any special danger, as the instruction is hypothetical in that respect. It does not assume that plaintiff's only source of knowledge was that acquired from his usual tasks, nor does it imply that the employer was called upon to fully explain the danger regardless of any knowledge that the plaintiff may have had.

As pointed out by respondent, the meaning conveyed was "that the plaintiff cannot be charged with knowledge of special dangers outside of his regular employment, by reason of knowledge acquired at his usual tasks, and that if the master does not explain such special dangers to him, he is entitled to assume that there are no greater risks attached to such special dangers than those which attach to his regular work." If there was any likelihood that the jury would misconstrue the instruction in the manner suggested by appellant, it was completely obviated by reason of other clear directions as to the duty of plaintiff to use whatever knowledge he may have derived from any source.

Some criticism is made of two or three other instructions, but we do not think it merits special attention. It may be said, also, that, after an examination of the rulings complained of as to the admissibility of evidence, it appears reasonably certain that if any of them was erroneous, the result could not possibly have been affected thereby to the prejudice of appellant.

We think no sufficient reasons exist for interference with the action of the lower court, and the judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

#### On Rehearing.

BURNETT, J. In its petition for rehearing, appellant manifests a degree of disappointment that in the original opinion we failed to discuss specifically some of the assignments of error as to the instructions. The constraint of custom and propriety as to the elaboration of judicial opinions, no doubt, is quite obvious to the learned counsel, and we think it is hardly necessary to assure them that we examined, as carefully as we could, not only the exhaustive briefs, but the whole of the transcript in the case. Our conclusion, however, was, and is, that, viewing the entire record, we cannot say that any prejudicial error was committed.

This much we have added in consequence of the respectful attitude and the admirable presentation, both in matter and method, by appellant's counsel of their contentions.

The petition is denied.

We concur: CHIPMAN, P. J.; HART, J.

20 Cal. App. 719

MADEIRA et al. v. SONOMA MAGNESITE CO. (Civ. 1,006.)

(District Court of Appeal, Third District, California. Dec. 27, 1912.)

1. MINES AND MINERALS (§ 29\*)—LOCATION—EXCESSIVE CLAIM.

Though the location of a mining claim exceeds more than 300 feet on each side of the middle of the vein, while Rev. St. U. S. § 2320



(U. S. Comp. St. 1901, p. 1424), provides that no claim shall exceed that limit, the claim is valid except as to the territory in excess of such limits.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 66-72; Dec. Dig. § 29.\*]

## 2. MINES AND MINERALS (§ 29\*)—LOCATION—EXCESSIVE AREA.

A locator who exceeds the legal lateral limits in laying out the boundaries of his mining claim will be protected as to the legal area allowed, if his location is distinctly marked on the ground so that its boundaries can be readily traced, as required by Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426).

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 66-72; Dec. Dig. § 29.\*]

## 3. MINES AND MINERALS (§ 20\*)—LOCATION—MARKING BOUNDARIES.

Where a locator of a mining claim, who did not definitely mark it at the time of discovery, knew that defendant had located on the ground and was at work thereon in September, 1905, and made no further attempt to mark his location until March, 1906, he did not act within a reasonable time in definitely marking the boundaries of his location.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 40-44; Dec. Dig. § 20.\*]

## 4. MINES AND MINERALS (§ 22\*)—LOCATION—RECORDED NOTICE—CONSTRUCTIVE NOTICE.

A recorded notice of a location of a mining claim was not constructive notice of such location, where it did not identify the lode.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 45-50; Dec. Dig. § 22.\*]

## 5. MINES AND MINERALS (§ 20\*)—LOCATION—MARKING OF LOCATION.

The marking of a mining location upon the ground should be so certain that one prospecting in the same locality would locate the exact ground claimed without difficulty.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 40-44; Dec. Dig. § 20.\*]

## 6. MINES AND MINERALS (§ 20\*)—LOCATION OF CLAIM—MARKING BOUNDARIES—SUFFICIENCY.

The southwest corner of a located claim was marked on the ground by a copy of the location notice tacked on a board and nailed on a tree 276 feet beyond the proper point of location; the notice, after describing the lode, calling for "corner stakes and monuments on each corner." The southeast corner was marked by nailing the notice on a fence picket and placing an earth mound around it at a point 283 feet beyond its proper location, and the northeast corner was made 145 feet north of its proper location by building a rock monument and placing a stake in it which was not driven in the ground, while the northwest corner was made by breaking off the top of a small dead tree three or four inches in diameter and digging a mound of earth and piling small boulders about its base, which was 364 feet north of the proper location of the corner. Held, that the marking of the boundaries of the claim was insufficient.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 40-44; Dec. Dig. § 20.\*]

## 7. APPEAL AND ERROR (§ 761\*)—BRIEFS—SUFFICIENCY OF PRESENTATION.

Statements in the brief "that the court erred in permitting the witness to answer the following questions," citing pages of the tran-

script, without arguing the alleged errors, did not sufficiently present the error to require consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3096; Dec. Dig. § 761.\*]

## Appeal from Superior Court, Sonoma County; T. J. Denny, Judge.

Action by George Madeira and another against the Sonoma Magnesite Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Archibald Bernard, of San Francisco, C. C. Hamilton, of Los Angeles, T. J. Butts, of Santa Rosa, and J. P. O'Brien, of San Francisco, for appellants. R. L. Thompson, of Santa Rosa, and Edward Rice, W. L. Samuels, and Grant H. Smith, all of San Francisco, for respondent.

CHIPMAN, P. J. This is an action to determine the conflicting claims to certain mineral land situated in Sonoma county. Plaintiffs claim by virtue of an alleged location made by plaintiff Madeira on April 12, 1905, called the Madeira Magnesite mine. Defendant claims as grantee of certain alleged several locations, made by Arnold, Davis, and Woods, on September 14, 1905, embracing the land claimed by plaintiffs. The cause was tried by the court without a jury, and defendant had findings and judgment in its favor. Plaintiffs claim that the following findings are not supported by the evidence: "(2) That said attempted location of said Madeira covered the ground described in paragraph 3 of the complaint herein and other ground. (3) That the attempted location, viz., the Madeira Magnesite mine, was not at the time of the attempted location thereof on or about April 12, 1905, or for more than a year thereafter, and long after the location on the same ground of the Cecilia, Flora, Marie, Seymour, and Cyril claims of defendant, distinctly marked on the ground, or marked at all, so that its boundaries could be readily traced." Plaintiffs appeal from the judgment on transcript of all the proceedings in the case.

There are but two questions discussed in the briefs: First, assuming that Madeira made a location, was it void because of the excess of land included in it? And, second, was his location marked on the ground so that its boundaries could be readily traced?

Plaintiffs introduced a blueprint map of the original Madeira location and as it was corrected on a relocation by Madeira in June, 1906. With the aid of this map and the testimony of plaintiffs' witness Riley, who made the survey for plaintiffs, a fairly clear conception may be gained of what Madeira did, as shown by his testimony, in making his location in April, 1905. Austin creek passes along a considerable portion of the southerly end line of the claim and meanders along its easterly boundary trending easterly at the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

northerly end line, as we understand the map; the points of the compass are not indicated. A trail ran along near this creek which was the means used by Madeira in passing from one part of the claim to another to locate his corners. As near as we can understand the process from his testimony, he made right angle offsets where he could and estimated the distances by stepping off the land. The country, he testified, is very rough and hilly and covered with a dense growth of chaparral along the east line impassable and generally difficult to penetrate except by cutting one's way through. The notice posted by him was as follows: "Austin Creek, April 12, 1905. Notice of Mineral Location. I the undersigned claim 1,500 feet by 600 feet of this lode for mining purposes. Located in Sec. 21 Twp. 9 N. R. 11 W. adjoining the lands of Dr. Otner near Redslide, beginning at a tree and stake with monuments on south bank of East Austin creek running 1,500 feet in a northwest and southeast direction, with 300 feet on each side of lode with corner stakes and monuments on each corner. Lode crops high. Claimed for quicksilver, gold, silver or magnesite. George Madeira."

His claim is in section 20 and not section 21, as stated in the notice. Madeira was familiar with the locality and with this particular ground and had made mineral locations before and claimed to know the requisites of the law governing the method of making them. He had some knowledge of surveying and civil engineering and carried a pocket compass on April 12, 1905. He testified: That he placed the first notice at "the point of discovery about 15 feet from the (south) end of the ledge on the south bank of the creek. \* \* \* On account of the creek raising in the winter, it would carry it away if it was on the ledge. \* \* \* Built a monument of rock around the base of the tree where the notice was posted, and that was the center of the ledge or lode." He then followed the trail leading up and down the creek to a point where "there was a pair of bars directly upon the trail." He picked up a board which he found at the base of a so-called juniper tree, nailed it to the tree, and on it nailed a copy of his notice. He testified that any one going through these bars would see the notice. This was what he intended as his southwest corner. It was 276 feet away from where it should have been as shown in the corrected location. He found his southeast corner by following the trail. "I would step straight east and then offset and go east again to maintain as straight a line as it was possible to do." Reaching what he supposed was the southeast corner, he testified: "Posted a notice and built a monument of earth there. There was no stone there. I had what I call my geological pick, and I dug up the earth and

made a mound of earth and put a picket from the fence in it and nailed the notice on the fence." This was in fact 283 feet beyond where it should have been. There was no evidence as to the size of this monument, nor was there any evidence that he drove the picket into the ground. He then followed the trail "on the right bank of the creek 1,500," measuring the supposed distance by stepping, to what he intended as his northeast corner, where, he testified, he "built a monument of rocks and placed a stake in it immediately on the bank of the creek." The size of the monument is not given, nor does it appear that the stake was driven in the ground, nor how it was placed among the rocks. This point was 145 feet north and away from where it should have been. "I then went directly west and stepped the ground the same way as I did before. It is very difficult to get across the creeks, and I had to guess at the distance. \* \* \* Then I came to the center. I called it the center of the claim again, and there I built a large stone monument in the gulch, in a little bit of a gulch that came down there, \* \* \* and placed a stake in that, but no notice on that end at all. From there I went west 300 feet from that stepping it up the hill through the brush. There I found a small dry tree, I suppose three or four feet in diameter. I broke the top off and dug a mound of earth again with a pick. There was some small boulders of rocks lying around there, and I gathered them up and piled them around the base of the tree. That marked the northwest corner of the claim." This was 364 feet north of where his corner should have been on the west side of his claim, which, according to his testimony, was practically impassable, and he made no effort to get through it. Summing up the matter, the court said, in its opinion printed in defendants' brief: "Madeira intended to step off a claim 1,500 feet by 600 feet, but he really marked out an irregular parallelogram over 2,000 feet long on the west side, 1,600 feet in the center, 1,700 feet on the east side, and probably 800 feet wide on the north side." Madeira visited his claim twice prior to defendants' location, once in April and once in July, and renewed some of his notices, but placed no new ones and did nothing more towards marking his claim. He also took away some specimens of the rock, but performed no work on the claim. He did nothing further, except in March, 1906, he attempted a survey but was prevented by the adverse locators, until in June, 1906, when he made a resurvey as shown by the map attached to the transcript. He was on his claim in the latter part of 1905, some time after defendants' location was made, and met Arnold, one of the contesting locators who were at work on the mine. He then expressed to Arnold the belief that he (Arnold) was on his (Madeira's



claim; but nothing further occurred then. He made no protest and offered no objection to the locators' possession.

Witness Bradley qualified as a surveyor and civil and mining engineer. He was employed, in September, 1905, to survey and assist defendant's grantors in locating their mines and running lines and establishing monuments. He was there for 10 days so engaged. His attention was called to the bars mentioned by Madeira and a cabin east of the outcroppings where Madeira testified he posted a notice on a picket fence. He testified that he was at these points and saw no notices. "Q. Did you cover the territory carefully around that deposit? A. Yes, sir; very carefully. Q. Did you cover the territory that could be described by a parallelogram 1,500 feet long, the center line running southeasterly and northwesterly from the outcrop 300 feet on each side? A. Yes, sir; I did. Q. Did you find at or near any of the corners of such a figure or at the center line any monument or remains of a monument of any kind? A. Well, only one monument in the creek on the lode line, which had been very recently established there, \* \* \* on the southerly end of the lode." It was shown that this monument was not one made by Madeira. "Q. Mr. Bradley, did you discover any evidence that a line had been run north or northeasterly from the outcrops? A. None at all; no blazed line; no brush cut out." Other witnesses, who had formed part of the surveying party, gave similar testimony. Witness Arnold, one of the locators of defendants' mines in conflict with the Madeira mine, in the last part of August, 1905, went to the located ground with his partners, Davis and Woods, and with them was Mr. Cooper, state mineralogist. Their particular object was to "expert this land for oil." The party was there two days. He testified: "We were examining the veins that were shown on the ground and also looking to see whether it had been located recently." When asked if he saw "any location notice or stakes upon or in the neighborhood of that ground," he answered, "We did not." Asked what investigation they made, he answered, "We were traveling on the ground in a radius of perhaps 700 or 800 feet hunting for corners, markings, or anything that would indicate a location that had been made there recently." He saw old markings on trees, weather-beaten, old blazes, but no evidences of recent markings. His attention was called to particular points mentioned by the witnesses for plaintiffs and testified that he saw no notices. Plaintiffs introduced witnesses who testified that, in the month of May and in the early part of July, 1905, they saw the notice posted on the juniper tree at the bars testified to by Madeira and also on the picket fence. Witness Riley testified for plaintiffs. He was employed to make the resurvey and relocation of the Madeira mine, in June, 1906.

After describing his work, which was only to establish the corners, he was asked: "Q. What did you see there at or near any of those corners? A. On the north lode line there was a small tree that had been broken off, a dead tree, and there were two or three stones around the bottom of it." That was 98 feet from the lode line and 364 feet from where he established the northwest corner. There were no marks on that tree. "On the northeast corner there were a few scattered stones, looked as though they had been piled, some monument"—(interrupted). That was 45 feet from where he established the northeast corner. "Down the creek some distance \* \* \* there was a tree standing there with some nails in it. \* \* \* That was 276 feet from the southwest corner." On cross-examination his attention was called to the fence and cabin near where Madeira claimed to have posted a notice. He testified: "There was a fence but no corner there, no monument." He testified that this point was 283 feet from the southeast corner as he established it. He found nothing at this latter point and "nothing in that neighborhood that would indicate a mining claim." He testified that he found no markings of any kind at the southwest corner nor within 100 feet radius. At the newly located northeast corner he saw nothing, but at a point 145 feet from there, pointed out to him by Madeira, he "found some loose stones which appeared as having been a stone mound at one time. There were different mounds around there in places. There had been, I suppose, some old locations or something. I noticed some mounds down below there on the creek. I don't know what they were there for."

Section 2320 of the Revised Statutes of the United States provides that "no claim shall exceed more than three hundred feet on each side of the middle of the vein at the surface." U. S. Comp. Stats. p. 1424.

[1] It does not follow that the location is invalid where the locator includes within the boundaries of his claim more than the law permits. "He is entitled nevertheless to hold to the limit which the law authorizes within the limits laid out, and only the territory embraced within his boundaries which is in excess of these limits is to be rejected." *McElligott v. Krogh*, 151 Cal. 126, 90 Pac. 823. This rule presupposes a location which "injures no one at the time it is made, and where it has been made in good faith." *Lindley on Mines*, § 362. The mere fact, then, that, in establishing his exterior boundaries, the locator has marked out too great a quantity of land, does not necessarily invalidate his location. Where, however, the locator relies upon the corners he has established or has attempted to mark as indicia of the location of the lode or ledge, a different question may arise and a different rule may govern. If the courses are so widely separated

from where they ought to be as to bear no apparent relation to the lode, i. e., are so remote as to justify a reasonable inference by one seeing the corners that they were not intended to apply to the lode in question, they would add little, if any, force to the claim that the law had been complied with. And this would be especially true if the notice once posted at the discovery point had disappeared or the lode line was not distinctly marked. "If the preliminary notice is wanting, there would be nothing to guide the subsequent locator, and the excessive location should be held worthless for any purpose." *Ledoux v. Forester* (C. C.) 94 Fed. 600.

A subsequent locator coming on the ground and finding an uncertain marking of the discovery point and lode line, and yet sufficient to arouse inquiry and require examination for exterior boundaries, would not be required to go much, if any, beyond the lateral limits to look for corners or other markings of the boundaries; and certainly he would not be charged with notice where the markings of the corners were so far from where they properly belonged, so obscure and lacking in permanency as in the present instance, and in a country densely covered with chaparral, and where the corners were not indicated by blazing of trees or cutting out of brush or otherwise marking their location.

An instructive opinion by Judge Hanford is found in *Ledoux v. Forester* (C. C.) 94 Fed. 600, where the requirements of the statute are stated and the suggestions last above made are given significance. It was there said: "Where the country is broken and the view from one corner to the other is obstructed by intervening gulches and timber and brush, it is necessary to blaze the trees along the lines, or cut away the brush and set more stakes at such distances that they may be seen from one to another, or dig the ground up in a way to indicate the lines so that the boundaries may be readily traced. The least that can be required of locators is that the corner stakes shall not be so far apart as to include an area considerably greater than the size of the claim as described in the posted notice, or greater than the law allows to be included in a single claim. I admit the rule that a location which is made in other respects in conformity to law, but which is greater in length or width than the law permits to be taken in one claim, is not for a mere error in that respect, void, except as to the excess; but when, as in this case, the validity of the location is disputed for alleged failure to fulfill the requirements of the law with reference to marking the claim upon the ground, so that the boundaries can be readily traced, the length of the lines and the distance between stakes must be taken into account in connection with the other facts proved, for the purpose of determining this question. It is obvious that if a person, measuring from the stakes at one end of the claim, the required distance in the

direction indicated by the notice of location does not find the other end stakes, nor anything else to guide him to where the stakes may be found, he may reasonably conclude that such corner stakes have not been set and that the location is void. In such a case the excessive distance between the corner stakes is misleading, and a locator who has committed such an error has failed to comply with the law."

[2] The cases which protect the locator where he exceeds the legal lateral limits are cases where he has marked his point of discovery and lode line and has made what would otherwise be required in making a valid location under section 2324 of the U. S. Statutes (U. S. Comp. St. 1901, p. 1426), which provides that "the location must be distinctly marked on the ground so that its boundaries can be readily traced." And this brings us to the question chiefly argued in the briefs: Was the location so distinctly marked as that its boundaries could be readily traced?

In *Gleeson v. Martin White M. Co.*, 13 Nev. 442, cited by both parties, will be found an illuminating discussion of the mining law. Beatty, J., speaking for the court, said: "One of the imperative requirements of the statute, an indispensable condition precedent of a valid location, is that it shall be 'distinctly marked on the ground so that the boundaries can be readily traced.'" Quoting from *Golden Fleece Co. v. Cable Con. Co.*, 12 Nev. 312, he said: "It is true that the vein is the principal thing and that the surface is but an incident thereto; but it is also true that the mining law has provided no means of locating a vein except by defining a surface claim, including the croppings, or point at which the vein is exposed, and the part of the vein located is determined by reference to the lines of the surface claim." Again: "How soon after the discovery of the vein 'the location must be distinctly marked on the ground so that its boundaries can be readily traced' (R. S. § 2324), we do not decide; but until it is so marked we are clear that the location is not complete, and the law has not been complied with." The opinion points out that the object of the law in requiring the location to be marked on the ground is "to fix the claim, to prevent floating and swinging, so that those who in good faith are looking for unoccupied ground in the vicinity of previous locations may be enabled to ascertain exactly what has been appropriated in order to make their locations upon the residue." It is further shown that the statute does not in terms require the *boundaries* to be marked, but requires the *location* to be so marked that its boundaries can be readily traced." The learned justice adds: "It would be safer, and therefore better, to comply with the recommendation of the land office and erect stakes at the corners of the claim; but, if the grand object of the law



is attained by the marking of a center line, we can see no reason why it should not be allowed to be sufficient." This rule is not everywhere accepted, nor do we think it necessary in the instant case to express a definite opinion upon it. If the rule in the Gleeson Case may be applied, we must always remember what were the facts. The Paymaster claim, the one giving rise to the rule, was marked "by means of the two stakes at the ends of the claim on the line of the croppings and by the location monument at the point of discovery." Furthermore, said the court, "it is to be observed that there is no question that the locators of the Paymaster were the original discoverers of the ledge in controversy; that their claim was notorious; that they and their successors have continued to occupy and develop the property; that the Shark locators were aware of the priority of the Paymaster claim." Such were the facts in view of which it was held that the location was sufficiently marked on the ground.

The facts in the present case differ widely and radically from the facts in the Gleeson Case in so far as the markings of the center line are concerned. Assuming all that Madeira testified to be true, what did he do? We quote from the opinion of the trial judge: "George Madeira testified that he had long been familiar with the ledge of magnesite at this point, and that on April 12, 1905, he visited it for the express purpose of locating a mine on it; that on this date the ledge was vacant and showed no signs of ever having been worked; that on this day he posted three notices and monuments on the claim as follows: The first notice was placed at the point of discovery, about 15 feet from the end of the ledge on the south bank of Austin creek, and he built a monument of rock around the base of the tree upon which the notice was posted. The second notice was tacked on a board, which board was nailed on a juniper cedar tree at a place where there was a pair of bars, near the trail running beside the creek; this was at the southwest corner of the claim. The third notice was posted by nailing it on a fence and making a mound of earth and placing a picket in it. This was the southeast corner of the claim. A copy of these notices, which were all alike, was recorded by him in Book G of Promiscuous Records at page 332, of Sonoma County Records, April 15, 1905. He then stepped off what he thought was 1,500 feet along the trail on the right bank of the creek, but what was in reality 200 feet or more than the 1,500 feet, and built a monument of rock and placed a picket in it. This was the northeast corner of the claim. He then stepped off what he thought was 300 feet to the west and built a large stone monument in a little gulch and placed a stake in it, but did not post any notices. This was the north center line of the claim. He then stepped

what he thought was 300 feet west of this and found a small dry tree, 3 or 4 inches in diameter, the top of which he broke off, and dug a small mound of earth and piled some small rocks around the base of the tree. This was the northwest corner of the claim."

No notice was posted at the south and center. Only the point of discovery and the north and center were thus marked, and these two points were nearly the entire length of the claim apart. There were no blazings or other markings of the center line; the country was rough and brushy, and neither end of the claim was visible from the other. It is obvious that the Gleeson Case gives no support to the claim that the center line was sufficiently marked to bring it within the requirements of the statute.

[3, 4] Madeira's resurvey and relocation, made in June, 1906, are convincing evidence that he did not regard his claim as distinctly marked on the ground. At best, his location was only such as would have entitled him within a reasonable time after discovery to mark his boundaries, either by definitely marking his center line, as was done in the Gleeson Case, or both by marking that line and his exterior boundaries, before conflicting rights accrued. Lindley on Mines, § 373. He knew that defendant's grantors had located the ground and were at work on it in September, 1905. The evidence is that they performed a large amount of labor on the mine; that their possession was unbroken from the date of their location; their good faith is not seriously questioned; there is no evidence that they knew of Madeira's location when they made their location, or until in October, unless imparted constructively by the recorded notice, which cannot be said to give notice, for it does not identify the lode. With this knowledge on his part and this ignorance on their part, Madeira made no further attempt to mark his location on the ground until in March, 1906. This we do not think was within a reasonable time under the circumstances.

Upon the sufficiency of the steps taken by Madeira to make a location, we content ourselves with the view expressed by the learned trial judge. We quote:

[5] "And the marking upon the ground should be made so certain and so plain that any one prospecting in the same locality would have no trouble in locating the exact ground claimed. Measured by the above rule, was the marking of the claim by Madeira sufficient? This statute (section 2324, Rev. Stat.) does not require that a notice shall be recorded. Nor does it require that a notice shall be posted on the claim. It leaves these matters to the regulations of the local laws. The local laws generally require that a notice shall be posted, and, even in the absence of such a requirement, it would be a very proper aid to the description. But the statute does not require it. *Carter v. Baciga-*

lupl, 83 Cal. 188 [23 Pac. 361]. It is conceded in this action that there are no local mining laws governing the location of the claim in dispute. All of the authorities agree that any marking by which the location may be readily traced is sufficient. I think that the following citations state the law: 'All of the authorities agree that any markings on the ground by stakes, monuments, mounds, and written notices whereby the boundaries can be readily traced are sufficient.' Book v. Justice Min. Co. (C. C.) 58 Fed. 113, and cases cited. 'If a third party intending to locate can readily ascertain from what has been done by the prior locator, the extent and boundaries of the claim so located, then the object of the statute has been accomplished.' Kern Oil Co. v. Crawford, 143 Cal. 302 [76 Pac. 1112, 3 L. R. A. (N. S.) 993].

[6] "Applying the above rule to the four corners as located by Madeira, I do not think that it can be said that any of them come within the rule. His southwest corner was a copy of the notice tacked on a board and nailed on a juniper tree 276 feet beyond the point where it should have been located. This notice, after describing the lode, called for 'corner stakes and monuments on each corner.' This posting of a notice without a monument could not be said to be sufficient to notify a third party who was seeking to locate, that this was his corner. His southeast corner was made by nailing his notice on a picket fence, and with his geological pick he 'made a mound of earth and put a picket from a fence in it.' This was at a point 283 feet beyond where it should have been. There is no testimony as to whether this mound was six inches or six feet high. If it had been high enough to keep the picket from falling over of its own weight, it would have taken years of erosion to obliterate it, yet there is no evidence that anyone ever saw it again. And a notice nailed on a picket fence would in all probability not last long in the mountains. His northeast corner was made by building a monument of rock and placing a stake in it. The stake was not driven in the ground, nor was the size of the monument given. This was 145 feet north of where it should have been located, in a country that was 'extremely broken and rough and covered densely with chaparral' (Madeira's testimony). And there were other monuments near by (Riley's testimony). His northwest corner was made by breaking off the top of a small dead tree 3 or 4 inches in diameter and digging a mound of earth with his pick, and piling some small boulders about the base of the tree. This was 364 feet north of where his corner should have been on the west side of his claim, which, according to his testimony, was practically impassable, and he made no effort to get through it. While the law is as has been quoted, that where a locator has by mistake

in good faith laid off more land in his claim than he was entitled to, it is void for the excess only, I do not think that it can be held that monuments of as temporary a character as Madeira testified that he built, in an extremely broken and rough country densely covered with brush and at points so far away from where the real corners should have been placed, where there were a good many other monuments of like character, with nothing to identify them as corners of this particular claim, can be said to come within the rule as above laid down, as being sufficient to notify third parties of what has been done by prior locators. There has been but one exception made to this rule. But that was where the prior locators had done work on the claim, and the junior locators knew the extent and boundaries of the claim, and relied on the errors of the location in an attempt to oust the senior locator. The courts have properly held that, having had the knowledge of the location, they were not harmed and could not be held to come within the rule."

[7] In their brief, appellants call attention to the errors of law alleged to have been committed in the admission or rejection of evidence. The brief states that "the court erred in permitting the witness," etc., or "the court erred in permitting the witness to answer the following question," citing page of transcript. The alleged errors are not argued, counsel merely calling attention to the exceptions reserved by the plaintiffs at certain folios of the transcript. A point so presented to this court will not be considered. *Pigeon v. Fuller*, 156 Cal. 691, 702, 105 Pac. 976.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

20 Cal. App. 544

NAYLOR v. ASHTON. (Civ. 1,105.)

(District Court of Appeal, First District, California. Dec. 9, 1912. On Petition for Rehearing, Jan. 8, 1913.)

1. BROKERS (§ 50\*)—PERFORMANCE OF CONTRACT.

Where the writing authorizing a broker to sell realty required that the offer to sell be accepted within 10 days from date, the broker could not recover a commission unless he obtained the acceptance within that time.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 68; Dec. Dig. § 50.\*]

2. BROKERS (§ 49\*)—RIGHT TO COMMISSION.

Unless the broker brings the minds of the buyer and seller together upon an agreement of sale and the price and terms of the sale, he is not entitled to commissions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 70-72; Dec. Dig. § 49.\*]

3. BROKERS (§ 50\*)—CONTRACT OF EMPLOYMENT—TIME OF SALE.

Time is always of the essence of a contract of employment to sell realty, when a time limit is placed upon the sale.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 68; Dec. Dig. § 50.\*]



#### 4. BROKERS (§ 86\*)—ACTION FOR COMMISSION—SUFFICIENCY OF EVIDENCE.

Evidence in an action for commissions for procuring the sale of realty *held* to show that no exchange or sale was effected by the broker.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 116-120; Dec. Dig. § 86.\*]

#### 5. APPEAL AND ERROR (§ 1048\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Any error in sustaining an objection to a question on cross-examination of defendant on the ground that the counsel was reading from what purported to be defendant's deposition which was not signed by her was not reversible, especially where counsel was given permission to fully cross-examine defendant as to her testimony, and only prevented from reading a series of questions from the unsigned deposition before examining her upon the facts covered thereby, after which he was permitted to use the deposition for impeachment purposes.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.\*]

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Action by Charles E. Naylor, Jr., against Ellen Lynch Ashton. From a judgment for defendant and an order denying plaintiff's motion for a new trial, plaintiff appeals. Affirmed.

Naylor & Riggins, of San Francisco, for appellant. McKee & Tasheira, of Oakland, for respondent.

HALL, J. This is an appeal from a judgment in favor of defendant, and the order denying plaintiff's motion for a new trial.

The action was brought by plaintiff as the assignee of Geo. H. Murdock & Son to recover the sum of \$500 as broker's commission under a written contract.

Murdock & Son had the property of defendant, a ranch in Tehama county, listed for sale or exchange. Learning that one Mrs. Thompson owned a piece of real property in Oakland which she was desirous of exchanging for ranch property, they informed defendant thereof and sent her to see Mrs. Thompson. All the business was transacted on behalf of the brokers by one Stanley. After defendant had examined the property, she signed and delivered to Stanley, for the brokers, a writing, dated September 27, 1909, in which she offered to sell and exchange her said ranch for the said property of Mrs. Thompson and the sum of \$5,750, to be paid in cash or approved securities bearing 8 per cent. per annum. The writing contains the following: "And I agree to pay Geo. H. Murdock & Son a commission of \$500 for their services as agents in effecting the above sale and exchange. Mrs. Thompson to be allowed ten days from the date hereof to examine the ranch and accept the above offer." This is the only written evidence of any contract between defendant and plaintiff's assignors, and is the one pleaded and relied on for a recovery.

The court found that on or about the 20th day of October, 1909, said defendant traded her said ranch to Mrs. Thompson for her said Oakland real estate and \$2,500 cash. But it also found that no sale or exchange of said properties was ever made or effected by said George H. Murdock & Son as provided in the said contract, and that Mrs. Thompson never did accept the offer made in said contract, and never did exchange or sell her said property in accordance with said contract, and that defendant did not extend the time within which Mrs. Thompson might accept said offer beyond the ten days mentioned in said contract. It is perfectly clear that upon these findings plaintiff should not recover. The finding that an exchange and sale, upon different terms and after the expiration of the time limit, was made by defendant with Mrs. Thompson, does not entitle the broker to recover, in the presence of the other findings that the broker did not effect the exchange, and that the time for the acceptance of the offer was never extended.

[1] It will be observed that the writing relied on was an offer to sell, which by its terms was to be accepted within 10 days from the date of the writing. This time expired on October 5, 1909. The broker's commissions were dependent on his obtaining the acceptance of this offer within 10 days from its date. This he did not do.

[2] "The duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until this is done his right to commission does not accrue." *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 382, 38 Am. Rep. 441. "It must further appear that the broker performed the duty assumed by him within the time limited in his contract, or within such extension of time as may have been granted by his employer. If he fail to do that, he is not entitled to the commissions, even though he made efforts to sell property, and first called to it the attention of the party who subsequently made the purchase, unless the delay was caused by the negligence, fault or fraud of the owner." *Zeimer v. Antisell*, 75 Cal. 509, 17 Pac. 642. See, also, to the same effect *Ayres v. Thomas*, 116 Cal. 140, 47 Pac. 1013; *Ropes v. Rosenfeld's Sons*, 145 Cal. 671, 79 Pac. 354; *Hicks v. Post*, 154 Cal. 22, 96 Pac. 878; *Brown v. Mason*, 155 Cal. 155, 99 Pac. 867, 12 L. R. A. (N. S.) 328.

[3] The time limit for an acceptance contained in the offer to sell made by defendant was a time limit upon the employment of the broker in this case. His only employment under the writing was to procure an acceptance of the offer contained in the writing. This he did not do, either within the time fixed for such acceptance or at all. Time is always of the essence of a contract

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of employment to sell real estate where a time limit is placed upon the employment. *Hicks v. Post*, supra. In *Ropes v. Rosenfeld's Sons*, supra, and *Brown v. Mason*, supra, the actions were for broker's commissions where the sale had eventually been made to the purchaser first found by the broker, and in each case judgment for defendant was sustained. The findings in the case at bar support the judgment. The evidence also fully supports the findings.

[4] As before stated, the offer of defendant fixed the time limit for an acceptance of her offer at 10 days, which expired on October 5th. Two days before October 5th the broker endeavored to induce defendant to exchange her ranch for certain stock, which he recommended to her, telling her that he had no hopes of doing any business with Mrs. Thompson. Indeed, he informed defendant at that time that the time allowed Mrs. Thompson for an acceptance of the offer had expired, but examination of the written offer proved this to be incorrect. So again, after the expiration of the 10 days, the broker (Mr. Stanley) told defendant that there was no hope of doing business with Mrs. Thompson, and that he would not waste any more time on her. And he did not thereafter make any further effort to effect the sale or exchange contemplated by his written employment, or at all. Subsequently defendant, without any assistance from plaintiff's assignors and without their knowledge, opened negotiations with Mrs. Thompson, and succeeded in making a trade with her, but not upon the terms of her original offer, but upon terms much less advantageous. It is thus apparent that the controlling findings are fully sustained by the evidence.

[5] Complaint is made of a ruling of the court in sustaining an objection to a question on cross-examination put to defendant by plaintiff. The objection seems to have been based upon the fact that counsel was reading from what purported to be a deposition made by defendant, but not signed by her. The matter, even if the court erred, is too unimportant to justify a new trial, especially as the court informed counsel that he might fully cross-examine the defendant about her testimony, and only prevented him from reading in the guise of a question a series of questions and answers from an unsigned deposition until he had first examined her as to the facts covered by the deposition, after which the court said the deposition might be used in impeachment.

On the whole record the case seems to have been fairly tried, and a correct judgment rendered.

The judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

### On Petition for Rehearing.

**PER CURIAM.** The petition for a rehearing is denied.

In denying the petition for a rehearing we deem it proper to again call attention to the fact that the only employment of the broker evidenced by the writing relied on was to procure an acceptance of the specific offer made by defendant, which the broker never succeeded in doing, either within the 10 days allowed for such acceptance or at all. The broker was not employed generally to effect a sale or exchange of defendant's property, but only to procure an acceptance by Mrs. Thompson of the offer to exchange and sell contained in the writing signed by defendant. In this particular the case is quite like the case of *Holland v. Flash*, 130 Pac. 32, decided December 19, 1912 (which is since the opinion in this case was filed), by the court of appeal of the Second District, where it was in effect held that under such a contract the broker could only recover on showing a compliance with the particular employment evidenced by the writing.

20 Cal. App. 797

**REYNOLDS v. YORK SYNDICATE OIL CO.**  
et al. (Civ. 1,169.)

(District Court of Appeal, Second District, California. Dec. 31, 1912.)

#### 1. NOVATION (§ 4\*)—NEW FORM OF INDEBTEDNESS.

Plaintiff and defendant corporation, for which plaintiff did certain work entitling him to a mining lien, executed an agreement by which defendant leased the mining ground to plaintiff for a year upon a royalty of 10 cents per barrel for all oil produced, and plaintiff agreed to make certain collections because of oil previously sold by defendant to third persons, and apply the same to an indebtedness against defendant in plaintiff's favor, and further agreed to sell oil in certain holes, and apply the proceeds upon such indebtedness, and that defendant should pay plaintiff as much money, as soon as possible, on account of such indebtedness, and at least \$2,700. *Held*, that the contract did not constitute a novation, so as to extinguish the old indebtedness and operate as a waiver of plaintiff's lien therefor.

[Ed. Note.—For other cases, see *Novation*, Cent. Dig. § 4; Dec. Dig. § 4.\*]

#### 2. MINES AND MINERALS (§ 117\*)—MINING LIEN—WAIVER—PLEADING.

Waiver of a mining lien must be pleaded and proven.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 239; Dec. Dig. § 117.\*]

Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by George A. Reynolds against the York Syndicate Oil Company and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

J. W. Wiley, of Bakersfield, for appellant.  
T. F. Allen, of Bakersfield, for respondents.

ALLEN, P. J. The action was one to foreclose a lien upon certain mining property.



The answer, in addition to denials with reference to ownership and the facts upon which the right to a lien depended, set up an agreement between plaintiff and defendant corporation, bearing date of March 10, 1904, through which the defendant leased to plaintiff the mining ground described in the complaint for the period of one year, upon a royalty of 10 cents per barrel for all oil produced on said premises during the period of the lease; and, in addition, the plaintiff agreed to make certain collections on account of oil previously sold by defendant to third persons, the amount of which collections when made to be applied to an indebtedness of \$3,625 agreed to exist against defendant in plaintiff's favor; and further, to sell certain oil in sump holes at a price of 25 cents per barrel, or as near that price as possible, the proceeds to be credited upon such indebtedness. And it was further agreed that the defendant should pay plaintiff "as much money (\$2,700 at least) on account of its indebtedness to him, and as soon as possible; the total indebtedness to him being at this date \$3,625." Other covenants were contained in the agreement of no moment in considering this appeal. The court found in favor of plaintiff upon all the issues relating to the character of the property, the amount of the indebtedness, the right of plaintiff to a lien therefor, and the filing of such lien. The court, in addition, found that the agreement above referred to had been entered into after the maturity of the indebtedness, and preceding the filing of the lien, and, as a conclusion of law, determined that such agreement constituted a novation, and amounted to a waiver on plaintiff's part of his right to a lien on account of the indebtedness. Judgment was accordingly entered in defendants' favor, from which judgment plaintiff appeals upon the judgment roll.

[1] Whether the findings of novation and waiver are those of fact or law, the findings or conclusions are shown by the judgment roll to have been based solely upon the terms of the agreement; and the construction which should be placed upon the agreement is determinative of all matters presented upon this appeal. We are of opinion that such agreement cannot be construed as the substitution of a new obligation between the same parties, with intent to extinguish an old one. On the contrary, the old obligation is referred to in the agreement and specifically affirmed. The mere taking of the lease upon a royalty and authority to collect certain debts due defendant can in no sense be construed as an agreement canceling the prior obligation of indebtedness. The authority to collect, and, if collected, to apply, the proceeds to certain indebtedness due defendant was but the creation of an agency not coupled with interest, and was revocable at pleasure, and constituted no security. Conceding that the lease gave right of immediate possession of the

premises to the lessee, it does not appear that the oil in the sump holes was upon the leased premises, or that any possession, or right to possession, of this oil was conferred by the agreement. If possession was not given to the oil, no pledge arose, and no security existed by virtue of the agency to sell. Were the facts otherwise, and the oil in fact given in pledge, the security afforded thereby being but a fraction of the lien indebtedness, the same would not, in the absence of an express agreement, amount to one of extinguishment.

[2] The instrument in which was embodied the lease did not, by its terms, express a waiver of the existing lien rights; and, if any waiver was contemplated or agreed to outside the instrument, the same should have been pleaded and proven essential matters, where parties rely upon a waiver. *Poheim v. Meyers*, 9 Cal. App. 37, 98 Pac. 65. There is nothing in the record indicating that, through the agreement set out, the time for payment of the original lien debt was extended beyond the term for filing a lien.

We are of opinion that the court erred in its judgment, and the same is reversed, and cause remanded.

We concur: JAMES, J.; SHAW, J.

20 Cal. App. 672

#### PEOPLE v. TOMSKY. (Cr. 193.)

(District Court of Appeal, Third District, California. Dec. 18, 1912. Rehearing Denied by Supreme Court Feb. 15, 1913.)

#### 1. CRIMINAL LAW (§ 1024\*)—APPEALABLE ORDERS—ORDER GRANTING NEW TRIAL.

Under the express provision of Pen. Code, § 1238, the people may appeal from an order granting a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2599-2614; Dec. Dig. § 1024.\*]

#### 2. CRIMINAL LAW (§ 970\*)—MOTION IN ARREST OF JUDGMENT—DEFECTS IN INDICTMENT OR INFORMATION.

Under Pen. Code, § 1185, providing that a motion in arrest of judgment may be founded on any of the defects in the indictment or information mentioned in section 1004, unless the objection is waived by failure to demur, and that it must be made before the judgment is pronounced, section 1004 enumerating the grounds upon which a defendant may demur to an indictment when the defects constituting such grounds appear on its face, and section 1187 declaring that an order arresting judgment places defendant in the same situation in which he was before the indictment was found, a motion in arrest of judgment is directed against the sufficiency of the indictment or information to state a public offense, or for any other defects appearing upon its face which would subject it to a demurrer, and is entertainable only where the defendant has demurred thereto.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2445-2462; Dec. Dig. § 970.\*]

#### 3. CRIMINAL LAW (§ 975\*)—MOTION IN ARREST OF JUDGMENT—ORDER SETTING ASIDE CONVICTION.

Defendant's motion to set aside the information was denied, and no demurrer thereto was shown, and after conviction, without a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

motion for a new trial, and over objection by defendant, the trial court of its own motion ordered the conviction set aside on the ground that defendant had never entered a plea to the information, and admitted him to bail and fixed a day for taking his plea to the information as originally filed. *Held*, on appeal by the people, that the order could not be regarded as a motion in arrest of judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2479; Dec. Dig. § 975.\*]

**4. CRIMINAL LAW (§ 918\*)—MOTION FOR NEW TRIAL—GROUNDS—FAILURE TO PLEAD TO INDICTMENT AND INFORMATION.**

The failure to secure the plea of a defendant on an information prior to putting him on his trial thereunder is a ground for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2163–2196, 2219–2224; Dec. Dig. § 918.\*]

**5. CRIMINAL LAW (§ 964\*)—MOTION FOR NEW TRIAL—ORDER SETTING ASIDE CONVICTION.**

On appeal by the people from an order of the trial court of its own motion setting aside a conviction on the ground that defendant had never entered a plea to the information, without a motion for new trial by the defendant and over his objection to the order, such order will be considered as an order granting a new trial on the ground that a mistrial was had by his failure to plead.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2419, 2420; Dec. Dig. § 964.\*]

**6. CRIMINAL LAW (§ 261\*)—NECESSITY OF PLEA—EFFECT OF FAILURE TO PLEAD.**

A defendant in a felony case, who has been put upon trial for the offense charged without a formal plea of not guilty having been entered by him to the indictment or information, has not been given a legal trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 612, 613; Dec. Dig. § 261.\*]

**7. CRIMINAL LAW (§ 961\*)—MOTIONS FOR NEW TRIAL—STATUTORY PROVISIONS—AS TO A MATTER OF "PROCEDURE."**

Const. art. 6, § 4½, which provides that no judgment shall be set aside or new trial granted in any criminal case for error as to any matter of pleading or procedure, unless after an examination of the entire case, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice, applies to trial courts in their review of records in criminal cases on motions for new trial; and the putting of a defendant in a criminal case upon trial without his pleading to the information is error as to a matter of "procedure."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2415–2417; Dec. Dig. § 961.\*]

For other definitions, see Words and Phrases, vol. 6, p. 5631.]

**8. CRIMINAL LAW (§ 961\*)—REVIEW—DISCRETION OF LOWER COURT—NEW TRIAL.**

Under Const. art. 6, § 4½, which provides that no judgment shall be set aside or new trial granted in any criminal case for error in any matter of procedure unless the court shall be of the opinion that it has resulted in a miscarriage of justice, such opinion must be supported by a substantial legal foundation, so that, where the action of a trial court in that respect is reviewed, the question whether the opinion upon which its action is based is or is not justified is purely a question of law, to be determined from a review of the whole case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2415–2417; Dec. Dig. § 961.\*]

**9. CRIMINAL LAW (§ 947\*)—NEW TRIAL—STATUTORY PROVISIONS—MISCARRIAGE OF JUSTICE.**

Const. art. 6, § 4½, provides that no judgment shall be set aside or new trial granted in any criminal case for any error as to any matter of procedure, unless on examination of the entire case, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. Defendant, convicted of obtaining personal property by false and fraudulent pretenses, upon the clerk's announcement that he had entered his plea, remained silent, although no plea had been in fact entered, and the trial was conducted upon the understanding of parties that a plea had been formally entered, so that defendant secured all the advantage of a plea regularly entered. After a conviction, sufficiently supported by the evidence, the trial court of its own motion set aside the conviction on the ground that defendant had not entered a plea. *Held*, that defendant's failure to plead could not under any possible view have resulted in a miscarriage of justice, so that the order would be reversed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2133; Dec. Dig. § 947.\*]

Appeal from Superior Court, Yolo County; K. S. Mahon, Judge.

Sam C. Tomskey was convicted of obtaining certain personal property by false and fraudulent pretenses. From an order setting aside the verdict, the people appeal. Motion to dismiss the appeal denied, and order appealed from reversed, with directions to the court below to proceed with the rendition of judgment upon the verdict as returned.

U. S. Webb, Atty. Gen., and J. Charles Jones, of Sacramento, for the People. Wm. Tomskey, of San Francisco, for respondent.

**HART, J.** The defendant was convicted in the superior court in and for the county of Yolo of the crime of obtaining certain personal property by false and fraudulent pretenses. At the time fixed for pronouncing the sentence or the judgment on the verdict of conviction, the court, of its own motion, made an order setting aside said verdict on the ground that the defendant had never entered a plea to the information under which he was prosecuted and adjudged guilty. The people, through the district attorney of Yolo county, present this appeal from said order.

This record certainly presents a peculiar situation for several reasons, the most important among which is the difficulty in determining with precision the legal nature of the order made by the court and from which this appeal has been taken. Most appropriately, the proceeding after verdict in this case may be said to be *sui generis*. There was no motion for a new trial by the defendant. In fact, counsel for the defendant, while interposing an objection to any judgment being pronounced on the verdict because of the failure of the defendant to plead to the information, refused to present a motion for a new trial, for the asserted reason that "there cannot be a new trial granted



where there has not been a valid trial in the first place," by which statement we understand counsel to have meant to say that, the defendant having failed to plead to the information, the proceedings involving the taking of testimony, etc., before an alleged jury and the conclusion of the latter, were an absolute nullity, or exactly the same as though the defendant had never been put upon his trial at all, from which postulate he argues, as obviously no other logical argument could therefrom reasonably be made, that there could be no new trial of a question that had never been tried. But counsel for the defendant went so far as to object to an order by the court setting aside the verdict; his contention being, in analogy to his position as to a motion for a new trial as above indicated, that there was no verdict to set aside, and that there was, therefore, nothing left for the court to do but to refuse to pronounce judgment or sentence. The court, however, as seen, made the order setting aside the verdict, and thereupon both the district attorney and the attorney for the defendant, in open court, gave "notice" that they each would appeal from said order (sections 1240 and 1259, Pen. Code), notwithstanding which action on the part of the defendant's counsel he appeared at the oral argument, and presents a brief with this record in resistance to a judgment of reversal. It may be parenthetically suggested that the Attorney General doubtless properly viewed the attitude of the defendant's counsel at the hearing of this cause before this court as tantamount to an abandonment of the defendant's appeal from the order, otherwise the state's attorney might with propriety have confessed error on the latter appeal and thus have secured a reversal without further ado.

However, the first important point presented here is as to the legal nature of the order from which this appeal is prosecuted. It must be admitted that the point is not one easily solved, if, indeed, it can be solved at all to the extent of giving an accurate legal description of the proceedings giving birth to the order appealed from or a proper designation to the order itself. The attorney for the respondent insists that the order is neither one in arrest of judgment nor one granting a new trial, and that, whatever it may be, it is not one from which the law authorizes an appeal, and upon this view of the case as it appears here, he has submitted a motion to dismiss the appeal. On the other hand, the Attorney General sees in the order many of the features or characteristics of an order in arrest of judgment, and in his argument before this court, both oral and by brief, he so treats it.

[1] There are, by virtue of the provisions of section 1238 of the Penal Code, five occasions on which the people may appeal in criminal cases, and they are (1) from an order setting aside the indictment or in-

formation; (2) from a judgment for the defendant on a demurrer to the indictment, accusation or information; (3) from an order granting a new trial; (4) from an order in arrest of judgment; (5) from an order made after judgment, affecting the substantial rights of the people.

It is clear that, if the order here complained of does not come within either the third or the fourth subdivisions of the foregoing section, it is not an appealable order. It certainly cannot be classed with the orders referred to in the other subdivisions of said section, for it is obviously neither an order setting aside the information, nor a judgment for the defendant on a demurrer to such pleading, nor an order made after judgment, etc., no judgment having been pronounced or entered. But, as stated, the Attorney General vigorously contends that the order is more in the nature of one in arrest of judgment than any other from which an appeal by the people is authorized. If that view of the order were justified, then unquestionably it would have to be reversed for the reason that the ground upon which it was granted is not included among those upon which an order in arrest of judgment may be made. And, for the same reason, we cannot see how it can be viewed as an order in arrest of judgment or as intended to have the effect of such an order.

[2, 3] Section 1185 of the Penal Code provides that a motion in arrest of judgment "may be founded on any of the defects in the indictment or information mentioned in section ten hundred and four, unless the objection has been waived by a failure to demur, and must be made and determined before the judgment is pronounced." Section 1004 enumerates the grounds upon which the defendant may demur to the indictment or information, when the defects constituting such grounds appear upon the face of the pleading. Section 1187 of said Code provides that the "effect of an order arresting the judgment is to place the defendant in the same situation in which he was before the indictment was found or the information filed." Thus it will be seen that a motion in arrest of judgment is directed against the sufficiency of the indictment or the information to state a public offense or for any other defects appearing upon the face of such pleading which would subject it, under the law, to the claims of a demurrer, and is entertainable only where the defendant has demurred to the pleading by which he is charged. While the record shows that the defendant made a motion to set aside the information and that the same was denied by the court, it does not thus appear that a demurrer was interposed thereto by the accused. Of course, it is plainly manifest that the effect of the order could not be to place the defendant in the same situation in which he was before the information was filed, as is true where an order in arrest of judgment

is made (section 1187, Pen. Code, supra), because said order, as shown, was not based upon defects in the information. Nor, obviously, did the court intend that it should have such effect, since it appears that it made an order admitting him to bail pending the trial of the case and fixed the following Monday as the time for taking his plea to the information as it was originally filed, preliminarily to setting the case down for trial. From all these considerations, it is very clear that the proceeding culminating in the making of the order appealed from bears no resemblance whatsoever to a motion in arrest of judgment and that it was not and it could not have been so regarded by the trial court.

[4, 5] It seems to be very plain, however, from the scope of the order as it was marked out by the court, that it bears a closer analogy to an order granting a new trial than to one in arrest of judgment. Although no formal motion for a new trial was presented, the court nevertheless, made an order the necessary effect of which was to award the defendant a new trial, and that such order was intended by the court to so operate is evidenced by the fact, as already shown, that the court ordered that the defendant be admitted to bail and fixed a time for taking his plea to the information. That the failure to secure the plea of a defendant to an information or indictment prior to putting him on his trial thereunder is a ground for a new trial is in effect held to be true in the case of the *People v. Corbett*, 28 Cal. 328, and we shall, in the consideration of this appeal, treat the order appealed from as one granting a new trial upon the sole ground that a mistrial was had by reason of the failure to take the defendant's plea to the information.

[6] It appears that, immediately after the jury were impaneled to try the defendant, the clerk of the court, in compliance with the mandate of section 1093, subd. 1, of the Penal Code, read the information to the jury, and thereupon stated, in the presence of the defendant and his counsel, that the accused had theretofore entered a plea of not guilty to said information. Neither the defendant nor his attorney interfered to say that no such plea had at any time been interposed to the information by the prisoner or made any objection whatsoever as to the matter of a plea until after a verdict of guilty had been returned.

With much force, the Attorney General has argued here: (1) That the silence of the accused and his counsel at the time of the announcement by the clerk to the jury, in the presence and hearing of the former, that the prisoner had entered a plea of not guilty to the information, should, upon principle, be construed as an indorsement by them of the clerk's statement in that regard, and therefore as in effect the interposition of a plea

of not guilty by the defendant himself, and, in this connection, it is argued that, upon every consideration of fairness and justice, he should under the circumstances be estopped from denying that a plea was entered; (2) that, since the trial was conducted upon the evident understanding by the parties on both sides that a plea had been formally entered, the defendant, therefore, securing all the benefit and every advantage of a plea regularly entered, the failure to make the formal plea should be treated as a mere irregularity which in no manner or degree affected or impinged upon his substantial rights. The last stated position of the Attorney General is supported by many of the courts of last resort of other jurisdictions by what appears to be very forceful reasoning. See *State v. Winstrand*, 37 Iowa, 112; *State v. Hayes*, 67 Iowa, 27, 24 N. W. 575; *State v. Bowman*, 78 Iowa, 520, 43 N. W. 302; *State v. Thompson*, 95 Iowa, 465, 64 N. W. 419; *State v. Straub*, 16 Wash. 111, 47 Pac. 227; *Jones v. Territory*, 5 Okl. 536, 49 Pac. 934; *Hudson v. State*, 117 Ga. 704, 45 S. E. 66; *Mecce v. Commonwealth*, 78 Ky. 586.

On the other hand, our Supreme Court, upon reasons equally cogent, has held that a defendant in a felony case who has been put upon trial for the offense charged without a formal plea of not guilty having been entered by him to the indictment or information has not been given a legal trial. *People v. Corbett*, 28 Cal. 328; *People v. Gaines*, 52 Cal. 479; *People v. Monaghan*, 102 Cal. 229, 36 Pac. 511. In the case last cited, it was argued, as here, by the Attorney General, and as is held by the foreign cases above cited to be the correct view of such a situation, that "by putting in evidence and arguing the case to the jury the defendant has had the benefit of a plea of not guilty, has waived its formal entry, has shown his intention to rest upon such an issue, and, having had the benefit of it, is not prejudiced by the fact it was not formally entered." Disapproving that argument, Judge Temple, in that case, said: "This position is inconsistent with the admission that a plea is necessary; for the argument would be just as persuasive had the defendant never been arraigned at all. It has been decided over and over again in numerous cases, all holding against the respondent"—citing *People v. Corbett*, supra; *People v. Gaines*, supra, and *Bishop's Criminal Procedure*, § 733, and cases there cited.

As suggested, the argument on both sides of the question is forceful, but the law of this state upon the subject is as our Supreme Court has construed and announced it, and, unless there has been pointed out here some reason which, by virtue of any change in our laws, has arisen since those cases were decided, requiring or authorizing the announcement of a different rule, it will be necessary



to hold that the position of the people upon the proposition cannot be sustained.

But the Attorney General makes the point, and contends, that the adoption of section 4½ of article 6 of the Constitution has wrought a marked and material change in the standpoint from which criminal cases must be considered and reviewed by the courts of this state, and that the opinions in the California cases above referred to, having been filed long before the adoption of said section, cannot be regarded as authority, so far as the point involved here is concerned, if it can justly and truly be said, after an examination of the whole record, that a miscarriage of justice did not follow the defendant's omission to enter a formal plea to the information. And it is further contended by the Attorney General that the constitutional provision thus invoked here applies as well to trial as to reviewing courts.

These points will now be considered. But, before doing so, it may be well first to note the fact that an examination of the record has convinced us that the verdict is sufficiently supported by the evidence. In truth, no fair-minded person can in our judgment read the evidence as it is disclosed by the record without reaching the conclusion that the jury were fully justified in finding the defendant guilty of the crime charged against him in the information. Indeed, it appears to us to have been conclusively shown that the accused, in a most deliberate and cold-blooded manner, obtained from the prosecuting witnesses, who as partners were engaged in carrying on the farming business in Yolo county, a large number of turkeys, of approximately the aggregate value of \$500, by falsely representing to them, with the intent, feloniously, to despoil them of said property, that he was the agent of a San Francisco mercantile establishment, dealing in turkeys and other fowl, and authorized as such to buy turkeys throughout the country for said house, when, as a matter of fact, there was no such house in existence, the defendant himself having received the shipment of turkeys at San Francisco, to which place they were consigned, sold them, and retained the proceeds of the sale. In short, if the testimony produced by the people was credible (and the jury seem to have so regarded it), then no other verdict than that of guilty as charged could have justly been returned.

Now, the important question here is whether, as the Attorney General contends, section 4½ of article 6 of the Constitution may properly be applied to the circumstances of this case. That section of the Constitution was adopted by the people and thus made a part of our organic law in the year 1911, but it has never up to the present time found its way to the Supreme Court in such manner as to require or receive at the hands of that court a construction of its real scope or intent. We are, therefore, without desirable

light from that source to guide us in determining the general character of the instances to which the rule thus laid down, necessarily in general terms, may justly and with propriety be applied. The question, however, whether the section may properly be invoked in support of the rights of the people in this case is squarely placed before us, and it must, therefore, be decided solely so far as this court is concerned by the unaided light of our own judgment.

[7] The section referred to reads as follows: "No judgment shall be set aside or new trial granted in any criminal case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Although it appears to have been supposed by many members of the legal profession that the foregoing section was designed to have exclusive application to the review of criminal cases by appellate courts, we are convinced from a careful reading of its language that it was the intention that it should as well apply to trial courts in the review of records in criminal cases on motions for new trials. The section, as will readily be perceived, does not expressly limit its application to reviewing or appellate courts, nor does its language in any view that may reasonably be taken of it justify a construction that it was so intended. Trial courts, obviously, have as ample power to set aside judgments and to grant new trials as have the appellate courts, and it is as much their duty as it is that of the higher courts to do so where they are convinced that there exist legal grounds demanding such a course. But the Constitution says to those courts, as it thus enjoins the appellate courts, that they must not exercise that power by setting aside a judgment or granting a new trial "in any criminal case on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." And, where a trial court sets aside a judgment or grants a new trial in a criminal case in contravention of that mandate of the Constitution, its action in that regard will be nullified on appeal as readily as the appellate court would refuse to reverse the judgment or the order denying a new trial in a criminal case for any of the errors specified or contemplated by the section, where such court was of the opinion that the error complained of has not "resulted in a miscarriage of justice."

The important question, then, to be decided is: May the error for which the court below set aside the verdict in the case at bar, when tested by the circumstances disclosed by the record, be said to be among those which may be excused by authority of the constitutional provision under consideration, or, in other words, among those which cannot be held to have resulted in a miscarriage of justice?

[8] Before proceeding to answer the foregoing question, the following may be stated as indisputable propositions: (1) That, where a defendant in a criminal case is put upon his trial upon an indictment or information without having entered a plea thereto, the error thus occurring is one "as to a matter of procedure." (2) That the language of the section, "unless \* \* \* the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice," clearly implies that such "opinion" must be supported by a substantial legal foundation, and that, in a given case, where the action of a trial court in that regard is up for review, whether the "opinion" upon which such action has been based is or is not justified, presents purely a question of law to be determined from a review of the whole record.

The central or all-important purpose of said constitutional provision is obviously to legally justify the courts in refusing to interfere with or disturb verdicts of guilty in criminal cases in the trial of which error has been committed and in which the evidence amply supports such verdicts, when such interferences may justly be withheld consistently with a just and proper regard for the substantial rights of persons tried for public offenses. The section is general in its language and terms, and, moreover, upon its face, very sweeping in its scope. It does not pretend to describe specifically the character of the errors coming within the purview of its language, or, by express language, to limit the right of the courts to determine, and say that any error, whatever its nature, has not resulted in a miscarriage of justice. But it is, of course, very clear that the power vested in the courts by the section is not to be arbitrarily exercised either in the one direction or the other, but that the propriety or impropriety of the application of the provisions of the section must be determined, perhaps, in all cases, as much on the character of the record of the particular case as upon the character of the error itself.

It is, of course, not our intention, nor, obviously, is it necessary, in this or perhaps in any other particular case, to attempt to sound the depths of the constitutional amendment, or, in other words, to undertake to suggest, even if such a task were capable of accomplishment, all the tests of its application. If, as we are convinced is true,

the record before us clearly discovers a proper occasion for its application, then the announcement of that conclusion, together with the reasons impelling us thereto, will comprehend all that the exigencies of this case require of us.

The California cases cited and relied upon by the respondent here, proceed upon the theory, which, under the former system in this state, was clearly sustainable, that, where the law prescribes and imperatively commands the observance of certain formalities in the procedure whereby citizens are put upon their trial for their lives or liberty, such formalities cannot be dispensed with, and that, where they have been disregarded, it becomes immaterial whether it may justly be said that in point of fact, the accused thereby suffered no substantial prejudice or that thus he was not deprived of a substantial right in his trial, for the law will itself conclusively presume therefrom prejudicial injury to his rights. It will always be true, and it is logically so, that there must be an issue before a trial can be had, and it is equally true that there can be no issue of fact to try unless there has been a formal affirmation of the fact in dispute on the one side and a like denial of such fact on the other, and this rule, in this state, has heretofore been strictly adhered to in criminal cases, although in civil actions relaxed under certain circumstances, or perhaps it would be better to say its breach excused by certain circumstances. Hence, as the California cases referred to say, where a criminal action is tried without issue having been formed in the manner prescribed by law, there is in law no trial. But we agree with the Attorney General that the section of the Constitution in question has overcome, so far as the point involved in this case is concerned, the effect of the decisions in those cases, and that they cannot be considered as authority in the determination of the question whether the error for which the trial court nullified the verdict in this case did or did not result in a miscarriage of justice.

In the foreign cases cited by the Attorney General and adverted to above, the conclusions were reached upon a consideration of the proposition that in point of fact the accused were not, and could not have been, damaged in any manner or sense by the failure to enter a plea to the indictment, and it is our opinion, as the Attorney General contends, that the section of our Constitution in question makes the reasoning in those cases peculiarly applicable to the case here.

[9] That it is strictly true that the defendant in this case, in point of fact, by his omission to enter a formal plea to the information, could not have been and, indeed, was not prejudiced in the remotest degree as to his substantial rights, or, in other words, could not have been, and, in truth,



was not thus deprived of a full and fair trial upon the merits of the charge, is the statement of a proposition too obvious to admit of legitimate discussion. To the contrary, it is plainly manifest that, the cause having been tried by both sides upon the theory that a plea of not guilty had been regularly entered, the defendant received the benefit of such a plea as fully and effectually as if the same had been formally interposed. The information was read, and the statement thereupon made to the jury by the clerk that the defendant had entered thereto a plea of not guilty. Evidence was received in support of the claims of both sides. Counsel on both sides argued the case to the jury, the court instructed the latter as to the law pertinent to the issues tried, and the jury returned the result of their deliberations upon the case to the court. Or, as is said in the case of *State v. Greene*, 66 Iowa, 11, 23 N. W. 154 (above referred to), where precisely the same question as the one under consideration here was before that court, "the defendant was permitted to introduce evidence to disprove the charge, and his counsel was permitted to argue the case to the jury on its merits, and the jury were required to determine it under the same rules which would have governed in its determination if the plea had been formally entered."

We cannot conceive of a case where section 4½ of article 6 of the Constitution could be applied with more propriety than it may be to the case at bar, and, if by any course of reasoning it may be shown that it does not apply here, then, indeed, may it well be said that it would be difficult to apprehend precisely what purpose it was intended to subserve. In *People v. Carroll*, 128 Pac. 4, where the trial court gave an instruction embracing the language of subdivisions 6 and 7 of section 2061 of the Code of Civil Procedure, which it was claimed with a considerable show of reason was out of place in said case and calculated to mislead the jury to the prejudice of the defendant, this court applied the constitutional amendment in question, saying: "We think, however, the rule established by the amendment to our Constitution \* \* \* was designed to meet just such a case as this and should be applied at this time."

Our conclusion is that the error impelling the learned trial judge to set aside the verdict in this case could not under any possible view which may be taken of it have resulted in a miscarriage of justice. On the other hand, it appears clear to our minds, after an examination of the whole record, that, to permit the order appealed from to stand undisturbed, would result in a distinct miscarriage of justice.

The motion of the respondent to dismiss the people's appeal from the order is denied.

The order appealed from is reversed, with directions to the court below to proceed with the rendition of judgment upon the verdict as returned.

We concur: CHIPMAN, P. J.; BURNETT, J.

20 Cal. App. 694

CALIFORNIA TRONA CO. v. WILKINSON  
et al. (Civ. 1,012.)

(District Court of Appeal, Third District, California. Dec. 24, 1912.)

1. CORPORATIONS (§ 99\*)—ISSUANCE OF STOCK  
—CONSIDERATION—CONSTITUTIONAL PROVISIONS.

The purpose of Const. art. 12, § 11, providing that no corporation shall issue stock except for money paid, labor done, or property actually received, is to prevent the disposal of stock by the company without a sufficient consideration in money, property, or labor; but where there is a consideration of some sort, and the transaction is intended for the benefit of the corporation in the prosecution of its purposes, the consideration is sufficient, though not equal in value to the stock.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 444-446; Dec. Dig. § 99.\*]

2. CORPORATIONS (§ 99\*)—ISSUANCE OF STOCK  
—CONSIDERATION — INSUFFICIENCY — WHO MAY OBJECT.

Where there is any consideration for the issuance by a corporation of its stock, neither the corporation nor its stockholders can assail the transfer on the sole ground of inadequacy of the consideration in the sense of disparity in the market value of the stock and the consideration.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 444-446; Dec. Dig. § 99.\*]

3. CORPORATIONS (§ 99\*)—ISSUANCE OF STOCK  
—INADEQUACY OF CONSIDERATION — "BONUS"—"BONUS STOCK."

A domestic corporation owning mining claims of unknown value was in need of funds for development work and applied to a foreign corporation for a loan. The application was granted in consideration of the domestic corporation mortgaging its property and delivering to the foreign corporation as a profit a per cent. of the gross sale value of mining products marketed, and an additional profit of 100 shares of stock. The domestic corporation assented to the proposition and received \$75,000 and issued the stock. *Held*, that the stock was issued for a valuable consideration in money and for the corporate purposes within Const. art. 12, § 11, providing that no corporation shall issue stock except for money paid, labor done, or property received, though the stock constituted a bonus given as an inducement to the loan, "bonus stock," technically speaking, being stock issued to the purchasers of bonds as an inducement to them to purchase bonds or loan money, though the word "bonus" may in its natural import imply a gift or gratuity.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 444-446; Dec. Dig. § 99.\*]

For other definitions, see *Words and Phrases*, vol. 1, p. 836.]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by the California Trona Company against Guy Wilkinson and others. From a judgment dissolving a temporary restraining order, plaintiff appeals. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Bishop, Hoeffler, Cook & Harwood, of San Francisco, Reed, Black & Reed, of Oakland, R. H. Countryman, of San Francisco, and J. W. Bingaman, of Oakland, for appellant. Charles W. Slack and Chauncey S. Goodrich, both of San Francisco, for respondents.

HART, J. The plaintiff is a corporation organized and existing under the laws of the state of California, with its principal place of business in the city of Oakland, this state. The defendant the Foreign Mines Development Company, Limited, is a corporation organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland. The defendant Guy Wilkinson was, at all the times referred to in the complaint, the manager of the defendant corporation and as such had sole charge of its business in the state of California.

It is alleged in the complaint that on the 12th day of November, 1908, "a certificate purporting to show that said defendant the Foreign Mines Development Company, Limited, was the owner of 100 shares of the capital stock of said California Trona Company, was issued to said defendant the Foreign Mines Development Company, Limited; that said certificate was numbered 29; that said defendant \* \* \* paid no money for said 100 shares of stock or any part thereof; that said defendant \* \* \* did no labor for said \* \* \* shares of stock, or any part thereof; that said defendant \* \* \* delivered no property for said \* \* \* shares of stock, or any part thereof; that said defendant \* \* \* neither paid nor rendered any consideration whatsoever for said stock purporting to have been issued to it, or any part thereof, and the issuance of said certificate to said defendant \* \* \* was wholly illegal and void, and did not constitute said defendant \* \* \* a stockholder of said California Trona Company; that upon the so-called issuance of said certificate to said defendant \* \* \* the name of said the Foreign Mines Development Company, Limited, was entered upon the corporate records as the owner of said 100 shares of stock." The complaint further shows that the certificate of shares so issued to the defendant corporation was surrendered to the secretary of plaintiff, who was directed by the said corporation defendant to issue, and upon such direction did issue, a new certificate in lieu thereof to one S. Walker Janes, the agent of said defendant corporation; that on the same day there was also issued to said Janes a certificate for five shares of the capital stock of plaintiff; that on the 18th day of April, 1911, said defendant corporation caused said certificates, aggregating 105 shares of the capital stock of plaintiff, issued to said Janes as stated, to be surrendered to the secretary of plaintiff, who, upon the direction of said defendant corporation, issued in lieu thereof to the defendant Wil-

kinson a certificate for 105 shares of the capital stock of the plaintiff.

It is further alleged that the plaintiff, on the 5th day of November, 1908, executed and delivered to the said defendant corporation a mortgage on all its real and personal property situated in the state of California, and that on the 27th day of November, 1909, said defendant corporation commenced an action in the Circuit Court of the United States in and for the Northern District of California to foreclose said mortgage; "that said action is now pending in said court; that judgment has not yet been rendered in said action; that a meeting of the stockholders of plaintiff for the purpose of electing a board of directors will be held at the office of the plaintiff, in the city of Oakland, on the 3d day of May, 1911, at the hour of 10:30 o'clock a. m.; that said defendant Guy Wilkinson threatens to vote at said meeting the said 100 shares of stock so illegally issued as aforesaid." It is charged that, on the 10th day of April, 1911, said the Foreign Mines Development Company, Limited, acting through said defendant Guy Wilkinson as its agent and manager, entered into an agreement with certain of the stockholders of plaintiff (naming them) whereby it was in effect agreed that said stockholders would vote with Wilkinson for the purpose of calling a meeting of the stockholders of the plaintiff for the 3d day of May, 1911, and that, at such meeting, said stockholders (parties to said agreement) would "cast," or cause to be cast, the votes to which the said number of shares shall entitle such party of the first part in filling vacancies in the board of directors of the said corporation for such persons as shall be indicated by the party of the second part, through its managing director, Guy Wilkinson," etc.

It is alleged that the 100 shares of stock so illegally issued to the defendant corporation and finally to said Wilkinson will, in conjunction with the shares held by the said persons who are parties to the agreement above referred to, constitute a majority of all the capital stock of the plaintiff, and that therefore, if said Wilkinson is permitted to vote said 100 shares of stock, he will control said election of directors to be held on the 3d day of May, 1911. It is charged that the purpose of said defendant corporation and Wilkinson "in seeking to control the election of the board of directors of plaintiff is to compromise said foreclosure suit now pending in the said Circuit Court of the United States by causing plaintiff to confess judgment therein in favor of said the Foreign Mines Development Company, Limited; that in said foreclosure suit there is a controversy as to the amount of the debt secured by said mortgage, said defendant \* \* \* claiming that there is due from said plaintiff a sum nearly twice as great as the sum which plaintiff admits is due." The



complaint declares that, unless a temporary restraining order is issued whereby said defendant Wilkinson is prevented from voting said 100 shares of stock "at said meeting of stockholders to be held on the 3d day of May, 1911, or at any time to which said meeting is adjourned, great and irreparable injury will result to the plaintiff and its stockholders."

Plaintiff prays judgment: That said 100 shares of stock were illegally issued, and that the certificate therefor be delivered up and canceled, and that, pending the determination of this issue, and until the further order of the court, said Wilkinson, his agents, etc., be restrained "from voting said 100 shares of stock at the said meeting of stockholders to be held on the 3d day of May, 1911, or at any time to which said meeting may be adjourned."

Upon the complaint (verified) the court granted a temporary restraining order, requiring said Wilkinson and his agents, etc., to desist and refrain from voting said shares of stock at the stockholders' meeting, to be held May 3, 1911, or "at any time to which said meeting may be adjourned." Said temporary restraining order was issued on the 2d day of May, 1911. On the 4th day of May, 1911, the defendants, by a verified answer, replied to the complaint and at the same time served upon the plaintiff and its attorneys a notice of motion to dissolve the temporary restraining order issued as above indicated.

The answer denies all the equities of the complaint, at the same time admitting certain averments thereof, and then, by way of a special defense, sets forth in detail the transaction between the plaintiff and the defendant corporation whereby the latter became the owner of the 100 shares of stock of the plaintiff referred to in the complaint, and from which it appears that, on the 1st day of August, 1908, the said plaintiff and the defendant corporation entered into an agreement in writing, the terms of which, in so far as they are important to the question here, are, in substance, as follows: That the said defendant agreed to advance to the plaintiff the sum of \$50,000, more or less, with which to develop certain mining properties owned by the latter in the state of California; that, for the purpose of erecting a plant, etc., upon said properties, the sum of \$25,000 was to be advanced, upon a favorable report by an engineer, selected for the purpose of investigating said properties, that the representations of the plaintiff as to the character and extent of the minerals contained therein were true; that, after the completion of said plant, the said defendant "shall deposit in said bank (First National Bank, of Oakland, Cal.) such additional sums as shall be called for from time to time by said company (plaintiff), such additional sums, however, not to exceed in the aggregate

the sum of twenty-five thousand dollars"; \* \* \* that, "as profit to the contractor (defendant corporation) for the advance of \$50,000 there shall be delivered to the contractor 6¼ per centum of the gross sale value in San Francisco of all products of said claims marketed by said company, for a period of operation, which in the aggregate shall be equivalent to the continuous operation of such plant for a period of three hundred days at full capacity." After making provision for a reduction of the per centum of the gross sale value of the products of said properties to be paid to the said defendant in case the full sum of \$50,000 is not so advanced and for an increase thereof in the event that a greater sum than \$50,000 is so advanced, the contract proceeds: "Sixth. As additional profit to said contractor (defendant corporation) for the advance of the sum of fifty thousand dollars, more or less, as above provided, said company (plaintiff) shall, upon receipt of the first payment of twenty-five thousand dollars, issue and deliver to said contractor or its nominees one hundred shares of the capital stock of said company, of the par value of one thousand dollars per share." It is then provided that the "said sum of fifty thousand dollars, or such other sum as shall be advanced as aforesaid by the contractor, shall be secured by a first mortgage to the contractor or its nominee upon the property of the company," etc.

In accordance with the provisions of the foregoing agreement, the answer alleges the defendant, on the 5th day of November, 1908, deposited to the credit of, and advanced to, the plaintiff the sum of \$25,000, and that on the 29th day of November, 1909, it advanced to the plaintiff additional sums, exceeding the sum of \$50,000, making in all so advanced by the defendant corporation to the plaintiff a sum exceeding that of \$75,000. The answer admits and alleges that the plaintiff, in pursuance of the terms of said agreement, executed to the defendant corporation "a mortgage on all its real and personal property situated in the state of California, which said mortgage was duly recorded in the offices of the county recorders of San Bernardino and Inyo counties, state of California, in which the said property is situated." It is admitted that an action for the foreclosure of said mortgage is now pending in the United States Circuit Court for the Northern District of California, and that no judgment has yet been rendered in said action; admits the agreement entered into between the defendant Wilkinson and certain other stockholders of the plaintiff, as set forth in the complaint, and that the stock held by said Wilkinson and that of said stockholders would, together, constitute a majority of the shares of the capital stock of plaintiff; denies that there was to be an election of directors of plaintiff at the meeting to be held on the 3d day of May, 1911; denies that Wilkinson would

have controlled the election of directors at said meeting; admits that there is a controversy as to the amount of the debt secured by the said mortgage, and that the defendant corporation claims a sum nearly twice as great as the sum which the said plaintiff admits in said foreclosure suit is due, but denies that the purpose of the defendant corporation and Wilkinson in securing control of the board of directors of the plaintiff "is to compromise the said foreclosure suit, now pending in the said Circuit Court of the United States, by causing the plaintiff to confess judgment therein in favor of the said defendant corporation," etc.

The plaintiff replies to the averments of the answer by an affidavit denying that there was any consideration rendered by the defendant for the 100 shares of stock "other than the so-called and alleged consideration set forth in said contract," referring to the agreement between the plaintiff and the defendant corporation.

Upon the record, of which the foregoing is a synopsis, the court, on the 15th day of May, 1911, made an order granting the motion of the defendants to dissolve the temporary restraining order. This appeal is by the plaintiff from said order dissolving the temporary restraining order.

The contention of the appellant is that the purport issue of 100 shares of stock by the plaintiff to the defendant corporation is unlawful and void under the terms of section 11 of article 12 of the Constitution of this state. The respondents not only controvert the position thus taken by the appellant, but vigorously insist that the order from which this appeal is prosecuted may and should be upheld for the asserted reason that the granting of the temporary restraining order was in direct violation of the mandates of section 527 of the Code of Civil Procedure, as amended by the Legislature of 1911 (Stats. 1911, p. 59), whereby a radical innovation on the former practice with respect to the issuance of temporary restraining orders has been brought about. The respondents also make the point that the plaintiff has not, by its complaint, shown itself to be entitled to favor from a court of equity in the matter as to which it seeks relief.

While we recognize in the last-stated contentions of respondents considerable force, it is not conceived to be necessary to consider them, since we are of the opinion that, upon the merits of the controversy, the order appealed from must be sustained.

We are unable to make out how or in what way the transaction complained of by the plaintiff may be held to be in opposition to the provisions of section 11 of article 12 of the Constitution, and, unless it can be said to be obnoxious to the objection so made, then the act of transferring the stock to the defendant corporation was in all respects bona fide and legal; there being no showing

or even pretense of extrinsic fraud in connection therewith.

The section of the Constitution, with the terms of which it is claimed the transaction involved here is in conflict, reads, in part, as follows: "No corporation shall issue stock or bonds, except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness shall be void."

[1] The purpose of those provisions of the Constitution is, of course, to preserve at all times the property of the corporation and thus protect and maintain the rights of the creditors and stockholders thereof as against any such manipulation or disposal of the capital stock by the owners of a majority of such stock as might result in the serious impairment if not the complete destruction of the rights of such creditors and the minority stockholders and at the same time in advantage to such majority stockholders—a situation which experience shows could easily be brought about if the law were otherwise than as laid down by the provisions of the Constitution above quoted. In other words, the design of said provisions is, among other things, to prevent the corporate stock of a corporation from being transferred or disposed of by it without a sufficient consideration, either in the form of money, or property or labor performed for it. But by this we are not to be understood as meaning a consideration equal in value with the stock, for we do not think that the constitutional inhibition invoked here requires such a consideration to render valid the issue of stock by a corporation. If there is a consideration of some sort, and the transaction is one that is intended to redound to the benefit of the corporation in the prosecution of its corporate purposes, then we should say that, so far as are concerned the requirements of the law in that regard, the consideration is sufficient, and, in a sense, adequate, although it may not be equal in value to that of the stock.

[2] In any event, in the case of the issuance of stock by a corporation for an inadequate consideration, viewed from the standpoint of value, such transaction cannot be assailed by the stockholders, or, which is the same thing, by the corporation itself, merely upon the ground of such inadequacy of consideration. "Creditors may attack the transaction—stockholders cannot." *O'Dea v. Hollywood Cemetery Ass'n*, 154 Cal. 67, 97 Pac. 6. So, in this case, if there be shown any consideration at all for issuance of the stock, then the plaintiff is in no position to challenge the transaction resulting in its issuance or the validity of such issue solely upon the ground of the inadequacy of the consideration in the sense that there is a marked or wide disparity, unfavorable to the stock, between the value of the latter and that of the consideration given therefor. Upon this proposition, assuming that the record



discloses some consideration for the issuance of the stock to the defendant, we could rest the decision of this case. But we are of the opinion that the facts disclosed here clearly show that the plaintiff received, under the circumstances under which the stock was issued, an adequate consideration.

[3] There is nothing in the record before us showing what the actual value of plaintiff's stock was, unless the par value thereof is to be assumed to be its actual value, which assumption is not warranted by the other facts disclosed by the record. The complaint is absolutely silent as to the actual value of said stock at the time of the transaction culminating in its transfer to the defendant. It merely alleges that the stock, having a par value of \$1,000 per share, was issued and delivered to the defendant corporation without any of the several kinds of consideration for which it may legally be issued. On the other hand, the answer declares "that the consideration for the issuance and delivery to the defendants \* \* \* of the said 100 shares of the capital stock of the plaintiff and of the said certificate No. 29 therefor, was the advance by the defendant \* \* \* of the sums provided by it to be advanced under the terms of said contract," etc., and that "the same was a good and valuable consideration."

Of course, it can seldom, if ever, be said that the capital stock of a mining corporation whose properties are undeveloped is actually worth its par value. It certainly cannot be said that the stock of the plaintiff, at the time of the transaction here, was worth its par value or anything near such value. The fact is that the properties of the plaintiff which were related to the transaction involved in this dispute were in a condition and of a character that it could not be told, at the time of said transaction, what actual value the stock issued to the defendant possessed, if very much of any when compared to the amount of money the plaintiff asked the defendant to loan to it. Manifestly, the value of said stock, at the time of the transaction involved here, in so far as such stock might have any actual value from the fact of plaintiff's ownership of the properties to develop which it borrowed money from the defendant (and it does not appear that it owned any other property), was purely tentative, or extremely problematical, as all undeveloped mining enterprises, from their very nature, must necessarily be, for whatever actual value it might acquire would, of course, have to depend and be determined upon the result of the experimental development of its said mining properties. It is therefore proper to say, from all the facts presented by this record, that the actual value of the stock transferred to the defendant corporation was, at the time of the issuance of said stock, very far short of its par value, if, indeed, it had any value at all as profit-producing property. We therefore

have this situation here: That the plaintiff was the owner of certain mining claims, the value of which as such was unknown, and that it was in need of the means necessary for the development of said claims; that it made an application to the defendant corporation for the loan of certain moneys to be used for that purpose, and its application was granted, the defendant corporation, upon an examination of the proposition, agreeing to advance the money required—the sum of \$50,000, more or less—in consideration of a promise upon the part of the plaintiff to do these things: (1) To execute and deliver to the said defendant a mortgage upon all its mining properties situated in the state of California and to develop which the loan was to be made; the money so loaned to bear interest at the rate of 6 per cent. per annum. (2) To pay and deliver to the said defendant, as a "profit" to it, a certain per centum of the gross sale value in San Francisco of all products of said claims marketed by the plaintiff; the amount of such per centum to be regulated according to the amount of money so advanced by the defendant. (3) As "additional profit" to the defendant, and upon receipt by it (plaintiff) of the first payment of \$25,000, to issue and deliver to the defendant, or to any person or persons it might name to receive the same, 100 shares of stock of plaintiff of the par value of \$1,000 per share.

The plaintiff assented to the foregoing propositions, and not only executed an agreement in writing to that effect, but executed the terms of the agreement, and thereupon received from the defendant the first advance of \$25,000 and thereafter, from time to time, received other sums until the total amount so received exceeded the sum of \$75,000. It seems to us that, under the circumstances as thus indicated, it must be held to be true that the stock involved in this litigation was issued to the defendant corporation for a consideration which, whatever its value was when compared to the actual value of the stock, not only satisfied the mandates of the Constitution, but which, even in a suit by creditors to cancel the stock on the ground of fraud in its issuance, could hardly be held to be such in itself to justify the inference of fraud, either as a matter of law or of fact.

It is very clear that the issuance of said stock to the defendant, under the circumstances disclosed here, was one of the chief inducements of the loan. Indeed, it is, we think, from a consideration of the whole transaction, proper to assume that, but for the agreement of the plaintiff to so transfer 100 shares of its stock to the defendant, the latter would not have agreed to advance to the former the large sum of money which was actually advanced.

However that may be, it is very clear that the stock was issued for a valuable consideration in the form of money and for the cor-

porate purposes of the corporation, and that is all that is required by the provisions of section 11 of article 12 of the Constitution to make it a perfectly valid transaction.

Provisions in the Constitutions of other states similar to those involved in this discussion have been considered by the courts of those jurisdictions as well as by the Supreme Court of the United States, and they have thus uniformly been held not to mean that the consideration should always be of equal value with the stock issued, so long as "the transaction is a real one, based upon a *present consideration*, and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden." *Memphis, etc., Railroad v. Dow*, 120 U. S. 287, 299, 7 Sup. Ct. 482, 487 (30 L. Ed. 595). See, also, *Grant v. East & West R. Co.*, 54 Fed. 569, 575, 576, 4 C. C. A. 511; *Nelson v. Hubbard*, 96 Ala. 238, 250, 11 South. 428, 17 L. R. A. 375; *Speer v. Bordeleau*, 20 Colo. App. 413, 79 Pac. 332; *Const. of Alabama 1875*, art. 14, § 6; *Colorado Const. art. 15*, § 9.

Even if the stock issued to the plaintiff may be said to have constituted a "bonus," as is the contention, still, it having been given as an inducement to the loan, it cannot be held to be void or even voidable for that reason. While the word "bonus" may, in its natural import, be said to imply a gift or gratuity, "bonus stock, technically, and perhaps correctly speaking, is stock issued to the purchasers of bonds as an inducement to them to purchase bonds or loan money to the corporation." *Thompson on Corporations* (2d Ed.) § 3444.

In *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423, where it was contended that certain stock was issued without a consideration to the purchasers of bonds of the corporation there concerned, it is said: "It is true that these parties, in disposing of the bonds, allowed to each purchaser of a \$1,000 bond \$200 of preferred and \$400 of common stock, but they do not seem to have profited by this themselves. *And if it were necessary to the negotiation of the bonds to give a bonus in that stock, it cannot be considered in the light of a mere donation.* (Italics ours.) Nor, if it were done in good faith, would it necessarily afford a ground of complaint to dissenting stockholders."

We have no fault to find with the cases cited by counsel for the plaintiff, notably the case of *Central Trust Co. v. New York City, etc., Co.*, 18 Abb. N. C. (N. Y.) 381, which held that stock issued by a corporation without any consideration is illegal, and that such issue may be set aside upon that ground. Indeed, obviously, the views expressed here are in perfect harmony with those announced in those cases. In the *Central Trust Co. Case*,

just mentioned, the transaction whereby certain parties secured, without any consideration whatsoever, a large amount of the bonds and stock of the corporation, came so close to actual fraud that the learned justice who wrote the opinion found no way of relieving it from that imputation except upon the ground that such a method of manipulating bonds and stocks of corporations had been for many years a common practice in that line of the world's activities. Obviously, if, as in that case, the corporation here had parted with a large amount of its capital stock without any sort or kind of consideration—indeed, by gift pure and simple, as in that case—then most unquestionably would the transaction be held to have been in direct violation of the provisions of section 11, art. 12, of the Constitution; but, as an examination of this record clearly and distinctly discloses, there was a consideration and a most valuable one for the issuance of the stock by the plaintiff to the defendant.

As stated in the beginning, a discussion of other points made by the respondents in support of the order dissolving the restraining order is altogether unnecessary in view of the opinion as to the merits of the dispute to which we have been persuaded by an examination of this record; yet we cannot refrain from observing that the plaintiff is in an awkward position as a supplicant for relief through the extraordinary remedial power of a court of conscience. It does not complain that it has received no benefits from the act of issuing the stock to the defendant. It does not charge actual fraud whereby it suffered any injury, nor, indeed, urge any objection which would render the transaction unconscientious; but, after complacently acquiescing therein for a long time and recognizing the validity of the stock issue by various positive acts (such as issuing new certificates for the old, etc.) and after the transaction had been a thing of the past by a number of years, it merely relies, for the establishment of the invalidity of the issue, upon what may well be regarded, at least before a court of equity, as an alleged technical violation of the law of this state concerning the matter of the issuance of stock by corporations. Of course, it is not possible that a corporation may, through an ultra vires transaction of its own making, receive something beneficial or advantageous to its corporate purposes, and then escape the burden of the obligations to which such transaction bound it upon the plea of ultra vires.

But, as shown, upon the merits of this controversy, the order should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.



20 Cal. App. 766

**FRESNO PLANING MILL CO. v. MANNING et al.** (Civ. 1,113.)

(District Court of Appeal, First District, California. Dec. 30, 1912.)

**1. APPEAL AND ERROR (§ 684\*)—QUESTIONS REVIEWABLE—RIGHT TO ATTACHMENT.**

Whether plaintiff is entitled to a writ of attachment under Code Civ. Proc. § 1197, as amended in 1911 (St. 1911, p. 1319, § 10), will not be considered on appeal where the record does not show that the writ was ever issued.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2887-2890; Dec. Dig. § 684.\*]

**2. APPEAL AND ERROR (§ 843\*)—QUESTIONS REVIEWABLE—RULINGS ON DEMURRERS.**

Where the trial court struck out a pleading and did not rule on a demurrer thereto, the sufficiency of the pleading as against the demurrer was not involved on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.\*]

**3. MECHANICS' LIENS (§ 305\*)—ENFORCEMENT—PARTIES.**

Under Code Civ. Proc. § 1197, providing that nothing in the chapter on mechanics' liens shall impair the right of any person, to whom a debt may be due for work or materials, to maintain a personal action for the debt, a materialman may foreclose a lien against the building and maintain a personal action against the contractor, or the contractor may be made a defendant with the owner in an action to foreclose the lien, and a personal judgment rendered against the contractor, though foreclosure of the lien is denied.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 636; Dec. Dig. § 305.\*]

**4. ABATEMENT AND REVIVAL (§ 4\*)—PENDENCY OF ACTION—EFFECT.**

An action abates on a showing of the pendency of a prior action between the same parties on the same subject.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 25-28; Dec. Dig. § 4.\*]

**5. ABATEMENT AND REVIVAL (§ 8\*)—PENDENCY OF ACTION—EFFECT.**

The pendency of an action by a materialman to enforce a mechanic's lien and for a personal judgment against the contractor abates a subsequent action by the materialman against the contractor alone for a personal judgment.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 39-72; Dec. Dig. § 8.\*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Fresno Planing Mill Company against S. E. Manning and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

E. A. Williams, of Fresno, for appellants. Cartwright & Cashin, of Fresno, for respondents.

**LENNON, P. J.** This is an appeal from a judgment against the defendants and in favor of the plaintiff in an action brought to recover the sum of \$450 for building materials alleged to have been sold and delivered by plaintiff to the defendants, and used by

them as contractors in the construction of a building for one T. J. Hammond in the city of Fresno. Prior to the commencement of the present action the plaintiff filed its claim of lien against the lot of land upon which the building was erected for the value of the material furnished the defendants, and in due time instituted an action to foreclose said lien, in which the defendants here were joined as defendants with the owner of the building. By their answer the defendants pleaded the pendency of the previous action in abatement of the present action. The plaintiff's motion to strike out this defense was granted, and it is of this that the defendants chiefly complain.

[1, 2] Incidentally counsel for the defendants discuss the question as to whether or not the plaintiff was entitled in this action to a writ of attachment under the provisions of the amendment of 1911 (St. 1911, p. 1319, § 10) to section 1197 of the Code of Civil Procedure. The record before us does not show that such a writ was ever issued in this action; and, in the absence of such a showing, the question of the plaintiff's right to a writ of attachment is not involved and cannot be considered. In addition to the motion to strike out, the plaintiff interposed a demurrer to the answer of the defendants, which assailed the sufficiency of the facts pleaded as a special defense in abatement of the present action. The demurrer, however, was not passed upon, for the reason, presumably, that the granting of the motion to strike out in effect disposed of the points raised by the demurrer. No question, therefore, of the technical sufficiency of the plea in abatement as against the demurrer, is involved upon this appeal.

Upon the record before us the only question which can be considered is the correctness of the lower court's ruling striking out the defendants' plea in abatement.

The answer of the defendants, in addition to a denial of all of the material allegations of the plaintiff's complaint, averred in effect that prior to the commencement of the present action the defendants entered into a contract with one T. J. Hammond, whereby the defendants agreed for a stipulated sum to erect a building in the city of Fresno for said Hammond; that during the construction of said building the plaintiff in this action furnished goods, wares, and merchandise to be used, and which were actually used, in the construction of said building; that thereafter the plaintiff, not having been paid for said goods, wares, and merchandise, filed its claim of lien upon the lot of land of said Hammond upon which said building was erected; that thereafter and within the time allowed by law the plaintiff instituted an action in the superior court of Fresno county to foreclose its lien for the value of the same goods, wares, and merchandise al-

leged in the present action to have been sold and delivered to the defendants, and for the value of which the plaintiff in the present action is seeking to recover a personal judgment against the defendants; that the defendants in the present action were joined as defendants in the prior one to foreclose the lien of plaintiff; and that said last-mentioned action had never been dismissed and was pending at the time the present action was commenced.

[3] Under the provisions of section 1197 of the Code of Civil Procedure, as that section was originally enacted and as it stands today, any person to whom a debt is due for materials furnished for the erection of a building may, in addition to an action to foreclose a lien against the building and its owner, maintain a personal action to recover such debt against the person liable therefor; and under the established and approved practice in this state the person contracting for such materials may be made a party defendant with the owner of the building in an action to foreclose a mechanic's lien. In such an action a personal judgment may be rendered against the contractor, even though foreclosure of the lien be denied as against the owner of the building. *Hooper v. Flood*, 54 Cal. 218, 220; *Bates v. Santa Barbara*, 90 Cal. 543, 27 Pac. 438; *McMenomy v. White*, 115 Cal. 339, 47 Pac. 109; *San Francisco Paving Co. v. Fairfield*, 134 Cal. 220, 226, 66 Pac. 255.

There seems to be some slight confusion of authority as to whether or not the contractor is a necessary party to an action to foreclose a mechanic's lien; but all of the authorities are agreed that, if a personal judgment is desired against the contractor, it is proper to make him a party defendant, and such practice is commended as tending to avoid a multiplicity of suits. *Giant P. Co. v. San Diego F. Co.*, 78 Cal. 193, 20 Pac. 419; *Russ L. & M. Co. v. Garrettson*, 87 Cal. 589, 25 Pac. 747; *Green v. Clifford*, 94 Cal. 49, 29 Pac. 331; *Yancy v. Morton*, 94 Cal. 558, 29 Pac. 1111; *S. F. Paving Co. v. Fairfield*, supra.

[4] It is not the policy of the law to permit different suits to be instituted and pending between the same parties concerning the same subject-matter; and hence the rule that an action abates upon a showing of the institution and pendency of a prior action between the same parties upon the same subject-matter. The reason for this rule is founded upon the theory that, if the first suit affords an ample remedy to the party claiming to be aggrieved, it would be not only unnecessary but vexatious to permit the prosecution of a second suit founded upon the same cause of action. An action is commenced when the complaint therein is filed. Code Civ. Proc. § 350. It is thereafter deemed to be pending until it is finally determin-

ed upon appeal (Code Civ. Proc. § 1049); and a plea in abatement, based upon the ground of another action pending, may be raised either by demurrer or by answer (Code Civ. Proc. § 430; *Tooms v. Randall*, 3 Cal. 438; *Coubrough v. Adams*, 70 Cal. 374, 11 Pac. 634).

[5] While it is not definitely stated in the answer of the defendants that Hammond, the owner of the building, was made a defendant in the prior pending action to foreclose plaintiff's claim of lien, or that the defendants here were joined as defendants in that action for the purpose of procuring a personal judgment against them, it is sufficiently clear, as against a motion to strike out, that the answer of the defendants purports to plead that the purpose of the prior action was to foreclose plaintiff's lien against Hammond and against Hammond's property, and at the same time to obtain a personal judgment against the defendants named as defendants in this action for the value of the identical goods, wares, and merchandise sued for therein. The only possible purpose in making the defendants in this action defendants in the prior action would be to secure a personal judgment against them for the satisfaction of the identical debt which is made the basis of the present action. The purpose of the present action is also to secure a personal judgment against the defendants upon practically the same cause of action upon which they were joined as defendants in the previous action. In short, the causes of action and the relief sought in the two suits, in so far as the defendants here are concerned, are alleged to be substantially the same. Consequently the pendency of the prior action was a material defense in the present one, which it was proper to present by way of answer; and it follows that the trial court erred to the prejudice of the defendants in granting the plaintiff's motion to strike out such defense upon the ground of its immateriality.

The judgment appealed from is reversed, and the cause remanded.

We concur: HALL, J.; KERRIGAN, J.

20 Cal. App. 743

STEVENS v. LOS ANGELES DOCK & TERMINAL CO. (Civ. 1,177.)

(District Court of Appeal, Second District, California. Dec. 30, 1912. Rehearing Denied Jan. 30, 1913.)

1. DAMAGES (§ 82\*)—CONTRACTS—CONSTRUCTION—PENALTY.

A provision in a contract for the sale of land which provided that, if the vendor failed to make certain improvements within a stipulated time, the purchaser should be excused from the payment of the third installment, is not a stipulation for a penalty or the payment of liquidated damages, so that specific performance could be had despite Civ. Code, §§ 1670 and 3369, respectively, declaring contracts pro-



viding a penalty invalid to that extent, and that specific performance of such agreements cannot be awarded.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 178; Dec. Dig. § 82.\*]

## 2. PARTIES (§ 80\*)—NECESSARY PARTIES—WAIVER OF OBJECTIONS.

Where plaintiff's complaint was not demurred to on the ground of nonjoinder of parties, he may have specific performance of a contract for the sale of land, even though his associates, who had received the lands to which they were entitled under the purchase, were not made parties plaintiff.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 123-131, 170; Dec. Dig. § 80.\*]

## 3. SPECIFIC PERFORMANCE (§ 17\*)—JUDGMENT—ERRORS.

Though plaintiff, who had entered into a contract for the purchase of land, sold part of it to a third person and defendant conveyed to plaintiff's grantee, yet, in an action by plaintiff for specific performance, a judgment awarding specific performance as to that portion is proper; the only effect being to perfect the grantee's record title.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 38-46; Dec. Dig. § 17.\*]

## 4. ESTOPPEL (§ 110\*)—PLEADING—NECESSITY.

In an action for the specific performance of a contract for the sale of land which provided for the construction of improvements by the vendor, and that, in case they were not constructed within 18 months, the purchaser would be excused from the payment of the last installment, where the vendor pleaded that this stipulation was a provision for a penalty and therefore invalid, but failed to plead the construction of the improvements after the expiration of the time limit, and that plaintiff was estopped to deny his liability therefor, plaintiff's estoppel, arising out of the construction of the improvements, cannot be shown as a defense.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 300; Dec. Dig. § 110.\*]

Appeal from Superior Court, Los Angeles County; F. E. Densmore, Judge.

Action by F. W. Stevens against the Los Angeles Dock & Terminal Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Campbell & Moore, of Los Angeles, for appellant. J. W. McKinley and Frank Karr, both of Los Angeles (W. R. Millar, of Los Angeles, of counsel), for respondent.

ALLEN, P. J. The action was one brought by plaintiff against defendant for the specific performance of a contract for the purchase of real estate. The contract, made a part of the complaint, was entered into by defendant as party of the first part and W. B. Redburn & Son and plaintiff of the second part, the same being an agreement to sell and convey to the parties of the second part certain described premises consisting of a large number of lots in a tract called the "Back Bay Tract No. 1," being a subdivision of certain lands in the city of Long Beach. The consideration price named for the lots was \$31,850, \$12,740 being paid at the date of the signing of the agreement, \$9,555 being pay-

able on or before the 15th day of July, 1906, and the balance of \$9,555 on or before the 15th day of January, 1907, with 6 per cent. interest upon deferred payments, payable semiannually. The agreement contained the usual clause providing that if default be made in any of the payments, or in any of the covenants and conditions of the contract, the whole should become due and payable, and the first party given the right to cancel and contract, re-enter, and take possession of the premises, and retain all moneys paid as rent for the use and occupation of such premises. It was further agreed that, when all of the payments were made, a deed should be given conveying a good and sufficient title to the property, free and clear of all incumbrances. It was further agreed that the first party should fill said land and raise it to a uniform height of at least three feet above its present elevation, or to such other height as first party might desire, not exceeding 10 feet; that the first party should grade all streets in said tract, and put in cement curbs and sidewalks. Time was made the essence of the contract. Attached to such contract and a part thereof was a further agreement between the parties to the effect that, if the improvements agreed to be put upon said premises by the first party were not completed within one year, second parties should be exonerated from the payment of interest for six months upon the third payment, and, in case the improvements were not completed at the end of 18 months, the third payment should not be required. It is alleged in the complaint that thereafter a partition was effected between the parties of the second part by which certain of the lots were apportioned to Redburn & Son in lieu of their interest in the contract, and certain other lots apportioned to plaintiff, those apportioned to plaintiff being the lots described in the complaint and with reference to which specific performance is asked; that defendant had conveyed to Redburn & Son their apportionment of the lots; that plaintiff had made all payments required of him by the contract other than the payment specified as becoming due on the 15th of January, 1907; and further alleging that none of the improvements had been placed upon said property, as specified in said contract, within the 18 months mentioned; that plaintiff has performed all of the conditions and covenants required of him to be performed by the agreement; that said agreement was just, fair, and reasonable, and the waiver of the third payment for said lands, in case said improvements should not be completed within 18 months from January 15, 1906, was fair and reasonable and was part of the consideration of such agreement, and was fair and adequate and was made for the purpose of inducing plaintiff to enter into said agreement with said defendant, and the enforcement of same is fair and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

reasonable and not to the undue advantage of either party, and that said consideration was not disproportionate to the value of said lands. There were further allegations of damage resulting from the nonperformance of the conditions of the contract upon the part of defendant, with a prayer for judgment that defendant execute to plaintiff a sufficient conveyance of the property in accordance with the terms and conditions of said agreement, for damages in the sum of \$20,000, and for costs of suit.

A general demurrer to the complaint was interposed and overruled, and defendant answered, admitting the execution of the contract, but denying performance upon plaintiff's part; and alleging further that in June, 1906, plaintiff and Redburn & Son partitioned the premises between themselves, evidenced by a new and independent contract which was entered into between defendant and the respective parties to the partition. Said second contract is set out in the answer, and contains no provision with reference to the price which should be received for the premises in the event the improvements were not made, admits the conveyance to Redburn & Son of their share of the property so allotted by the mutual partition and the receipt by defendant of the full consideration price therefor. Defendant denies that all of the improvements were not made within 18 months, but alleges that they were all made before the suit was commenced, except as to the matter of sidewalks and curbs; that defendant was unable to make such sidewalks and curbs because of the absence of certain ordinances requisite therefor. Defendant further alleges that at the time of the filing of the complaint herein it had filled the said lots, but there is no issue as to default having been made in the filling of such lots within the 18 months prescribed in the original agreement. The answer, however, seeks to excuse this nonperformance of the contract because of its impracticability, in view of the fact that the Back Bay tract comprised a large body of land which, to be filled in a proper manner, required dredging and filling of the entire tract, which could not be done within the 18 months. Defendant denies generally those allegations of the complaint as to the reasonableness and fairness of the contract with reference to the purchase price. Plaintiff in due time filed his affidavit denying the due execution and delivery of the second contract attached to defendant's answer.

The action was tried by the court, which found the allegations of the complaint to be true, found that the contract set up by defendant in its answer, called the second contract, was never executed and delivered; found that the partition had been made as was substantially agreed to by both parties; found that the improvements referred to in said agreement attached to the complaint were not made and constructed within 18

months from the 15th day of January, 1906, the date of the contract, and that the same were not completed until long after 18 months from such date and are not now completed, in that neither curbs nor sidewalks are laid in the streets running through said tract; that plaintiff has performed all of the conditions and covenants required of him to be performed by the contract; that the agreement to waive the third payment for said land in case said improvements should not be completed within 18 months was fair and reasonable and was a part of the said agreement so entered into; that the first and second payments expressed in said agreement for said lands constituted the reasonable and adequate value thereof in an incomplete and unfilled condition and not disproportionate to the value of said lands; that great damage had been suffered by plaintiff, but that the same was offset and equaled by the amount of filling which had been done after the expiration of the 18 months, and that under the terms of the contract defendant is not now required to make sidewalks and curbs; that it was not impossible to make the improvements prescribed by the agreement within the time set forth; that the agreement with reference to the waiver of the third payment was not an attempt to determine and liquidate in anticipation thereof damages to be paid or other compensation to be made to plaintiff by reason of a breach of defendant's obligation mentioned. Judgment was accordingly entered in favor of plaintiff from which judgment defendant appeals upon a bill of exceptions.

It is very clear from the record that the second contract, being the one set out and attached to defendant's answer, was never executed; that, while the signatures were thereto attached, the same was not delivered by defendant or accepted by plaintiff; and that the only contract between the parties duly executed and delivered was the contract set out and attached to plaintiff's complaint. The answer admits the partition, alleging only that it was evidenced in a particular manner. The court finds that the same was not so evidenced.

[1] The principal point presented by appellant is that this waiver of the third payment in default of the making of the improvements was a contract either for a penalty or for liquidated damages; that regarding the same as one for liquidated damages, under section 1670 of the Civil Code, the same is void because from the nature of the case it was neither impracticable nor extremely difficult to fix the actual damages in the event of failure to perform the conditions, and that there is no evidence in the record tending to show the amount of actual damages, if any existed; and, further, that if treated as a penalty, under section 3369 of the Civil Code, specific relief cannot be granted to enforce a penalty or forfeiture



in any case. The learned trial judge in construing the agreement determined the case evidently upon the theory that the so-called waiver of the third payment was neither an attempt to liquidate damages, nor in the nature of a penalty, but was, in effect, an agreement to sell property in an incomplete condition for a fixed price, which was the cash price plus the first deferred payment, with an option to make certain improvements thereon within 18 months, which, if made, then the price agreed upon should be the total amount specified, which included the third payment. In other words, that the specified third payment was nothing more than a stipulation as to the enhancement in value which would attach to the property in the event that the contemplated improvements were made within the specified time, and, if so made, that the plaintiff should pay therefor a stipulated sum, a condition somewhat analogous to a contract involving a sale of vacant property at a fixed price, with an option to construct a house thereon of certain character within a stipulated time, which, if done by the seller, an additional price should be paid therefor. We are of opinion that this is a fair construction of this contract and so construed it is not open to the criticism offered, and does not come within the provisions of the sections of the Civil Code above cited, and that the allegations of the complaint were sufficient to warrant the relief granted.

[2] Appellant further contends that, the action being one for the specific performance of a contract to which Redburn & Son were parties, the same could not be decreed unless Redburn & Son had their day in court and were concluded by the judgment. There was no demurrer on account of nonjoinder of parties, and, in addition to this, it is admitted by the pleadings that Redburn & Son had received the lots mutually agreed upon to be received by them in lieu of their interest in the entire contract; that defendant had conveyed such lots to Redburn & Son; and that they had no interest in the controversy. Under this condition of the pleadings, we think the court was warranted in granting the decree in favor of plaintiff alone.

[3] Appellant further contends that it was error for the court to grant a decree requiring specific performance of the contract by a conveyance of all of the lots, for the reason that it was alleged in the answer and found by the court that one of the lots had been conveyed by defendant to one Patterson, thereby as to such lot waiving the benefit of the contract, and which lot was included in the decree. While the finding of the court that this particular lot was subject to an agreement of sale entered into between plaintiff and Patterson is inaccurate, the record disclosing the conveyance by defendant to Patterson with plaintiff's consent, never-

theless, no prejudice could result to defendant on account of such unwarranted finding. The lot was included in the original contract of sale, and the decree could only have the effect to perfect Patterson's record title. The mere sale of one or more of the lots would not have the effect to destroy plaintiff's right to have specific performance, to the end that the title by him agreed to be conveyed to the purchasers might be perfected.

[4] We quite agree with appellant that, under the construction of the contract as determined by the court, no claim for damages could be considered. The purchasers took only the uncompleted property, and the making of the improvements was optional with the seller, who failed to avail himself of such option, and the same could not be the basis for damages. The finding of the court with reference to the value of the improvements and the damages incurred by reason of the delay may be ignored. There is no evidence in the record from which damages may be estimated, even if allowable; nor were there any allegations in the answer that would permit a finding as to the value of the improvements made after the time had expired under the contract therefor. The action was upon the written contract. The defense was based upon defendant's construction thereof. There were no facts pleaded in the answer from which it could be claimed that plaintiff was estopped by any act to deny his liability on account of improvements made after the expiration of 18 months. If, as a matter of fact, the improvements were made with plaintiff's knowledge and acquiescence, the court might have taken the same into consideration, but such matters would arise by virtue of an estoppel and not through the contract. Defendant having had an opportunity to plead an estoppel, if the facts warranted the same, and failing so to do, the same could not be considered by the court. Neither could the court consider the question of practicability involved in the manner of making the improvements, the right to make which within 18 months was reserved in the contract. The contract on its face was positive in its terms, and the right to make such improvements was stipulated to terminate at the expiration of the 18 months, and when such time had elapsed and no improvements were made, in our opinion, the property in its uncompleted condition, the value of which was determined between the parties under the contract and which is found by the court to have been the reasonable value thereof, was the price and sum agreed to be paid therefor; and, it being disclosed that plaintiff had fully paid all of such contract price, he was entitled to a decree as prayed for in his complaint.

Judgment affirmed.

We concur: JAMES, J.; SHAW, J.

20 Cal. App. 770

**ROSSI v. BEAULIEU VINEYARD.**

(Civ. 1,020.)

(District Court of Appeal, Third District, California. Dec. 31, 1912.)

**1. APPEAL AND ERROR (§ 348\*)—QUESTIONS REVIEWABLE—EVIDENCE.**

Where an appeal from a judgment alone is taken under the new method prescribed by Code Civ. Proc. §§ 941a-941c, within the statutory six months after entry of judgment, and the record does not show that any notice of the rendition of the judgment was served, the court, if necessary, may consider the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1897-1899; Dec. Dig. § 348.\*]

**2. TRIAL (§ 397\*)—FINDINGS—FAILURE TO MAKE.**

Where the court failed to make a finding on a material issue submitted by a pleading, the judgment must be reversed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940-945; Dec. Dig. § 397.\*]

**3. SALES (§ 442\*)—CONTRACTS—CONSTRUCTION—LIABILITY OF PARTIES.**

A contract for the sale of machinery for \$1,000, \$500 payable before a designated date, and \$500 when all the machinery had proved to give satisfaction, contained a guaranty that the machinery would work in good order. The machinery, when installed, did not perform its functions properly, and the parties made a new agreement, requiring the buyer to pay \$200 on the contract price on the seller exchanging parts of the machinery, so that it would operate satisfactorily for two days, after which the buyer should pay \$300 and the balance at a future time, provided the machinery complied with the guaranty. The court, adopting the theory that the new agreement was an unconditional settlement of the original contract, found that the machinery did not comply with the guaranty in the original contract, and that its actual value did not exceed \$250, and that the buyer expended, between the delivery of the machinery and the commencement by the seller of an action for the price, in repairs, a specified sum in endeavoring to use the machinery, and also found that the buyer was entitled to a deduction from the balance of \$500 of a specified sum by reason of the difference in value of the machinery and the loss sustained in operating it. *Held* that, on the theory, as maintained by the buyer, that the warranty contained in the original contract was not modified by the new agreement, the findings were irreconcilably conflicting; and, assuming that the first finding was true, the buyer would, under Civ. Code, §§ 3313, 3314, be entitled, for the detriment by breach of warranty, to the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284-1301; Dec. Dig. § 442.\*]

**4. TRIAL (§ 395\*)—FINDINGS—ISSUES.**

Where the findings, taken as a whole or construed together, clearly show that they included the court's conclusions on all the material issues, the findings are sufficient, as against the objection that the court failed to make a finding on a material issue submitted by the pleadings.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 927-934, 939; Dec. Dig. § 395.\*]

**5. SALES (§ 447\*)—CONTRACTS—ACTION FOR PRICE—ISSUES—FINDINGS.**

In an action for the balance due under a contract of sale of machinery, the buyer filed

a cross-complaint, alleging defects in the machinery and a loss in consequence thereof. A witness testified that the failure of the machinery caused a loss to the buyer of a specified sum. The court found that the buyer expended in repairs a specified sum in endeavoring to use the machinery, and also found that he was entitled to a deduction from the balance due of a specified sum, by reason of the difference in value in the original and the losses sustained in operating the same. *Held*, that the findings, made under the theory that a new agreement was in the nature of an accord and satisfaction binding the buyer to pay a sum whether the machinery complied with the original contract or not, did not contain findings on the issue submitted by the cross-complaint; and a judgment thereon must be reversed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1318; Dec. Dig. § 447.\*]

**6. APPEAL AND ERROR (§ 931\*)—FINDINGS—CONSTRUCTION.**

The findings of the trial court must receive such a construction as will uphold rather than defeat the judgment thereon; and when, from the facts found, other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931.\*]

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by A. Rossi against the Beaulieu Vineyard. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Sterling Carr, of San Francisco, for appellant. John J. Mazza, of San Francisco, and C. E. Trower, of Napa, for respondent.

**HART, J.** This is an action to recover a balance of \$800, alleged to be due the plaintiff under a certain contract made and entered into between the said plaintiff, carrying on business under the name of A. Rossi & Co., in the city of San Francisco, and the defendant.

The trial was had before the court without a jury, and judgment was awarded the plaintiff in the sum of \$561.09 and costs of suit.

This appeal is by the defendant from the judgment under the alternative method of taking such appeals. Sections 941a, 941b, 941c, Code Civ. Proc.

The defendant, as indicated by the entitlement of this cause, is a corporation, engaged in the manufacture of wine in the county of Napa, this state.

The contract referred to and out of which this controversy grows was consummated through written correspondence between the plaintiff and the defendant, the former, in so far as the pleadings disclose, first addressing to George De Latour, the president and manager of the defendant, the following letter, dated at the city of San Francisco, on August 19, 1909: "As per your inquiry for a must pump, 4x4, and a grape crusher and stemmer (combined) with shaft, belting, pulleys, pipes and fitting also, installation of same at your vineyard, at Rutherford, Cal.,



without the freight expenses, we will furnish all the above machinery and parts for the sum of \$1,000.00. We also guaranty you that the machinery shall work on good order. This price includes gasoline engine of 10 H. P. Yours very truly, A. Rossi & Co. A. Rossi."

To the foregoing letter the defendant, by De Latour, replied as follows: "Referring to your letter of even date and our conversation this morning with your Mr. Rossi, we beg to confirm the following purchase: You will supply and set up at our winery at Rutherford, as indicated by us, a must pump, grape crusher and stemmer combined of a capacity of not less than one hundred tons per day, with shaftings, beltings, pulleys, pipe and fittings complete, and a Peerless gasoline engine of ten H. P. without any expense to us except the freight and teaming from the Rutherford station to our winery, and carpenter and mason work, for the sum of one thousand dollars, payable five hundred dollars before the end of September, and five hundred dollars before the end of October, when all the machinery has proven to give satisfaction. It is understood that everything must be set up and in running order on or before September tenth, 1909. Very truly yours, Beaulieu Vineyard, per G. De Latour."

The plaintiff did not complete the delivery and installation of said machinery until the 19th day of September, 1909. This delay, the plaintiff claims and alleges in his complaint, was due entirely to the neglect of the defendant in not having prepared the masonry work or the concrete foundation for the gasoline engine.

After the machinery had been installed, the defendant complained that it did not work satisfactorily, or perform in the proper way the functions for which it was intended, and thus there arose between the parties differences, to settle which they, on the 5th day of October, 1909, made and entered into an agreement in writing, which, after reciting the differences existing between the parties as to the machinery, and that the defendant intended at the date of said agreement to make a payment of \$200 to the plaintiff on the contract price of the same, provided Rossi & Co. should "exchange the stemmer, and fix the said machinery, so that it will operate satisfactorily for two days, after which said time said G. De Latour is to pay the said A. Rossi & Co. the further sum of three hundred dollars, said exchange and said satisfactory run of two days to take place before the 15th day of October, 1909," further provided: "Said G. De Latour further agrees to pay the balance of five hundred dollars by the end of October, 1909, providing the said machinery and equipment furnished complies with the guaranty of A. Rossi & Co. All of the other conditions of said original agreement are to remain in full force and effect, and the pres-

ent payment of two hundred dollars and the foregoing is understood to be an attempt to settle the present difficulties. \* \* \*" At the time of the execution of the last-mentioned agreement, the defendant paid to the plaintiff the sum of \$200.

The complaint alleges that the plaintiff, after the execution of the said last-mentioned agreement, "did perform and carry out all of the conditions agreed to be performed by it under said agreement, dated October 5, 1909, and did exchange said stemmer on the 11th day of October, 1909, and did operate said machinery satisfactorily for two successive days, to wit, on October 11, 1909, and October 12, 1909, and that said machinery is now, and ever since said 11th day of October, 1909, has been, in good condition and operating in a satisfactory manner; that said A. Rossi & Co. has performed every and all of the conditions agreed by it to be performed under the agreement hereinabove referred to, as well as under the agreement last hereinabove referred to."

The making of the agreements above referred to is not controverted by the answer; but it denies that the plaintiff at any time placed said machinery, or any part thereof, in good working order, and, in this connection, alleges: "That said machinery and every part of it has wholly failed to do and perform the work required of it, or in any particular to comply with the said guaranty of the said A. Rossi & Co.; that the piping in said machinery was not properly done, and that the same clogs up and prevents the machine from operating; that the gasoline engine mentioned in the complaint \* \* \* does not work properly or sufficiently or according to the guaranty of the said A. Rossi & Co.; that the stemmer in said machinery does not operate properly, nor is the same properly constructed; that the pulleys and belts used in said machinery are not of the requisite size, or make, or character, and that said machinery, and every part of it, has failed to do or perform the work for which it was intended, and for which the said A. Rossi & Co. guaranteed its performance; that defendant \* \* \* has often requested said A. Rossi & Co. to repair said machinery, but they have wholly refused to so repair or perfect the said machinery, or to comply with their said guaranty." The answer denies that the delay in installing said machinery was due to any fault or the neglect of the defendant in the preparation of the concrete foundation for the gasoline engine, but alleges that the delay in the installation of said machinery was occasioned solely by the neglect of said A. Rossi & Co.; denies that, subsequent to the 5th day of October, 1909, the said A. Rossi & Co. "did perform and carry out all the conditions agreed to be performed by it under said agreement, dated October 5, 1909, and further denies that the said A. Rossi & Co. did operate said ma-

chinery satisfactorily for two successive days"; denies that said machinery has at any time worked satisfactorily, or according to the terms of the agreement, or that it is now, or at any time has been, since its installation, in good condition or operated in a satisfactory manner, and alleges that "the said machinery and every part of it fails to perform the work required of it, or for which it was intended, in a proper or satisfactory manner"; admits the payment by the defendant to A. Rossi & Co., on the 5th day of October, 1909, of the sum of \$200 on account of and in accordance with the terms of said agreement.

The defendant also filed a cross-complaint, in which it pleads the agreement entered into between A. Rossi & Co. and the defendant, and alleges that the former guaranteed, in writing, that the machinery which said Rossi agreed to furnish to and install for the defendant would run and operate and perform the work for which it was intended in a proper and satisfactory manner; alleges delay in installing said machinery, and that such delay was caused solely by the unwarranted neglect of the plaintiff; that by reason of said delay the "defendant and cross-complainant was prevented from complying with certain contracts which it had with the grape growers in the vicinity of cross-complainant's vineyard, for the crushing of their grapes within said time, and was put to great loss and expense and inconvenience;" alleges that, by reason of the defectiveness of said machinery and its consequent failure to properly perform the work it was intended and warranted to perform, and the failure of Rossi to correct the defects therein after having been notified thereof and requested by the defendant to rectify the same, the defendant suffered the loss of 300 gallons of wine on each of 35 days during which it endeavored, "in good faith," to run and operate said machine and machinery, and that the value of said wine so lost is 12 cents per gallon; that the defendant was compelled, by reason of the "defective construction of said machinery and of its character, to employ an expert machinist to endeavor to remedy the defects in said machine, for which the defendant and cross-complainant incurred a liability, the amount of which is not as yet known to it;" alleges "that the present value of said machinery as so delivered and set up by the said A. Rossi & Co. does not exceed the sum of two hundred and fifty dollars."

The cross-complaint asks for judgment: That plaintiff take nothing against the defendant by reason of plaintiff's action; and, further, that the defendant and cross-complainant "do have and recover from said plaintiff the sum of two thousand and ten dollars, and, further, for such additional sums as defendant has incurred in an endeavor to repair said machinery and for costs of suit."

The plaintiff answered the cross-complaint, specifically denying and admitting the material allegations of that pleading, according as such allegations were true or not true from the plaintiff's viewpoint.

The contentions of the appellant are: (1) That the court erred in not finding as to the damage alleged to have been sustained by the defendant in the loss of wine during the period during which it endeavored, without success, because of the defectiveness of the same, to operate the machinery mentioned in the pleadings; (2) that the evidence does not support certain findings; (3) that the findings are irreconcilably inconsistent.

[1] It is preliminarily objected by the plaintiff that, the appeal being from the judgment only, the question of the evidence to support the findings cannot be reviewed. This appeal, as stated, is taken under the new or alternative method and by the objection thus raised we understand the point is sought to be made that, because the appeal was not taken "within sixty days after notice of entry of judgment," the evidence cannot be considered or reviewed. Sections 939, 941a, 941b, 941c, Code Civ. Proc. The point is not well taken. The judgment was rendered and entered on the 21st day of April, 1910. The notice of appeal was served on the attorney for the plaintiff on the 29th day of April, 1910, and filed on the 30th day of said month. There is no evidence in the record of any notice of the rendition of the judgment having been served on the defendant. There can be no doubt that, under the circumstances as thus indicated, it is competent for this court, if it be found necessary, to consider the evidence, notwithstanding that the appeal is from the judgment only. *Brown v. Coffee*, 17 Cal. App. 381, 383, 386, 121 Pac. 309, 311.

[2] As stated, it is claimed for a reversal of the judgment that the findings are contradictory; that some of them find no support in the evidence; and that the court failed to make a finding upon a material issue submitted by the cross-complaint. While the judgment will have to be reversed for the last-stated reason—that is, because of the omission by the court to make a finding upon the question of damage from loss of wine alleged by the cross-complaint to have been sustained by the defendant by reason of the alleged defectiveness of the machinery—still, it is deemed proper to examine the findings to some extent, since it is claimed, as stated, that they are in some respects in direct conflict with each other upon matters vital to the judgment.

[3] The court found that the machinery did not prove satisfactory to the defendant from the time of its installation up to the 5th day of October, 1909, on which date the "supplemental agreement" was made. As to the manner in which Rossi & Co. complied with the terms of the agreement, dated Octo-



ber 5, 1909, the court finds: "(6) That thereafter said A. Rossi & Co. did perform and carry out all of the conditions agreed to be performed by it under said agreement, dated October 5, 1909, and did exchange said stemmer on the 11th day of October, 1909, and did fix said machinery and operate the same satisfactorily for two successive days, to wit, on October 11, 1909, and October 12, 1909," etc. The court then found (finding 7) that, by reason of the compliance with that part of the "supplemental agreement" calling for certain specified changes in the machinery and for the satisfactory operation of the same after such changes therein were made, the plaintiff was entitled to be paid by the defendant, under the terms of said "supplemental agreement," the sum of \$300. By finding 8 the court found: "That prior to said 5th day of October, 1909, and after said date, except as recited in finding 6 hereof, said machinery did not prove satisfactory, and did not comply with the guaranty contained in said first agreement; that the actual value of said machinery after said 5th day of October, 1909, and up to the date of the commencement of this action did not exceed the sum of two hundred and fifty dollars; that the defendant necessarily expended between the delivery of said machinery and the commencement of this action, in repairs thereto, the sum of forty-five and twenty one-hundredths dollars in endeavoring, in good faith, to use the same for the purposes for which it was intended."

The court then found (finding 10) "that on the 1st day of November, 1909, there became due and owing to the plaintiff from the defendant, on account of the purchase price of said machinery and for extras hereinbefore mentioned [the extras referred to were found to be of the aggregate value of \$36.23—see finding 9], the further sum of \$536.23, which said sum has not been paid, but that the defendant, by reason of the difference in value of said machinery and the loss sustained in operating the same, as aforesaid, is entitled to a deduction from said balance of the sum of \$295.20, leaving the whole amount due, owing, and unpaid from the defendant to the plaintiff of \$541.03."

Now, it appears to be the theory of the plaintiff that the "supplemental agreement" constituted an unconditional or definitive settlement of a part of the original agreement or the differences arising with respect thereto; that is to say, that said second writing, as far as it extended in the matter of settling said differences, was in the nature of an accord and satisfaction, and that the amounts thereby agreed to be paid by the defendant constituted a liquidated sum to be so paid, regardless of whether or not the machinery thereafter complied with the terms of the guaranty (warranty) contained in the agreement as originally made. The court seems to have taken that view of the "supplemental agreement," and, accordingly, having found that the actual value of the machinery

was much less than that represented by the purchase price, made the allowance in that respect to the defendant with reference to the balance of \$500 on the purchase price, after the sums of \$200 and \$300 were disposed of as above indicated.

There can be no doubt that, upon its face, the writing of October 5th, or the "supplemental agreement," as it is characterized by the court, is capable of the construction thus given it. On the other hand, it would seem to be absurd to so construe that transaction as to bring about the conclusion that the defendant was willing to pay one-half of the purchase price without any assurance that the machinery would ever operate any more satisfactorily than it had prior thereto. It would therefore seem to be the more reasonable to hold that the purpose of said "supplemental agreement" was to secure upon the part of the plaintiff the execution of the agreement as it was originally made, according to the terms of the warranty contained in said agreement; and that it was not thereby intended by the parties to take any part of the original agreement out of the operation of the warranty. It is very clear that this was the defendant's conception of the "supplemental" agreement, as we judge from the allegations of the cross-complaint. It is very probable, however, that the meaning of said "supplemental agreement," as ascribed to it by the court, was based upon the testimony of the parties, explaining, as under the circumstances they should be permitted to do, what was intended thereby in the respect referred to. We have not examined the testimony with a view of determining this proposition, because, in the first place, if there is any testimony regarding the matter, it is probably conflicting, and the trial court's conclusion thereon would, perhaps, be conclusive upon us; and, in the second place, as declared, the cause will have to be remanded for the reason above stated, and upon a retrial the question under consideration will, no doubt, be fully examined and properly decided. It is to be observed, however, that, upon the plaintiff's theory of the intent and effect of said supplementary agreement, the court made a due and proper allowance for the difference in the actual value of the machinery, as found by finding 8, from that represented by the purchase price. But upon the theory that the warranty contained in the original agreement was not modified or limited in its operation by the supplemental agreement—that is to say, that by said latter agreement it was not intended that the payments provided for therein should be treated as liquidated, or to be made regardless of whether or not the machinery came up to the test of said warranty—findings 8 and 10 are irreconcilably conflicting; for in the first-mentioned finding the court fixes the actual value of the machinery at \$250, and in the last-mentioned finding allows against the defendant a sum vastly in excess of said sum. Obviously, assuming

that finding 8 speaks the truth as to the actual value of the machinery, all that the court would be authorized to allow against the defendant on that account would be the sum as so found. Or, in other words, the defendant, in such a case as this, would be entitled for the detriment caused by the breach of the warranty to "the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time" (sections 3313, 3314, Civ. Code), which in this case means, as stated, the difference between the actual value as found by the court and the purchase price—the sum of \$750. But the consideration and solution of this whole question by the light of the suggestions we have ventured with reference thereto may be left to the trial court upon the retrial of the cause.

[4, 5] Now as to the point that the court failed to make a finding upon a material issue. As has been shown, the cross-complaint alleges that, because of the defectiveness of the machinery, and in endeavoring, in good faith, to run and operate said machinery on 35 different days, the defendant suffered the loss of 300 gallons of wine on each of said days, valued at 12 cents per gallon. In response to that issue the witness De Latour, the manager of the defendant, testified that the failure of the machinery to properly operate caused a loss to the defendant of about 10,000 gallons of wine of the value of 12 cents per gallon. Of course, it will not be disputed that a failure to find on a material issue to which evidence had been addressed is fatal to the judgment. But it is not always necessary to make a specific finding as to each of several material issues, where the findings, taken as a whole or construed together, clearly enough show that they include the court's conclusion upon all the material issues (Hayne on New Trial and Appeal [16th Ed.] p. 1356), and this is what counsel for the defendant contend is true in this case. It is argued that findings 8 and 10, read together, clearly show that the court found upon the question of the alleged damage from the loss of the wine. But we are satisfied that an analysis of those findings, by the light of the theory upon which the allowance was made on account of the difference in the value of the machinery, will not sustain counsel's view of the matter.

In finding 8, as we have seen, the court finds "that the defendant necessarily expended between the delivery of said machinery and the commencement of this action, in repairs thereto, the sum of forty-five and twenty one-hundredths dollars in *endeavoring in good faith, to use the same for the purposes for which it was intended*;" and in finding 10 it is found that the defendant is entitled to a deduction from said balance of \$500 of the sum of \$295.20, "by reason of the difference in value of said machinery, and the loss sustained in operating the same, as aforesaid."

Now, in our opinion, rather than giving the language italicized in those two instructions the effect which counsel claim for it, a comparison of said instructions clearly discloses that the court did not therein take into account the damage which the defendant alleges that it sustained from the loss of wine. The cross-complaint, in paragraph 10 thereof, specifically alleges that the defendant was compelled, on account of the defective construction of the machinery and of its character, "to employ an expert machinist to endeavor to remedy the defects in said machinery, for which defendant and cross-complainant incurred a liability, the exact amount of which is not yet known to it." We think that it must be true that the sum of \$45.20 allowed to the defendant by finding 8 was intended as reimbursement for the expenditure which the defendant alleges in the foregoing paragraph of the cross-complaint that he was required to make in an effort to remedy the defects in the machinery. In any event, it is plainly manifest, not only from finding 8 itself, but from an arithmetical calculation of the items constituting the total deduction allowed to the defendant by finding 10, that no allowance was made on account of the alleged loss of wine. Finding 8 declares that the sum of \$45.20 constituted the sum expended by the defendant in *repairs to the machinery* between the delivery of the same and the commencement of this action. Now, then, it is only necessary to subtract the sum of \$250, found to be the actual value of the machinery, from the sum of \$295.20, the total deduction allowed to the defendant from the total found coming to the plaintiff, to find that the \$45.20 which the court allows the defendant in finding 10 for "the loss sustained in operating the same [the machinery], *as aforesaid*," is the identical sum of \$45.20 which the court declares in finding 8 was "necessarily expended by the defendant between the delivery of said machinery and the commencement of this action in *repairs thereto*," etc.

[6] We are familiar with the rule as to the construction of findings as laid down in *Breeze v. Brooks*, 97 Cal. 72, 31 Pac. 742, 22 L. R. A. 257, cited by counsel for the plaintiff, and which rule is followed by many other cases, of which one is from this court. *Etna Indem. Co. v. Altadena Min. Co.*, 11 Cal. App. 165, 173, 104 Pac. 470. In the *Breeze* Case it is said that "the findings of the trial court are to receive such a construction as will uphold rather than defeat its judgment thereon; and whenever, from the facts found by it, other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court, and upon an appeal from that judgment this court will not draw from those facts any inference of fact contrary to that which may have been drawn by the trial court, for the purpose of rendering such judgment." But it is very clear that by no possible construction can the finding in the



case at bar, awarding the defendant reimbursement for expenditures in repairing the machinery, be held to furnish even the remotest ground for the inference that, in awarding such reimbursement, the court took into account or included therein any damage which the defendant might have sustained by reason of the alleged loss of wine.

The defendant, as stated, was undoubtedly entitled to a finding upon the issue under consideration, and, as before declared, the omission to make such finding constitutes an error fatal to the judgment.

The judgment is therefore reversed, and the cause remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

20 Cal. App. 661

MEYER v. PERKINS. (Civ. 1,017.)

(District Court of Appeal, Third District, California. Dec. 17, 1912. Rehearing Denied by Supreme Court Feb. 15, 1913. Supplemental Opinion, April 10, 1913.)

**1. BANKRUPTCY (§ 279\*)—ACTIONS BY TRUSTEE—SETTING ASIDE BANKRUPT'S FRAUDULENT CONVEYANCE.**

Under Federal Bankruptcy Act July 1, 1898, c. 541, § 70, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), vesting a trustee in bankruptcy with the title of the bankrupt as of the date he was adjudged a bankrupt, except as to property exempt and to property transferred in fraud of creditors, and subdivision "e" providing that he may avoid any transfer by the bankrupt which a creditor might have avoided, and recover the property so transferred, except as against bona fide holders for value, a trustee, on a showing that a transfer of property by the bankrupt, while insolvent, was made to defraud his creditors, and that there was no immediate delivery or actual or continued change in the possession, and that the effect thereof was to prevent the enforcement of creditors' claims, could maintain an action to recover such property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 419-424; Dec. Dig. § 279.\*]

**2. BANKRUPTCY (§ 399\*) — FRAUDULENT TRANSFERS — STATUTORY EXEMPTIONS — WAIVER.**

Under Civ. Code, § 3440, declaring that a transfer of personal property by a person in possession or control, not accompanied by immediate delivery, and followed by an actual and continued change of possession, shall be fraudulent, except as to any transfer of property exempt from execution, an insolvent person, transferring property without immediate delivery or change of possession, does not waive the statutory exemption by a failure to claim it at the time of sale, nor by failure to claim it in his bankruptcy schedule, since, having transferred it, he could not consistently claim it in his schedule.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 669; Dec. Dig. § 399.\*]

**3. BANKRUPTCY (§ 302\*) — FRAUDULENT TRANSFERS—ACTION TO SET ASIDE—ANSWER OF TRANSFeree—CLAIM TO EXEMPT.**

Under Civ. Code, § 3440, declaring that transfers of personal property, not accompanied by an immediate delivery or actual change of possession, shall be presumed fraudulent, except as to property exempt from execution, the exception extends to the transferee as well as to the transferor; and relying upon such exception, in an action by the transferor's trustee in bankruptcy, it was incumbent upon the trans-

feree to set forth in his answer the facts which would bring him within the exception.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 456, 457; Dec. Dig. § 302.\*]

**4. BANKRUPTCY (§ 476\*)—COSTS—ITEMS—DISBURSEMENTS NECESSARILY INCURRED.**

A trustee in bankruptcy, bringing an action to recover stock alleged to have been fraudulently transferred by the bankrupt, and taking possession thereof as provided by Code Civ. Proc. § 510 et seq., was not entitled, as a part of his costs, to the expenses incurred in keeping and feeding the stock pending the action.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 898, 899; Dec. Dig. § 476.\*]

**Supplemental Opinion.**

**5. APPEAL AND ERROR (§ 45\*)—JURISDICTION—AMOUNT IN CONTROVERSY.**

The amount of money involved in an appeal from an order of the superior court taxing costs is not determinative of the jurisdiction of the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 152-155, 157, 158, 172-176, 178-184, 186-197; Dec. Dig. § 45.\*]

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by Henry C. Meyer, as trustee in bankruptcy of the estate of John A. De Voll, against George W. Perkins, sometimes called George W. De Voll. Judgment for plaintiff, and defendant appeals. Reversed.

For opinion of Supreme Court denying rehearing, see 130 Pac. 208.

A. H. Carpenter, of Stockton, for appellant. C. W. Miller, of Stockton, for respondent.

BURNETT, J. On the 16th day of October, 1911, one John A. De Voll was duly adjudged a bankrupt in the District Court of the United States for the Northern District of California, and, on the 9th day of November following, plaintiff herein was appointed trustee of the estate of said bankrupt, and he thereupon qualified, and ever since has been such trustee. This action was brought by him, in that capacity, to recover certain personal property which he claims was attempted to be transferred by said John A. De Voll, on the 18th day of July, 1910, to defendant herein. The said transaction of July 18, 1910, in reference to said property, evidenced by a bill of sale, was asserted to be for the purpose of defrauding the creditors of said De Voll, and "was not accompanied by an immediate delivery thereof, or followed by an actual or continued change of possession thereof, and that the said personal property then and thereafter remained in the care, custody, control, possession, use, and enjoyment of the said John A. De Voll, the same after the said pretended transfer as before."

[1] One of the questions presented for consideration is whether plaintiff, as trustee, was authorized to prosecute the action. This seems to be set at rest by the provisions of the United States bankruptcy act. Section 70 thereof provides that: "The trustee of the estate of a bankrupt, upon his appoint-

ment and qualification, \* \* \* shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt \* \* \* (4) property transferred by him in fraud of his creditors." *Pierce's United States Code*, p. 335 (U. S. Comp. St. 1901, p. 3451). In subdivision "e" of said section it is provided that: "The trustee may avoid any transfer by the bankrupt of his property which any creditor of said bankrupt might have avoided and may recover the property so transferred or its value from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of adjudication." In this respect, the trustee in bankruptcy, under the United States bankrupt law, holds a position analogous to that formerly held by the assignee in insolvency under the state law. Such assignee had the right to sue for and recover everything due to the estate for the benefit of the creditors. Where a pretended transfer from the assignor was void as to creditors, the title passed to the assignee in insolvency for the benefit of the creditors, and he was authorized to maintain an action on their behalf to reduce the property to possession. As between the creditors and the debtor, who fraudulently conveyed property to defeat them, he was regarded as holding the title to, or an interest in, the property conveyed, and it therefore passed to the assignee. *Brown v. Bank of Napa*, 77 Cal. 544, 20 Pac. 71; *Ruggles v. Cannedy*, 127 Cal. 305, 53 Pac. 911, 59 Pac. 827, 46 L. R. A. 371. The same principle holds now as to the trustee in bankruptcy. We think, also, that it may be said that sufficient facts are alleged in the complaint to disclose a case for the exercise of this authority of the said trustee. It appears that at all times said De Voll was insolvent; that the pretended transfer was made to defraud his creditors; that there was no immediate delivery or actual or continued change of possession; and that the effect of the said transfer was to prevent the enforcement of the claims of the creditors.

[2] Examining the evidence, we find that the only ground upon which it could be held that the said transfer was fraudulent grows out of the condition contemplated by section 3440 of the Civil Code. There was, in other words, support for the finding that there was no immediate delivery and no actual or continued change of possession of the said property. The conclusive presumption as to fraud would be indulged, therefore, as demanded by said section, if it were not for the circumstance that it is therein provided that the provisions of said section "shall not apply or extend to any sale, transfer, or assignment of any property exempt from execution." And that brings us to what we regard as the serious question in the case. It was alleged in the answer "that the said John A. De Voll was, at the time of such

sale, and for a long time prior thereto had been, a farmer, and that all of said property so sold and delivered by him to defendant, and which plaintiff seeks to recover in this action, was then and there exempt from execution under section 690, subds. 2 and 3, of the Code of Civil Procedure." The court did not find that said property, or any of it, was not exempt from execution; but, as to the aforesaid allegation of the answer, the court's conclusion was: "That the said John A. De Voll did not claim any part of said described personal property so transferred to defendant, as above set forth, to be exempt in his schedule of bankruptcy, or in said bankruptcy proceedings, or at all, and that the said John A. De Voll has waived any and all claim or right, to any exemption of said personal property, that he might otherwise have been entitled to assert or claim." The only fact, it may be said, from which the court drew the conclusion that he waived the exemption is his failure to claim it in "his schedule in bankruptcy." But, the evidence here showing that he had sold it, now could he claim, in his schedule, property as exempt from execution which did not belong to him? The law, of course, contemplates that, when he files his petition in bankruptcy, he shall furnish a schedule of the property which he owns at the time, and shall claim exemption out of that property, and not from property that belongs to some one else. The insolvent would have presented rather a curious spectacle if he had claimed this property, as exempt or otherwise, and, upon examination, had testified that more than a year before he had divested himself of all interest whatever in said property, and that the other party still remained the owner of it. Manifestly, the law would not undertake to compel a person to claim property which he knowingly has no right to claim. Nor, at the time of sale, is he required to make any claim of exemption. The law does not exact of him any declaration or agreement with the vendee as to the character of the property. It provides that the presumption of fraud does not attach to the sale of "any property exempt from execution." The question whether the property belongs to that category, if the issue arises, will be determined like any other question of fact, keeping in view and applying the provisions of section 690 of the Code of Civil Procedure, which defines and classifies the property that is "exempt from execution." Nor has any other occasion arisen when De Voll was called upon to make such claim. He was not made a party to the present action.

[3] The vendee alone was sued, and he very properly, in his answer, alleged that the property was exempt from execution. Why did he do this? For the simple reason that plaintiff, invoking the general rule, based his cause of action upon the contention that there was no "immediate delivery," etc.



But, defendant relying upon an exception to the general rule, it was incumbent upon him to set forth in his answer the facts which would bring him within the exception. Of course, this proviso in said section 3440, in reference to exempt property, applies to the vendee as well as to the vendor, and it may be asserted in behalf of the former as well as of the latter.

The trouble seems to have been born of a misapplication of *Barton v. Brown*, 68 Cal. 11, 8 Pac. 517. There it is held that: "The right to claim the exemption of personal property from execution is waived by a failure of the debtor to exercise it; and the fact that he might have claimed it will not be sufficient, as against his creditors, to impart validity to a sale of the property, without an actual and continued change of possessions." But in that case a judgment was obtained against the vendor, and a writ of execution was issued and placed in the hands of the sheriff, who levied it upon the property in the possession of the vendor and sold it to satisfy said judgment. Afterward the action was brought by the vendee against the sheriff for conversion. It was under these circumstances that the court held as aforesaid. The property being in the hands of the vendor when the writ was executed, it was certainly due the sheriff that he be notified that the property was exempt from execution, and therefore within the exception to the general rule. Upon this point, the expression in said opinion may not be altogether accurate; but the decision was just, and also warranted by the other ground that a portion of the property was not exempt.

[4] Another question of moment is argued by counsel, which is suggested by the appeal from an order taxing costs. It seems that, after the suit was brought, plaintiff took possession of the property, as provided by section 510 et seq. of the Code of Civil Procedure. Certain expenses incurred by plaintiff in keeping and feeding the stock, during the pending of the action, were allowed as a part of the costs.

In *Williams v. Atchison, etc., Ry. Co.*, 156 Cal. 140, 103 Pac. 885, 134 Am. St. Rep. 117, 19 Ann. Cas. 1260, it is said: "The right to recover costs is purely statutory; and, in the absence of a statute, no costs can be recovered by either party. *Fox v. Hale & Norcross S. M. Co.*, 122 Cal. 219, 54 Pac. 731. Section 1023 of the Code of Civil Procedure is the statute which gives the right of the recovery of costs. Section 1033 prescribes the procedure for their recovery, and defines what costs and disbursements are recoverable. That section declares, in effect, that one may recover disbursements necessarily incurred in the action. The right accorded to a party, upon filing a proper bond, to take into possession the personal property in dispute is a privilege accorded him by law. It is not a necessity to his cause of action." It was therefore held, in that case, that the

charge paid to a surety company for the replevin bond was not a proper item in the cost bill. The same principle must apply to all the expenses incurred by plaintiff as a result of his exercise of this privilege and taking possession of the property *pendente lite*. No doubt, as suggested in the *Williams Case*, the Legislature could provide that such expenditures might be recoverable as costs; but it has not done so. The expenses incurred by the trustee for said purpose would probably be a matter of adjustment in the settlement of his account in the insolvency proceedings; but there seems to be no authority for making the defendant in this action liable for them.

The foregoing suggestions are made in view of future contingency, as, the amount of the costs allowed being less than \$300, the action of the trial court in the matter is not reviewable upon appeal. *Foley v. California Horse Shoe Co.*, 115 Cal. 196, 47 Pac. 42, 56 Am. St. Rep. 87.

The judgment is reversed. The separate appeal from the order taxing costs is dismissed.

We concur: CHIPMAN, P. J.; HART, J.

#### SUPPLEMENTAL OPINION.

PER CURIAM. In the consideration of the appeal from the order taxing costs in the above cause, our attention was not called to the fact that *Foley v. California Horseshoe Co.*, 115 Cal. 196, 47 Pac. 42, 56 Am. St. Rep. 87, has been overruled by the Supreme Court.

[5] It must be deemed settled now that the amount of money involved in an appeal from an order of the superior court taxing costs is not determinative of the jurisdiction of the appellate court. *Southern Cal. Ry. Co. v. Superior Court*, 127 Cal. 417, 59 Pac. 789; *Sierra Union, etc., Co. v. Wolff*, 144 Cal. 432, 77 Pac. 1038. It was erroneous therefore to dismiss the said appeal; but, of course, the effect of the reversal of the judgment was to vacate the order allowing costs.

20 Cal. App. 661

MEYER v. PERKINS. (Sac. 2,084.)

(Supreme Court of California. Feb. 15, 1913.)

In Bank. Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by Henry C. Meyer, as trustee in bankruptcy of the estate of John A. De Voll, against George W. Perkins. Judgment for plaintiff was reversed on appeal to the Appellate District Court (130 Pac. 206). Rehearing denied.

A. H. Carpenter, of Stockton, for appellant.  
C. W. Miller, of Stockton, for respondent.

PER CURIAM. In further explanation of the decision in the case of *Barton v. Brown*, 68 Cal. 11, 8 Pac. 517, referred to in the opinion of the District Court of Appeal, we think it is proper to say that, at the time that case arose and was determined, section 3440 of the Civil Code did not contain the proviso declaring that its provisions should not apply or extend to a transfer of property exempt from execution. The proviso was first added to the section by the amendment of 1903. Stats. 1903, p. 111.

The decision is therefore inapplicable to the present case, and is not in conflict therewith.

164 Cal. 636

## In re COWELL'S ESTATE. (S. F. 5,928.)

(Supreme Court of California. Feb. 7, 1913.  
Rehearing Denied March 7, 1913.)**1. EXECUTORS AND ADMINISTRATORS (§ 194\*)  
—ALLOWANCE TO WIDOW—TERMINATION.**

An allowance to a widow, under Code Civ. Proc. § 1464, providing that such allowance shall be made until the inventory is returned, terminates upon the return of the inventory, at which time the court, under the express terms of section 1466, may make an order for such allowance as may be necessary during the further progress of the settlement of the estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 713-723; Dec. Dig. § 194.\*]

**2. EXECUTORS AND ADMINISTRATORS (§ 194\*)  
ALLOWANCE TO WIDOW.**

Since the matter of the amount of the preliminary allowance to be made to the widow rests in the sound discretion of the judge, his action will not be disturbed on appeal, in the absence of a clear abuse of such discretion.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 713-723; Dec. Dig. § 194.\*]

**3. EXECUTORS AND ADMINISTRATORS (§ 187\*)  
ALLOWANCE TO WIDOW.**

That a widow had property of her own did not affect her right, under the express terms of Code Civ. Proc. § 1464, to have an allowance made for her support until the inventory was returned, though the source of such property was a special bequest, which became available to her at once upon the death of her husband.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 697; Dec. Dig. § 187.\*]

**4. WILLS (§ 782\*)—ALLOWANCE TO WIDOW.**

While a husband cannot deprive his widow of her right, under the express provisions of Code Civ. Proc. § 1464, to an allowance for her support until the inventory is returned, he may so frame his will that she cannot have the benefits thereby given her and also those of the statute, but will be required to elect between them.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 2018-2033; Dec. Dig. § 782.\*]

**5. WILLS (§ 782\*)—ALLOWANCE TO WIDOW.**

A bequest to testator's wife will not be construed to be in lieu of the statutory provisions for her support until the inventory is returned, unless it clearly and unequivocally appears from the will that testator so intended.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 2018-2033; Dec. Dig. § 782.\*]

**6. WILLS (§ 782\*)—CONSTRUCTION.**

A will bequeathing an estate of about a million dollars, and providing that the testator's wife should receive cash and bank stock, to be at once delivered to her, and that for seven years, and until certain of his interests were converted into cash, she should be paid \$1,000 monthly, was not inconsistent with the widow's right to receive the preliminary allowance provided for by Code Civ. Proc. § 1464, until the inventory is returned, so as to require her to elect whether she would take under the will or under the statute, where the making of the statutory allowance in no way conflicted with other bequests made by the will.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 2018-2033; Dec. Dig. § 782.\*]

**7. APPEAL AND ERROR (§ 1043\*)—HARMLESS  
ERROR—REFUSAL OF CONTINUANCE.**

The refusal of a continuance sought so as to permit the testimony of an absent witness to be procured, if error, was harmless, where another witness testified to the same facts without objection, though his testimony was merely hearsay and largely statements of what the absent witness had told him.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4115-4121; Dec. Dig. § 1043.\*]

Department 1. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Ernest V. Cowell, deceased. From an order directing monthly payments to be made to Alice M. Cowell, widow of deceased, from the date of his death until the return of the inventory, a brother and two sisters of deceased appeal. Affirmed.

Mastick & Partridge, of San Francisco, for appellants. W. I. Brobeck and P. F. Dunne, both of San Francisco, for respondent.

ANGELLOTTI, J. This is an appeal by a brother and two sisters of deceased, who are residuary legatees under his will, from an order directing the payment to Alice M. Cowell, his widow, for her support, the sum of \$1,500 per month, from the date of his death, March 18, 1911, until the return of the inventory of his estate.

The deceased left an estate valued at about \$1,000,000. The greater portion of this estate was his one-fourth interest in the property distributed in the estate of his father, Henry Cowell, his brother and two sisters owning the remaining three-fourths. The greater part of this again was held through three corporations, engaged generally in the manufacture of cement, of which he, his brother and sisters owned the stock, he holding one-fourth. These corporations were indebted to the extent of some \$600,000, which indebtedness, on account of the very large earnings reasonably anticipated, would probably be wholly discharged in two or three years if no dividend was declared. It is not suggested that the estate of deceased was at all indebted, except in so far as it might be liable on account of the indebtedness of these corporations. There was a parol understanding between the brothers and sisters that all earnings of the corporations shall be applied to the payment of the debt until the same is discharged. The property of the Henry Cowell estate outside of the corporations yielded an annual income of about \$25,000, of which deceased owned one-fourth. In addition to this deceased owned stock in the Bank of California valued at \$20,000, and about \$23,000 in cash in bank. Deceased left no heir other than his wife and his brother and sisters.

By his will deceased provided as follows: All cash and bank stock were "to be at once

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



delivered" to his wife, "whom I desire appointed executrix without bonds for all such property." He then declared: "Second: I desire that all my one-fourth interests in the various Cowell properties be converted into cash within seven years, and that until such distribution, the properties are to pay my wife Alice M. Cowell the sum of one thousand dollars in gold coin on the first of every month. At the end of seven years she is to receive the income from two hundred and fifty thousand dollars as long as she may live. At her death the said two hundred and fifty thousand dollars is to be paid to the regents of the University of California for the purpose of building a hospital on the grounds at Berkeley." He then gave, "as soon as the money becomes available," \$500,000 to the regents of the University of California for a students' gymnasium and a stadium on the grounds at Berkeley. He then gave legacies of \$1,000 to certain employes and \$500 to others, \$2,500 each to Patrick Dorsey and Cornelius Coghlan, and a legacy of \$10,000 to the Cowell Scholarship Committee of Santa Cruz. He then directed that as much of his one-fourth interest in the Cowell properties as was necessary to pay the "minor bequests" should be sold within one year. He then provided as follows: "Tenth: That the affairs of the Cowell Co. may in no wise be interfered with, I hereby direct that if all these bequests are paid within seven years from the date of my death it will not be necessary that any more of my interests be sold than will carry out these bequests. Whatever remains after paying these bequests and final settlement is to become the property of my brother and sisters." He then provided, "if none survive" the residue shall go to the regents of the University of California for certain purposes, and appointed his wife and Alexander F. Morrison executors without bonds.

[1] The allowance made was what was styled by Mr. Justice De Haven in *Estate of Lux*, 100 Cal. 593, 35 Pac. 341, the "preliminary or temporary allowance," required to be made by section 1464 of the Code of Civil Procedure, which provides that where a person dies leaving a widow or minor children, the widow or children, until the inventory is returned, are entitled to remain in the possession of the homestead, the wearing apparel of the family, and of all the household furniture, "and are also entitled to a reasonable allowance for their support, to be allowed by the superior court or a judge thereof." The allowance so made terminates upon the return of the inventory (In re *Lux*, supra; *Crew v. Pratt*, 119 Cal. 137, 51 Pac. 44; *Estate of Bell*, 142 Cal. 100, 75 Pac. 679), when the court may make an order for such allowance as may be necessary during the further progress of the settlement of the estate (section 1466, Code Civ. Proc.).

[2] It is urged that the amount allowed

was much greater than any sum reasonably necessary for the support of the widow. In the determination of a question of this character much is necessarily left to the discretion of the judge to whom the application is made. His action will not be disturbed on appeal, unless it clearly appears that the discretion has been improperly exercised. In re *Lux*, 100 Cal. 605, 35 Pac. 341; *Estate of Bump*, 152 Cal. 279, 92 Pac. 643. "The court is not restricted, in making this allowance, to a bare support for the widow. Regard should be had \* \* \* to the mode in which she lived during the lifetime of her husband. The allowance is to be sufficient to provide all the necessities of life, and this will include all those things which are reasonable and proper for one in the home and in social intercourse, in view of the condition and value of the estate and the station and surroundings of the family." In re *Lux*, supra. In view of the condition and value of this estate the widow was entitled to continue to live, if she so desired, at the hotel where she and her husband had lived for several years immediately preceding his death, and to be maintained in such a way, as regards board, lodging, attendance, clothing, and the comforts of life generally, as would be considered reasonable and proper for the widow of one leaving an estate valued at a million dollars, for it seems clear that the estate of deceased, after payment of debts, will easily reach that amount. This leaves a wide range for the discretion of the judge in probate, and even if we were inclined, in view of the record on this appeal, to consider that the amount allowed is more than we would have given had we been in his place, invested with the discretion committed by the law to him, we are of the opinion that it is not so high, in view of the circumstances and condition of the estate, that we can say that there has been any abuse of discretion on his part.

[3] It seems to be well settled under such statutes as ours that the fact that a widow has property of her own, or other means of subsistence, in no way affects her right to such an allowance from the estate of her deceased husband as is reasonably necessary for her support. The statute gives her this right to be so supported by the estate, regardless of her own means. See *Estate of Lux*, 100 Cal. 604, 605, 35 Pac. 341; *Estate of Bump*, 152 Cal. 276, 92 Pac. 643. And it also appears to be settled in this state, even as to an allowance made under section 1466 of the Code of Civil Procedure after the return of the inventory, that the fact that the widow is given property by the will of her husband in no way affects her right to be given, by way of allowance for support, such sum as is reasonably necessary therefor, leaving the property given her by the will, in the words of the Chief Justice in his concurring opinion in *Estate of Lux*, 114 Cal. 83, 45

Pac. 1026, "whether distributed pending the administration, or at the close of it, \* \* \* to go to the widow intact, and undiminished by any charge for expense of administration or support of family." See *Estate of Lux*, 100 Cal. 593, 35 Pac. 341; *Id.*, 114 Cal. 73, 45 Pac. 1023. Especially does it appear to us that bequests and devises to the wife are altogether immaterial in connection with the question of the preliminary or temporary allowance to be made at the outset for the period prior to the return of the inventory. We can see no good reason for concluding that it affects the question that a bequest or devise is by the terms of the will made available to the widow, in whole or in part, at once. This appears to have been the view of at least four of the justices in *Estate of Lux*, 114 Cal. 73, 45 Pac. 1023. Of course, we are not now speaking of such a provision in a will as puts the widow to her election.

[4, 5] It is not within the power of the husband, by any provision of his will, to deprive the widow of her right to a family allowance from the estate under the statutes, or to in any wise limit the power of the court in the exercise of its proper discretion to fix the amount to be allowed. See *Estate of Bump*, 152 Cal. 278, 92 Pac. 643, and cases there cited. But, of course, he may so frame his will that she cannot have the benefits thereby given her and those of the statutes also, and she will then be put to her election which she will take. *Id.* It is claimed that deceased so did. His will nowhere declares in express words that the provision made for his wife is in lieu of such provision for her support during the administration of the estate as she would be entitled to under the statutes of this state, as was the case in *Estate of Bump*, *supra*, and *Estate of Lufkin*, 131 Cal. 291, 63 Pac. 469. In the will before us such provision as is made for the wife is in terms absolute and unconditional. But it is not essential to the imposition of the duty of election that a declaration to the effect above stated should be expressly made. It is sufficient that it should clearly appear from the language of the will that such was the intention of the testator. We do not understand, however, that in the absence of such an express declaration there is any presumption of an intention on the part of the testator to put the widow to her election. To accomplish this result it must clearly and unequivocally appear that the provision made by the will was intended to be in lieu of such rights as are given by the law.

[6] We do not think that such is the situation here. The provision that "the properties are to pay" the widow \$1,000 on the first day of every month "until such distribution" does not so show such an intention. While the language of the provision of the will numbered "Second," which is the only provision in the will in her favor, with the possible exception of the preceding provision

as to cash and bank stock, is not as well chosen as it might have been, we think it clear enough that the design thereof was practically to give to the wife as a bequest the income for her life from \$250,000 of his estate, from the time of his death. As he desired that there should be no immediate segregation of his interest from the other "Cowell properties," he definitely fixed \$1,000 as the amount that she should receive monthly from his death until his interest should be so segregated, fixing the end of seven years as the time by which the division must be made. The amount so fixed was what might reasonably be considered a fair return on \$250,000 safely invested, being just a trifle less than 5 per cent. per annum on such amount. When the segregation, or "distribution" as he puts it, is had, she is thenceforth to receive the income of \$250,000 thereof. The gift thus made is absolute and unconditional, with absolutely nothing being said to indicate that it is anything else than a legacy. Whether we call it an annuity or a demonstrative legacy is unimportant here. We see nothing in the fact that it was contemplated that the amount fixed was to be paid monthly from the time of the death of the deceased to require a different conclusion.

We are of the opinion that there is nothing in the will inconsistent with the right of the widow to receive a family allowance. The deceased has not thereby disposed of all property other than that given to the widow "in such a way as to make it apparent that the assertion by the widow of the right to take both under the law and under the will would defeat the manifest purpose of the testator." See *Shipman v. Keys*, 127 Ind. 353, 26 N. E. 896. It is not pretended that all the bequests made thereby cannot be fully paid in such event. The only persons who will suffer thereby are those who are given "whatever remains after paying these bequests and final settlement." These are the brother and sisters of deceased (appellants here) if they or any of them are then alive, and if none survive, then the regents of the University of California, who have already been given \$500,000 outright, and, upon the death of the wife, the \$250,000 set apart for her use during her life. We thus have as to these parties merely a general disposition of what may be left after all bequests and charges are paid. Such a disposition is not at all inconsistent with the assertion by the widow of her statutory right to a family allowance notwithstanding the provision made for her by the will. See *Shipman v. Keys*, *supra*. It is to be noted that the language is "whatever remains after paying these bequests and final settlement," clearly referring only to such property as may remain at final settlement after, not only the bequests have been paid, but also all such other amounts as may lawfully be required to be



paid in the course of the administration and settlement of the estate. This would of course include such amounts as the widow was entitled to as family allowance under the statutes of the state. As said in the case last cited, such a disposition will be construed as made in view of the absolute statutory rights of the wife and subject thereto.

We see nothing in the expressed desires of the testator, with regard to sales and refraining from interference with the affairs of the "Cowell Co." to any greater extent than is necessary, that materially assists in the determination of the question before us. The same is true as to the evidence that there was an understanding between deceased and his brother and sisters, the stockholders in the Cowell corporations, that all the earnings thereof shall be applied to the discharge of the indebtedness thereof until the same is fully paid, even if we assume that this evidence may properly be taken into consideration in determining the proper construction of the will in the matter under consideration.

Taking the will as a whole, we are unable to find therein any sufficient warrant for a conclusion that the widow was thereby put to her election in the matter of family allowance.

[7] There was certainly no prejudicial error in refusing to continue the hearing of the application for family allowance until the return of Mr. George, who was desired as a witness by appellants, from Oregon. The testimony expected to be elicited from him, as stated by the attorney for appellants to the court below, was in no substantial respect different from that given by Mr. Morrison, one of the executors, the only witness who testified in detail as to the condition and circumstances of the estate. While the testimony given by him was in many respects hearsay, his information having been largely obtained from Mr. George, it was received without objection, and, as said before, was in substantial accord with what the learned attorney for appellants stated he expected to prove by Mr. George.

The order appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.

164 Cal. 629

**HORNUNG v. SEDGWICK et al.**  
(S. F. 6,029.)

(Supreme Court of California. Feb. 6, 1913.  
Rehearing Denied March 7, 1913.)

**1. TRUSTS (§ 112\*)—EXPRESS TRUSTS—CONSTRUCTION.**

Where an attempted trust was solely for the benefit of the minor son of the grantor, and was to terminate on his reaching majority age or his prior death, provisions in the instrument prescribing to whom the property should belong in the event of the failure or ter-

mination of the trust, and for a transfer of the property subject to the execution of the trust, as authorized by Civ. Code, § 864, could be considered in determining the proper construction of the provisions relating to the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 162; Dec. Dig. § 112.\*]

**2. PERPETUITIES (§ 9\*)—ACCUMULATIONS—EXPRESS TRUSTS—VALIDITY.**

A deed which conveyed real estate of the grantor in trust to manage the same and pay out of the net profits sums necessary for the proper education and support of a minor child of the grantor until attaining full age, and, on his attaining full age, the trust to terminate and the property described or the fund in the hands of the trustee to become the absolute property of the child, and, in case of his death during minority, the property to go to third persons not minors, created a trust for the benefit of the child during his infancy, and for the accumulation during that period of profits not necessary for his education and support, and was valid within Civ. Code, §§ 724, 852, 857, permitting provisions for accumulations for the benefit of infants, terminating at the expiration of their minority, and providing that no trust in realty is valid unless created by a written instrument, and that an express trust may be created to receive the rents and profits of real estate during the life of any person or for any shorter term.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 67-73; Dec. Dig. § 9.\*]

**3. PERPETUITIES (§ 9\*)—ACCUMULATIONS—EXPRESS TRUSTS—VALIDITY.**

The fact that the right of the child to receive real property and accumulated income was dependent on his attaining full age, and that under the other provisions of the deed as to the passing of the property on the termination of the trust by his death during infancy, the accumulations, if any, would become the property of others, not minors, was immaterial as bearing on the validity of the trust in favor of the infant.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 67-73; Dec. Dig. § 9.\*]

**4. TRUSTS (§ 51\*)—EXPRESS TRUSTS—CREATION—CONSTRUCTION.**

A deed whereby a grantor conveyed land in trust to manage the same, and to pay such parts of the net profits as would be necessary for the proper education and support of the infant during minority, and on his attaining full age the property described or the trust fund in the hands of the trustee to become the property of the infant, confided discretion in the trustee to determine what things were necessary or proper for the education and support of the infant, but the duty of the trustee to apply the profits for such education and support was absolute, and the trust created by the deed was not void on the ground that it was not imperative.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 71; Dec. Dig. § 51.\*]

Department 1. Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by Rudolph C. Hornung, administrator of Laura Hornung, deceased, against Catherine Lester Sedgwick and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Edward C. Harrison and Maurice E. Harrison, both of San Francisco, for appellant. Tobin & Tobin and George A. Clough, all of San Francisco, for respondents.

ANGELLOTTI, J. This is an appeal by plaintiff from a judgment that he take nothing and that he has no interest in the real property described in his complaint, given in an action brought by him as administrator to recover possession of said property, and to obtain a decree quieting the title of his intestate and her estate to said property as against defendants.

The appeal is on the judgment roll alone. The findings of the trial court fully present the facts upon which the respective claims of the parties are based.

On May 13, 1909, plaintiff's intestate, Mrs. Laura Hornung, who it appears in the complaint was the wife of said Rudolph C. Hornung, was the owner of the real property involved, the same being a lot of land 25 by 105 feet on Willard street in the city and county of San Francisco. On that day she signed, acknowledged, and delivered to defendants her deed of conveyance thereof. The sole question on this appeal is whether this instrument was effective to convey all the interest of Mrs. Hornung in said land. If it was so effective, the findings of the lower court fully sustain the judgment given.

The deed named Mrs. Hornung as the party of the first part, defendant Catherine Lester Sedgwick (then Catherine Lester) as party of the second part, and defendants Harold Joseph Hornung, a minor (her only child), said Catherine Lester, Lillie Mengel, Emma Matthesen, and Lewis Borle, parties of the third part. It purported first to convey the property to the parties of the second and third parts "in trust for the purposes and subject to the conditions" thereafter set forth. It then purported to grant such property to the party of the second part, now Mrs. Sedgwick, in trust, to hold, manage, and control the same, to collect the rents, issues, and profits thereof, to make all necessary repairs, improvements, etc., and "to pay out of the balance of the proceeds of said premises all sums necessary for the proper education, maintenance, and support of the above-named Harold Joseph Hornung, until he shall have arrived at the age of twenty-one years, and the said party of the first part, does hereby give and grant unto the said party of the second part, full power and discretion as to what may be necessary for the proper education, maintenance and support of the said minor, in so far as the same relates to the trust fund hereby created." A provision follows conferring upon the trustee power to sell the property and reinvest the proceeds, to mortgage the same or any property which she may purchase with the said trust fund, and to do all things necessary or proper in the full and complete management, etc., of the said trust fund. It is then provided as follows: "In the event and upon the condition that the said Harold Joseph Hornung, son of the party of the first part, should arrive at the age of twenty-one years, then and in that event the said trust shall termi-

nate and the said real property hereinabove described, or the trust fund hereby created, then in the hands of the trustee, shall be and become the absolute property of the said Harold Joseph Hornung, and subject to the said condition and trust, the said party of the first part does hereby grant, transfer and convey to the said Harold Joseph Hornung, the real property hereinabove described. In the event and upon the condition that the said Harold Joseph Hornung shall die prior to reaching the age of twenty-one years, then and in that event the said real property, hereinabove described, or the trust fund, which may at the date of the death of the said Harold Joseph Hornung, in case of his death prior to reaching the age of twenty-one years, be in existence, shall be and become the property of the above named Catherine Lester (widow), Lillie Mengel, wife of John Mengel, Emma Matthesen, wife of Joseph Matthesen, and Lewis Borle, and the party of the first part does hereby grant, transfer and convey to the said last named parties share and share alike, that is to say, an undivided one-fourth to each thereof, the said real property, hereinabove described, or in the event that the said real property had been sold, then the property constituting the trust fund, subject to the said condition hereinabove expressed." This is followed by a provision as to the duties of the trustee in the event of a sale of the property. A consideration of this instrument leaves no doubt as to the intention of Mrs. Hornung in executing it. She desired, first of all, to provide from the property, or its proceeds in the event of a sale thereof, for the proper education, maintenance, and support of her son during his minority, and, secondly, she desired such property or proceeds or what was then left of the same, to go absolutely to such son upon his arriving at the age of majority, if he should live so long; thirdly, in the event that he died before arriving at such age, she desired such property or proceeds, or what was left of the same at the time of his death, to go in equal shares to the four other persons named as parties of the third part.

The contention of learned counsel for appellant is that the trust attempted to be created by the deed to carry into effect her intention relative to her son during the period of his minority is invalid under our statutory provisions regarding express trusts, and that the attempted grants in remainder are so dependent upon the execution of the trust that they also must fall with the attempted trust.

[1] The attempted trust was solely for the benefit of the minor son of the grantor, and was to terminate upon his arriving at the age of majority or upon his death prior to such time. The other provisions were solely in the way of prescribing to whom the property to which such trusts related should belong "in the event of the failure or termina-



tion of the trust," and of a transfer of such property subject to the execution of the trust. Section 864, Civ. Code. They may, however, be looked to and considered in determining the proper construction of the provisions relating to the trust.

[2] Subdivision 3 of section 857, Civil Code, provides that an express trust may be created to receive the rents and profits of real property, and pay them to or apply them to the use of any person during the life of such person, or for any shorter term, and subdivision 4 of the same section provides that such a trust may be created to receive the rents and profits of real property, and to accumulate the same for the purposes and within the limits prescribed by title 2 of part 2, division 2, of the Civil Code. Section 724, Civil Code, contained in said title 2, permits provision for such an accumulation for the benefit of one or more minors then in being, terminating at the expiration of their minority. We are of the opinion that these provisions fully authorize the trust attempted to be declared by the deed before us. The question in this connection is simply one of construction of such provisions, for, of course, learned counsel for appellant are correct in their statement that no trust in relation to real property is valid unless created or declared in writing. Section 852, Civ. Code. But we think that, fairly construed, the deed does declare these purposes. The requirement that the trustee shall pay out of the net profits of said property or its proceeds in the event of sale all sums necessary for the proper education, maintenance, and support of the minor son during the period of his minority, in other words, shall apply to the use of said minor so much of said net profits as is necessary for such purposes during his minority, is absolute and imperative, leaving no discretion whatever in the trustee other than one to determine what things are necessary or proper to accomplish the education, maintenance, and support commanded. This matter of discretion we will discuss later. It is sufficient for the moment to point out that as to such things as are determined by the trustee to be necessary for the proper education, maintenance, and support of the minor the duty of the trustee to apply the net profits is absolute and imperative. As to any possible surplus of net profits remaining in the hands of the trustee after the application of such amounts as may be necessary for the purposes enumerated, it is true that she is not in terms directed "to accumulate" the same for the benefit of the minor. But such we think is fairly the effect of the provisions of the deed as to all amounts not so needed at any time during the minority of the beneficiary, for, of course, it was neither contemplated nor necessary to the validity of the trust to apply that it should be required that net profits to be devoted to that purpose must be so applied im-

mediately on coming into the hands of the trustee. They were to be so applied as needed for the designated purposes, and in the meantime were to be retained by the trustee. But there might be net profits in excess of the amount so needed during the continuance of the trust. All of the net profits received by the trustee, whether so needed or not, while remaining in her custody, constituted a part of the trust fund, both under well-settled principles of law and within the contemplation of the grantor, as is shown by her use of the words "trust fund hereby created" in the first provision as to the discretion to be exercised by the trustee. It was thereafter substantially provided that, upon the completion of the minority of the son, all of the trust property or trust fund "then in the hands of the trustee" shall be and become the property of such son. These provisions to our minds necessarily imply a direction to the trustee to hold for the minor all portions of the rents and profits not necessary to be applied to the designated purposes, in other words, to accumulate the same for his benefit until he arrives at the age of majority. We thus have as to any surplus of rents and profits over the amounts to be applied to the use of the minor for education, etc., a sufficient declaration of a trust for accumulation authorized by subdivision 4 of section 857, Civil Code.

[3] The fact that the right of the minor to receive the real property and the accumulated income is dependent upon the contingency of his attaining the age of majority, and that under the other provisions of the deed as to the devolution of the property upon the termination of the trust by his death before his majority, such accumulations, if any, will become the property of others who are not minors, and who are persons in whose favor a direction to accumulate would not be valid, we regard as immaterial. As we have said, the attempted trust was one solely for the benefit of the minor. The whole object thereof was to make proper provision for the support, maintenance, and education of the minor and to insure the keeping together for him during his minority of such of the property as was not required to be used for these purposes, so that it might go to him upon attaining the age of majority. The accumulation was directed solely for his benefit, and the same was to terminate immediately upon his death, if he died prior to attaining his majority. The fact that the amounts accumulated would go to others in the event of his death before majority was a thing entirely apart from and independent of any provision of the trust, and was a mere incident to the exercise by the trustor of the right given her by the law to transfer the property subject to the execution of the trust.

[4] It is earnestly urged that the attempted trust to apply rents and profits to the use of

the minor for his education, support, and maintenance is void for the reason that it is not imperative, but merely discretionary—in other words, that the trustee is left with full discretion to determine whether any of the rents and profits shall be applied to any of such purposes, and, if any, how much. We have already referred to this point, and have shown, we think, that such is not a fair construction of the provisions of the deed. As we have said, the only discretion confided to the trustee is to determine what things are necessary or proper to accomplish the education, maintenance, and support of the minor, and, of course, it is to be assumed that the trustee will exercise that discretion fairly and honestly, with a view to provide, so far as the net profits will allow and warrant, for such education, maintenance, and support as are reasonable and proper. The duty of the trustee to apply such rents and profits for such education, maintenance and support as may be found to be necessary is, as we have said, absolute and imperative. The language involved in *Estate of Sanford*, 136 Cal. 97, 68 Pac. 494, the case very strongly relied on by appellant, differed from that in the case at bar, and, as was pointed out in *Estate of Reith*, 144 Cal. 314, 77 Pac. 942, the trustees there were to receive the rents and profits and apply the same “to such extent \* \* \* as in their judgment may be proper to and for the use and benefit” of certain children. This language was construed as leaving to the discretion of the trustees “what amount of the income shall be applied” to the purposes designated, entirely regardless of the needs of the beneficiaries, or, as said by this court in *Estate of Dunphy*, 147 Cal. 95, 81 Pac. 315, through Mr. Justice McFarland, who wrote the opinion in the *Sanford* case, as leaving to the discretion of the trustees “what amount of the income, if any, should be applied.” As we have shown, no such construction can fairly be given to the language in the deed before us. The views expressed in *Estate of Reith*, supra, 144 Cal. 319, 320, 77 Pac. 942, in response to the claim made that the trust there involved was void for the reason that it left to the discretion of the trustee how much income shall be used for the support and education of the children, which was concurred in by three of the four justices concurring in the majority opinion in *Estate of Sanford*, supra, are applicable to the case at bar, and fully sustain the trust here involved in so far as this objection is concerned.

It follows from what we have said that the attempted trust is valid, and that the deed of Mrs. Hornung was effective to convey all of her interest in the property in suit.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

(164 Cal. 645)

# MEYER v. CITY ST. IMPROVEMENT CO.

(S. F. 6,058.)

(Supreme Court of California. Feb. 7, 1913.

Rehearing Denied March 7, 1913.)

## 1. MECHANICS' LIENS (§ 118\*)—PUBLIC IMPROVEMENTS—LIENS — STATUTORY PROVISIONS.

The provision in Code Civ. Proc. § 1187, added by amendment in 1897, requiring notice of completion of any work mentioned in section 1183, giving a lien for labor and materials, does not apply to improvements under section 1191, giving a lien for street improvements, and the provision does not limit the time for the filing of a lien therefor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 161; Dec. Dig. § 118.\*]

## 2. MECHANICS' LIENS (§ 132\*)—PUBLIC IMPROVEMENTS—LIENS — STATUTORY PROVISIONS—“IMPROVEMENT.”

The provision in Code Civ. Proc. § 1187, that all claims of lien must be filed within 90 days after the completion of the “building improvement, or structure,” applies to liens under section 1191, giving a lien for the grading of streets, or any “improvement” in connection therewith; the word “improvement” in the quoted phrase being used in its broadest sense to include any improvement for which a lien is given by the chapter entitled, “Liens of Mechanics and Others upon Real Property.”

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 190, 192–207; Dec. Dig. § 132.\*]

For other definitions, see *Words and Phrases*, vol. 4, p. 3454.]

## 3. MECHANICS' LIENS (§ 260\*)—PUBLIC IMPROVEMENTS—LIENS—ENFORCEMENT — ACTIONS.

Code Civ. Proc. § 1190, providing that no lien binds any property for more than 90 days after the filing thereof unless an action is begun within that time to enforce it, or where a credit is given then within 90 days after the expiration of the credit, applies to all liens, including those for street improvements, and an action to enforce a lien must be brought within the statutory time.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 456, 458–468; Dec. Dig. § 260.\*]

Department 1. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Alice L. Meyer against the City Street Improvement Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Bishop, Hoefler, Cook & Harwood, of San Francisco, for appellant. Stafford & Stafford, of San Francisco, for respondent.

SHAW, J. The action herein was in the ordinary form of a suit to quiet title. An answer and cross-complaint was filed by the appellant, in which it set up that it had a lien on plaintiff's lot by virtue of a contract for the improvement of the street in front thereof, entered into with plaintiff's grantor who owned the lot at the time of the contract. The trial court held that the appellant had no lien and gave judgment quieting respondent's title, from which judgment, and



from an order refusing a new trial, the present appeals are taken.

The improvement referred to consisted of paving and curbing the street in front of the lot. It was completed on August 13, 1909, under a contract with Frederick P. Zwicker, made on June 17, 1908. At that time the lot belonged in equal shares to Frederick P. Zwicker and his wife, Helene M. F. Zwicker. On September 8, 1909, Frederick conveyed his interest to his wife, and on December 22, 1909, she conveyed the entire lot to the plaintiff. On January 5, 1910, the defendant filed in the recorder's office a claim of lien on said lot for the contract price of said improvement, which claim was in the form prescribed for claims of liens by section 1187 of the Code of Civil Procedure. The cross-complaint to foreclose the alleged lien for this work was filed on July 27, 1910. The owners of the lot did not file any notice of the completion of the improvement as provided by section 1187, and no term of credit was given for payment of the amount due for said improvement.

It will be noted that, although the work was completed on August 13, 1909, the claim of lien was not filed until January 5, 1910, and the cross-complaint to foreclose said lien was not filed until July 27, 1910. The court below held that there was no lien for two reasons: First, because the defendant did not file the claim of lien within the time prescribed by section 1187 aforesaid; second, because an action to foreclose was not begun within the time limited by section 1190 of the Code of Civil Procedure, as it read prior to the amendment of 1911 thereto. The defendant contends that, under the provisions of the Code prior to said amendment of 1911, it was not necessary to file a claim of lien for improvements of a street in front of a lot, made at the request of the owner; also that, if such lien must be filed, the owner who does not file notice of completion under section 1187 is forever estopped to show that the lien was not filed in time; also, that section 1190 does not apply to liens for work done under the provisions of section 1191.

The decision of these questions depends on the meaning and effect of the mechanic's lien law in force prior to the revision thereof by the Legislature of 1911. Stats. 1911, p. 1313. The sections involved in this case are so amended by that revision that an interpretation of the former sections would not determine the effect of the revised act. The lien law has been amended so often and with apparently such slight consideration of the relation of one section to another and with such free use of the same or similar expressions to refer to distinct things that a complete discussion of the various expressions involved and of the decisions construing similar expressions in other sections would extend this opinion to a length which we deem unnecessary, in view of the fact that, so far as the questions under consideration are con-

cerned, the original act is practically superseded by the revision. We therefore give only a brief statement of our conclusions as to the meaning and effect of the different sections as applied to the present case.

[1] Section 1191 gives a lien to any person who, at the request of the owner of a lot in any incorporated city or town, "grades, fills in, or otherwise improves the same," or the street or sidewalk in front of such lot, or who "makes any improvements in connection therewith." It was not amended in 1911. As originally enacted, section 1187 provided only for the time of filing claims of lien and the form thereof. The provision requiring the filing of notices of completion was added by amendment in 1897. Instead of placing this provision at the end of the section, it was inserted as the opening paragraph, and the original provisions concerning claims of lien were made the second paragraph. The first paragraph requires a notice of completion to be filed by the owner in every case in which a lien may be filed under section 1183, but it is silent as to liens under section 1191, and therefore in the case of improvements under the latter section a notice of completion is not required.

[2] The introductory part of the second paragraph of section 1187 allows to original contractors 60 days and to other persons 30 days, after the filing of notice of completion, as the utmost limit of the time for filing claims of lien upon any "building, improvement, or structure." This cannot apply to liens under section 1191, for, as we have seen, the owner need not file such notice of completion of work done under that section. The only provision of section 1187 that fixes the time for filing claims of lien under section 1191 is the proviso immediately succeeding the clause prescribing the form of the claim. It is as follows: "Provided, however, that in any event all claims of lien must be filed within ninety days after the completion of said building, improvement, or structure, or the alteration, addition to, or repair thereof."

We cannot believe that the Legislature intended to create a lien for work upon a lot, or upon the street in front of it, which should continue without limit, or at least for the full time of the period of limitation of the cause of action against the owner, without any provision for making it a matter of record, or for giving notice to the owner, or his successor. Yet this would be the result if the provisions of section 1187, requiring the filing of claims of lien and fixing the time therefor, do not apply to liens under section 1191. The act, as a whole, shows that its policy is to require a record notice of all liens. It would not be good public policy to allow secret liens of this character. It should not be so construed unless its language permits no other reasonable interpretation. The word "improvement" has a broad meaning. In its ordinary use it includes the work of grading

an abutting street, as well as buildings, and the like, upon the lot itself. While the intent to require liens to be filed for work under section 1191 is not clearly stated, yet we think the section plainly implies that such claims must be filed for all work mentioned in the section or included in its terms. We therefore hold that the word "improvement" in the proviso was used in the broadest sense to include any and every improvement for which a lien is given by the chapter, those under section 1191, as well as those under section 1183, and that the provisions prescribing the form of the statement and requiring that such statement be filed, apply to all such liens.

In *Warren v. Hopkins*, 110 Cal. 506, 42 Pac. 986, in construing section 1188, the court held that the word "improvement," as used in that section, refers only to the works and buildings mentioned in section 1183. But this narrow meaning of the word, as there used, is necessarily implied from the context, especially the last clause, which speaks of the liens therein referred to as liens for improvements "upon the land upon which the same are situated." This explains the case, and shows that it does not fix the meaning of the word in other sections with a different context. The decisions in *Kreuzberger v. Wingfield*, 96 Cal. 257, 31 Pac. 109, and *Macomber v. Bigelow*, 126 Cal. 13, 58 Pac. 312, merely hold that the liens provided for by section 1191 are not governed by the provisions of section 1183 relating to the form of the contract and mode of contracting. They are not otherwise important here.

[3] 2. Section 1190 is as follows: "No lien provided for in this chapter binds any building, mining claim, improvement, or structure for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same; or, if a credit be given, then ninety days after the expiration of such credit; but no lien continues in force for a longer time than two years from the time the work is completed, by any agreement to give credit." Here is an express declaration making the provision applicable to all liens provided for in the chapter. And at the close of the provision in regard to the effect of giving credit there is a reference to the time when "the work is completed," a phrase which refers as aptly to work under section 1191 as to that done under section 1183. The reasons already given as to the construction of section 1187 are pertinent here. The word "improvement" was here again evidently used to include any kind of improvement for which a lien is given by any section of the chapter, and it includes work done under section 1191.

For these reasons, we hold that the claim of lien of the defendant should have been filed at least within 90 days after the completion of the work, and that the action

should have been begun to enforce it (a cross-complaint in this instance), within 90 days after the filing of such lien. This conclusion makes it unnecessary to consider the other points presented. The court below correctly refused to allow the defendant any relief.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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(164 Cal. 650)

**BORGWARDT et al. v. MCKITTRICK OIL CO. (L. A. 2,997.)**(Supreme Court of California. Feb. 11, 1913.  
Rehearing Denied March 13, 1913.)**1. MINES AND MINERALS (§ 14\*)—LOCATION—VALIDITY.**

Where persons locating mining claims formed a corporation, each owning stock in proportion to their claims, the location is not invalid, as in the case where persons merely lend their names to a corporation, in which they have no interest, to enable it to acquire a greater area of mining ground than is allowed.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 19, 20; Dec. Dig. § 14.\*]

**2. MINES AND MINERALS (§ 38\*)—LOCATION—ABANDONMENT.**

In an action involving the right to mining land, evidence held not to establish a voluntary abandonment by defendant of its location.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.\*]

**3. MINES AND MINERALS (§ 23\*)—ANNUAL ASSESSMENT WORK—NECESSITY.**

Until an actual discovery of mineral is made upon a claim, the location is not perfected, and annual assessment work is not necessary.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 51-59, 114; Dec. Dig. § 23.\*]

**4. MINES AND MINERALS (§ 26\*)—LOCATION—EFFECT.**

Upon the locating of a claim and posting of notice, the locator, while acquiring no vested right as against Congress until the inchoate location is perfected by discovery, has a right, as against third persons, to be protected against all forms of entries, so long as he remains in possession and with due diligence prosecutes his work of discovery; but, where he abandons his work toward discovery, the claim may be relocated, and the subsequent locators, if they remain in possession and diligently prosecute the work of discovery, which does not mean the pursuit of capital for the work, but the actual prosecution of the work, they may perfect title good as against the original locator.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 61-63; Dec. Dig. § 26.\*]

**5. MINES AND MINERALS (§ 36\*)—LOCATION OF CLAIM—WORK OF DISCOVERY.**

Where a claim upon which there had been no discovery was relocated by plaintiffs, their placing men in a cabin, with directions to watch the land, together with the mere figuring as to the charge for drilling oil wells, is not such a diligent prosecution of the work of discovery as to perfect the relocation as against the original locator.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 87; Dec. Dig. § 36.\*]

**6. MINES AND MINERALS (§ 23\*)—LOCATION—WORK OF DISCOVERY.**

A locator of a mining claim is protected in his possession only while he may be fairly held to be actually engaged in such work as reasonably may be discovery work, and will not be protected on the theory that he is entitled to a reasonable time to begin work, where actual operations were not begun for several months after location.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 51-59, 114; Dec. Dig. § 23.\*]

**7. MINES AND MINERALS (§ 26\*)—LOCATION—RELOCATION.**

Where defendant did not abandon its original location, but merely failed to diligently prosecute the work of discovery, a relocation by plaintiffs, who also failed to prosecute the work of discovery until after re-entry and commencement of discovery work by defendants, will not bar defendant of its rights under the original location.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 61-63; Dec. Dig. § 26.\*]

Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by George W. Borgwardt and others against the McKittrick Oil Company. From a judgment for plaintiffs, defendant appeals. Reversed.

J. W. Laird and F. E. Borton, both of Bakersfield, for appellant. George E. Whitaker, of Bakersfield, and Charles G. Lamberson and Lamberson & Lamberson, all of Visalia, for respondents.

ANGELLOTTI, J. This is an appeal from a judgment given in an action commenced June 1, 1908, to quiet plaintiffs' title to the N. E. ¼ of section 12, township 30 south, range 21 east, Mt. Diablo base and meridian, containing 160 acres, which is valuable for petroleum oil. Plaintiffs claim under an attempted United States placer mining location, initiated by the posting by them of notice of location on the ground on May 26, 1908, while defendant claims under two locations initiated on September 19, 1899, one including the N. ½ of said N. E. ¼, with lots 1 and 2 in the N. W. ¼ of the same section, and the other including the S. ½ of said N. E. ¼, with lots 3, 4, 5, and 6 in the S. E. ¼ of the same section.

The findings of the trial court, which are in full accord with the allegations of the complaint of plaintiffs, are to the following effect: Plaintiffs, who were then citizens of the United States over the age of 21 years, on May 26, 1908, filed a mineral location covering said quarter section under and pursuant to the provisions of chapter 6, title 32, Revised Statutes of the United States, by posting a notice in due form thereon, where it was easily discernible, and performing the other acts essential to the initiation of a location. All said land was at said time a part of the public domain of the United States, and was unappropriated, open, vacant, and unoccupied land, subject to location and entry by citizens of the United States. Immediately following the making of such location, they entered upon the occupancy and possession thereof, and continued in the exclusive possession thereof up to May 29, 1908, engaged in the development of the same for the oils, gypsum, and other minerals contained therein. During the night of May 29, 1908, while plaintiffs were in such possession, the defendant, without their consent, entered in and upon the



surface lines of said claim, announcing its intention to drill for mineral oils contained therein, and have ever since proceeded, and are now proceeding, "to put into effect the said announcement and the preliminary work of drilling for said mineral oils." The court further found that, at the time of plaintiffs' location, the land was not held by the defendant under or by virtue of any mineral location whatever, and the defendant was not the owner of, or entitled to the possession of or in the occupancy or possession of, said land or any part thereof, or actively or in good faith engaged in the work of prosecuting the development of said land or any part thereof for oil. It further found that any attempted location which defendant had made upon said land had, prior to May 26, 1908, become forfeited by reason of the failure of defendant or its predecessors in interest to do or perform the assessment work required by law to be performed upon said land during the year 1907, and that defendant was not thereafter, or on August 18, 1908, in the possession or occupancy of the land under any mineral location whatever. It further found that plaintiffs, within a reasonable time after their location, commenced in good faith the work of developing the land for the mineral oil contained therein, and prosecuted the same with reasonable diligence until the discovery of oil in a well drilled by the lessees of plaintiffs.

Judgment was given that, subject only to the paramount title of the United States, the plaintiffs are the sole owners of said land, and enjoining defendant from asserting any claim thereto. As we have said, this is an appeal by defendant from such judgment. It is claimed that the findings are in certain material respects without support from the evidence.

Except in regard to the matter of assessment work for the year 1907, there is practically no conflict in the evidence. Substantially such evidence is as follows: As we have said, defendant claims under two locations initiated on September 19, 1899, one including the N.  $\frac{1}{2}$  of said N. E.  $\frac{1}{4}$ , with lots 1 and 2 in the N. W.  $\frac{1}{4}$  of the same section, and the other including the S.  $\frac{1}{2}$  of said N. E.  $\frac{1}{4}$ , with lots 3, 4, 5, and 6 in the S. E.  $\frac{1}{4}$  of the same section. Notices of location were posted on September 19, 1899, on these two claims on behalf of the requisite number of persons, who at such time intended to work through the agency of a corporation, in which they were to hold the stock in equal shares, and who subsequently, on December 2, 1899, conveyed their respective interests to defendant corporation. The work of development was immediately proceeded with on lot 5 in the S. E.  $\frac{1}{4}$  of the section, with the result that a well was drilled to the depth of about 1,100 feet. At a depth of some 775 feet, 25 feet of rich oil sands were discovered,

capable of producing, it is claimed, 40 barrels of oil per day. No oil was in fact produced; defendant endeavoring to pass through and reach a greater production at a lower depth. Finally an immense flow of artesian water was struck, which effectually prevented further operations in that well. This was in the latter part of 1899 or the early part of 1900. It may be conceded that from such time until May 28, 1908, there was no such continuous work as would warrant a conclusion that defendant was continuously and diligently prosecuting any discovery work on either location, and that it was not doing so on May 26, 1908. It claims that a sufficient discovery was shown on the southerly location by what we have already stated, which perfected that location, obviated the necessity of any further work, except the \$100 assessment work required annually on a claim after discovery and before patent, and dispensed with the necessity of further actual possession, all of which results do follow an actual discovery. Defendant owned other claims, adjoining or cornering on these locations, on some of which it was prosecuting work. In April, 1908, defendant's board of directors voted to order the timbers for a rig to drill a well on the northerly location. At this time, Mr. Davis, who located the alleged claim, as agent of plaintiffs, was the foreman of defendant, as well as a stockholder and director therein. Early in May he severed his relations with defendant. On May 23, 1908, defendant commenced the overhauling and repair of a water pipe line to be used in drilling on said northerly location. On May 26, 1908, Davis went upon the N. E.  $\frac{1}{4}$  of section 12 to locate the same for plaintiffs. At that time no one was in actual physical possession of any part thereof. There was an old cabin on the northerly  $\frac{1}{2}$  of said N. E.  $\frac{1}{4}$ , and another old cabin on the S. E.  $\frac{1}{4}$  of said section, some little distance outside of the lines of the land attempted to be located by him, but within the lines of defendant's southerly location. Both of these cabins had been erected by defendant. Davis posted his notice of location, and looked at the boundaries already marked on the ground. On May 27, 1908, he departed for Bakersfield, leaving a man named Garner in the cabin on the S. E.  $\frac{1}{4}$  of the section, with directions to get two or three other men to watch the claim and stay on the ground. During the evening of May 28, 1908, defendant brought to the N.  $\frac{1}{2}$  of said N. E.  $\frac{1}{4}$  in wagons certain timber for the construction of a rig to bore a well, and deposited the same thereon, following this with rig lumber on the next day. Davis returned to the land on May 29th, with a surveyor to run the lines, and found the timber that had already been left there by defendant, and also found a man occupying the cabin thereon, who had been left in possession by defendant. On May 30th or 31st he returned again, staying overnight, and

sleeping in the cabin on the N.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  with the man who occupied the same for defendant. He returned to Bakersfield the next day, and on June 1, 1908, this action was commenced. The only actual possession on the part of plaintiffs up to this time was such as can be held to have existed by reason of the occupancy by Garner, and three men whom he employed, of the cabin on the S. E.  $\frac{1}{4}$  of the section, and the fact that such men were there to watch the claim, and walked over the ground occasionally. The only alleged prosecution of any discovery work on the part of plaintiffs up to this time was that Mr. Davis, some 10 days before May 26, 1908, had been negotiating with certain parties as to the amount that they would charge to place a drilling rig on this land, or as he put it, "figuring" with them as to what they would charge. This resulted in nothing in the way of any arrangement; and it was as late as the middle of July, 1908, before any arrangement was made with anybody to procure a drilling rig. From the time that defendant commenced to move timber upon the N.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  on May 28, 1908, it was never out of actual possession thereof, and continued to diligently prosecute discovery work, ultimately, some time in the fall of 1908, finishing a well capable of producing oil in paying quantities. Some time subsequent to the commencement of the action, and in the early part of June, 1908, while defendant was enjoying actual possession of the land, engaged in prosecuting discovery work, Davis constructed a small cabin thereon, which was thereafter occupied by plaintiffs' agents. About the middle of July, plaintiffs commenced to place timber for a boring rig upon the land. They completed a rig there about July 22d or 23d, "spudded in" on August 31st, and thenceforth prosecuted their discovery work with diligence, finally, some time after defendant's discovery, finishing a well.

[1] We see no reason to doubt the validity of the locations of defendant's predecessors, made in the year 1899. The 16 locators located the claims solely for their own individual benefit, and not as mere agents for the benefit of some other person or of some corporation in which they had no interest. The defendant corporation, to which it was proposed to transfer the claims, was to be one in which they were to be the sole stockholders, each to own one-sixteenth of the stock. As said in appellant's brief: "This is no case of dummy locators, lending their names to any person or any corporation for the purpose of permitting it to acquire lands. This is a case of 16 men locating, in apparent good faith, lands within the limit of the amount allowed to them, and adopting a corporate management as an appropriate means of regulating and handling their joint interests, and each retaining, through the agency of the corporation, the exact interest

in the land which he acquired under his location." The authorities cited by respondents in this regard, have no application to such a situation, but refer to cases where a location is made by so-called "dummy locators," persons who simply loan their names as locators and act simply as the agents or employes of some person or corporation to whom they are to transfer their interest. Our own case of *Mitchell v. Cline*, 84 Cal. 409, 24 Pac. 164, cited by respondents, is one of such cases. There, as said by the court, three of the locators of one claim and five of another were "sham locators," not pretending to have any interest in the claim. "They merely permitted their names to be used as locators to enable their friends to obtain possession of and patent for more mineral land than they were entitled to by law; and they executed conveyances to such friends without any valuable or lawful consideration therefor." This was held to be contrary to the policy and object of the United States law limiting the quantity of placer mineral land, which may be located by one person. In *Cook v. Klonos*, 164 Fed. 529, 90 C. C. A. 403, the question, as stated by the court, was "whether an individual can, by the use of the names of his friends, relatives, or employes, as dummies, locate, for his own benefit, a greater area of mining ground than that allowed by law." No reason is advanced or can be conceived why such a practice, as was adopted in the case at bar, can be held to be violative of any statute, rule, or policy relating to the disposition of mineral lands, and we know of no ruling to the effect that it is forbidden. See, in this connection, *Lindley on Mines*, § 226.

[2, 3] There was never, prior to the latter part of the year 1908, any discovery of oil or other mineral by defendant on the northerly location, sufficient to perfect the location. We do not think that the evidence was of such a nature as to establish any voluntary abandonment of this location by defendant; and we do not understand that the conclusion of the lower court was in any way based on the theory of an abandonment of the claim. Its express finding on the subject is not one of abandonment, but that any attempted location which defendant had made became forfeited by reason of the failure of defendant or its predecessors in interest to do or perform the assessment work required by law to be performed upon said land during the year 1907. Until a sufficient actual discovery of mineral is made on such a claim, a location is not perfected, and no question of the doing of annual assessment work is involved. It is only after such discovery, when actual possession is no longer necessary to protect the location against subsequent locators, that annual assessment work is essential to prevent a forfeiture.

[4] The rights of the person or persons endeavoring to locate an oil claim, after the posting of notice, etc., are well settled by the



decisions. Until the inchoate location is perfected by discovery, the locator has no vested right which Congress is obliged to recognize. But where his location is made in good faith, he has the right, as against third persons, which is transferable, "to be protected against all forms of forcible, fraudulent, surreptitious, or clandestine entries and intrusions upon his possession," so long as he "remains in possession and with due diligence prosecutes his work toward a discovery." *Miller v. Chrisman*, 140 Cal. 440, 447, 73 Pac. 1084, 98 Am. St. Rep. 63; *Weed v. Snook*, 144 Cal. 439, 77 Pac. 1023. As long as such a condition continues, no one, without his consent, can make the actual entry of the land essential to legally initiate a new location. But actual possession of the land, coupled with continued diligent prosecution of discovery work, are essential to his protection. "What the attempting locator has is the right to continue in possession, undisturbed by any form of hostile or clandestine entry, while he is diligently prosecuting his work to a discovery." *McLemore v. Express Oil Co.*, 158 Cal. 559, 112 Pac. 59, 139 Am. St. Rep. 147. "Where the alleged locator has not made a discovery, and has not retained possession for the purpose of prosecuting work looking to a discovery, his mere posting of notice and marking of boundaries upon the ground will not serve to exclude others who may peaceably enter upon the land which he is not actually working or occupying." *New England, etc., Oil Co. v. Congdon*, 152 Cal. 211, 214, 92 Pac. 180, 181. The case of *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735, does not hold otherwise. The location there involved was one perfected by discovery, or rather one where discovery preceded the posting of notice of location; and, as we have said, actual possession is not essential after the location has been perfected by discovery. The requirement of diligent prosecution of the work was described in *McLemore v. Express Oil Co.*, supra, as follows: "This diligent prosecution of the work of discovery does not mean the doing of assessment work. It does not mean the pursuit of capital to prosecute the work. It does not mean any attempted holding, by cabin, lumber pile, or unused derrick. It means the diligent, continuous prosecution of the work, with the expenditure of whatever money may be necessary to the end in view." It is only one so actually possessed and so engaged in the diligent prosecution of the work of discovery who is thus protected, by reason of his attempted location, against an entry by another.

As we have intimated, in view of what we have said, the situation was not such on May 26, 1908, that defendant could complain of an entry then made by another in good faith on the land embraced in its northerly location. Apparently it was not then in actual possession of any part thereof, or engaged in the diligent prosecution of discovery work

thereon. Accordingly, plaintiffs were then entitled to locate the same as an oil claim. They were entitled to go into actual possession thereof, post their notice of location, and continue in actual possession as long as they were diligently prosecuting discovery work thereon for the purpose of perfecting their location by discovery, protected against any re-entry on the part of defendant. But, as we have seen, their mere entry into possession and posting of a notice of location, without continuance of actual possession and continued diligent prosecution of discovery work, would not avail them. These things would serve only to protect them in their actual possession while they were engaged in diligently prosecuting discovery work.

As we have seen, the trial court found in favor of plaintiffs upon the matter of actual possession and diligent prosecution of discovery work at the time defendant re-entered the land, and commenced its own discovery work thereon. This was one of the allegations of paragraph 5 of the complaint, all the allegations of which were found to be true by the trial court. The finding is a material one, as is apparent from what we have said.

[5] As to the matter of possession, it appears, without conflict, that there was absolutely no one in actual occupancy of any part of the land embraced in plaintiffs' attempted location from the time of the posting of plaintiffs' notice to the time of defendant's re-entry, or, indeed, until some time during the following month, when Davis constructed a cabin thereon. The utmost effect of plaintiffs' evidence, in this behalf, was that men had been placed in a cabin on an adjoining tract of land, with directions simply to watch this land and walk over it once or twice a day. Whatever may be said as to this as being capable of sustaining a finding of actual possession, it is clear that the evidence is not sufficient to support the finding substantially to the effect that plaintiffs were engaged in the prosecution of discovery work at any time prior to the entry by defendant and the commencement of its own discovery work, or, indeed, to support a conclusion that they were so engaged at any time prior to the middle of July, long after the commencement of this action. Clearly, the mere "figuring" with other persons by the locator as to what they will charge for the doing of such work, or the making of an effort to find some one who will do such work at a price satisfactory to the attempting locator, which is the utmost plaintiffs' evidence tends to show was done, cannot be held to constitute a diligent prosecution of the work of discovery any more than the pursuit of capital to prosecute such work can be held to constitute such diligent prosecution. See *McLemore v. Express Oil Co.*, supra. Under the rule established by the decisions, the locator is protected in his possession only when engaged in the diligent prosecution of actual

work for a discovery, and the commencement and continuance of such work are as essential, when he complains of interference with his possession, as is the posting of his notice of location. We do not mean to hold that such diligent prosecution of the work may not include such actual preparation for the same as the bringing to the claim of the materials necessary therefor. We have no such situation presented by the evidence here, and need not determine exactly what will constitute the diligent prosecution of discovery work. Here we have nothing more than an indefinite "figuring" with other persons as to what they will charge for doing the work, if employed to do so, which by no stretch can be held to constitute a part of the actual prosecution of the work of discovery.

[6] It is urged that an attempting locator is protected in his possession without commencing such work, provided he does not allow an "unreasonable time" to lapse without making such a commencement; and this appears to have been the theory of the learned judge of the trial court, as evidenced by one of his findings, where it is declared that plaintiffs, "within a reasonable time thereafter, commenced in good faith the work of developing the said land," etc. Such commencement, as we have seen, was long after defendant's re-entry, and long after the commencement of this action. The rule declared by the decisions does not so provide. The attempting locator's possession is protected only while he may fairly be held to be actually engaged in such work as may reasonably be held to be discovery work.

It would seem to follow that, as to defendant's northerly location, plaintiffs were not protected in their alleged possession at the time of defendant's re-entry on May 28, 1908, by reason of the posting of their notice of location. As we have said, it cannot be fairly held that plaintiffs had then commenced any work which by any stretch can be called discovery work. Until they had made such a commencement, the claim was as freely open to defendant, under its location of September, 1899, as it would have been had no notice of location been posted by plaintiff. Learned counsel for plaintiffs are in error in claiming that the location of defendant's predecessors had been forfeited. Such would have been the situation if a discovery had been made on the claim and the location thus perfected, and there had been a subsequent failure to do the annual assessment work expressly made necessary by statute to avoid a forfeiture, coupled with a subsequent valid location by an adverse claimant. Defendant's northerly location had never been perfected by discovery.

[7] In the absence of a voluntary abandonment of all claims thereunder, it had the

right to enter into possession of the land and do discovery work thereon at any time that it could do so without transgressing any right obtained by another. The alleged occupancy of plaintiffs was not of such a nature as to destroy or affect this right of defendant; and defendant, in going again into possession and commencing discovery work on the land, did not violate any right of plaintiffs.

In view of what we have said, it is apparent that the judgment must be reversed. A material finding, essential to plaintiffs' right to prevail as to the land embraced in defendant's northerly location, is not sufficiently supported by the evidence.

We have not considered what the effect on plaintiffs' claim as to the southerly  $\frac{1}{2}$  of said N. E.  $\frac{1}{4}$  will be, if they finally fail to substantiate their claim as to the northerly half thereof; and, as that question has not been argued, we shall not attempt to determine it here. As we understand the record, all of plaintiffs' development work has been done on the northerly  $\frac{1}{2}$  of said N. E.  $\frac{1}{4}$ .

It is proper to say, for the purpose of a new trial, that we see no good reason for doubting that the evidence was such as to support a conclusion that there was a sufficient discovery by defendant, in 1899 or 1900, to perfect its location in so far as its southerly claim is concerned. Such would appear from the findings of the trial court to have been the view of the learned trial judge. The material question, then, in regard to the validity of such location at the time of plaintiffs' entry, would appear to be whether defendant, subsequent to such discovery, had failed to do the necessary annual assessment work required by the United States statutes.

There is no other matter suggested in the briefs that appears to require discussion in this opinion.

The judgment is reversed.

We concur: SHAW, J.; SLOSS, J.

(164 Cal. 667)

WIDENMANN v. WENIGER, County Treasurer. (Sac. 1,843.)

(Supreme Court of California. Feb. 11, 1913.)

# 1. PARTITION (§ 111\*)—SALE OF LAND—PROCEEDS—NATURE OF ACTION TO RECOVER.

Upon a sale of land for partition, one of the owners assigned his interest in the purchase money to plaintiff, who notified the referee, who made the sale of the assignment, but the referee paid the money to the clerk of the court without any authority, and the clerk subsequently transferred the fund to defendant, the county treasurer. *Held*, that the referee was not the custodian of earmarked money belonging to the owners, the precise amount due being still to be determined, and consequently the owner had only a chose in action for debt due from the referee, and an action by the as-



signee for the proceeds is not an action in the nature of replevin.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 401-418; Dec. Dig. § 111.\*]

## 2. EXECUTION (§ 264\*)—SALES—TITLE OF PURCHASER.

Under Code Civ. Proc. § 699, providing that, when personal property not capable of manual delivery is bought on execution, the certificate of the officer making the sale conveys to the purchaser all the rights of the debtor, an execution purchaser of the interest of the owner in the fund held by the county treasurer obtains no better title than if he had bought the claim privately, getting the same title that he would have received had he bought from the owner without notice of his assignment.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 747-758; Dec. Dig. § 264.\*]

## 3. EXECUTION (§ 264\*)—EXECUTION PURCHASER AS ASSIGNEE—EFFECT OF PRIOR ASSIGNMENT.

As the execution purchaser takes only the right of a successive assignee without notice, the rule that, as between successive assignees, he has preference who first gives notice to the debtor, even though he be a subsequent assignee, provided that at the time of taking he had no notice of the prior assignment, prevails.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 747-758; Dec. Dig. § 264.\*]

## 4. EXECUTION (§ 264\*)—RIGHTS OF ASSIGNEES—NOTICE.

The transfer by a referee to the clerk of the court and by him to the treasurer did not divest the rights of the first assignee who had notified the referee of the assignment, and consequently a payment by the treasurer to the execution purchaser will not bar the first assignee's right of action against him, particularly as he gave notice of his claim before payment.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 747-758; Dec. Dig. § 264.\*]

## 5. PARTITION (§ 111\*)—SALE—DISTRIBUTION OF PROCEEDS—NECESSITY OF NOTICE.

Where, upon sale of land for partition, the court confirmed the sale and directed distribution, the action not being continued for the disposition of money as provided for by Code Civ. Proc. § 774, the proceeds did not remain in custodia legis, and an assignee of the interest of one of the owners cannot be deprived of his rights by a proceeding begun without notice; it being in effect a new action.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 216-225; Dec. Dig. § 111.\*]

## 6. APPEAL AND ERROR (§ 1056\*)—REVIEW—HARMLESS ERROR.

In an action involving the rights of assignees in a chose in action, where the title of the one to whom defendant paid the fund was inferior to that of plaintiff, the exclusion of evidence of that assignee's title was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.\*]

## 7. ASSIGNMENTS (§ 122\*)—DEMAND BY ASSIGNEE—NECESSITY.

A demand upon a debtor by an assignee of a chose in action is unnecessary, where the debtor, after the filing of the complaint, paid the debt to another.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 210; Dec. Dig. § 122.\*]

In Bank. Appeal from Superior Court, Solano County; Henry C. Gesford, Judge.

Action by Henry J. Widenmann against George Weniger, as treasurer of the county

of Solano. From a judgment for plaintiff, defendant appeals. Affirmed.

T. T. O. Gregory, Gaillard Stoney, and Oroville C. Pratt, Jr., all of San Francisco, for appellant. Theodore A. Bell, of San Francisco, for respondent.

SHAW, J. The defendant appeals from an order denying his motion for a new trial.

The plaintiff sued to recover the sum of \$4,875 alleged to belong to the plaintiff, but which the defendant has in his possession and refuses to pay over to the plaintiff. The facts are as follows: In a suit in partition, entitled Catherine Magee et al. v. James Magee et al., pending in the superior court of Solano county, a sale of the land was ordered, and R. J. R. Aden and two others were appointed as referees to make the sale. The sale was conducted by Aden, who on April 23, 1908, sold the land to Henry Widenmann, the plaintiff, for \$10,500, and received from him the purchase money. Widenmann bought the property at the instance of James Magee, who advanced to him \$1,500 for that purpose, and it was the understanding between them that after the purchase from the referee was consummated Widenmann would resell the property to Magee. On May 1, 1908, Widenmann agreed to sell the land to Magee for \$10,500 and to convey the same as soon as the partition sale was confirmed. Magee owned one-half of the money realized on the partition sale, less the costs. On May 2, 1908, Magee, in writing, duly assigned to Widenmann all his interest in the partition money; the understanding between them being that the same when received was to be a part payment on the price of the sale of the land by Widenmann to Magee. The partition money was then in the hands of Aden as referee, and Widenmann immediately gave notice in writing to said referees, including Aden, of his said assignment from Magee.

The referees afterwards reported the partition sale to the court, and on August 6, 1908, the court made a decree confirming said sale, declaring the share of James Magee in the money to be \$4,875, and directing the said referees to distribute and deliver said sum to Magee. It does not appear that the referees mentioned the assignment in their report, or that it is referred to in the decree. The Code provides that the referees shall make the distribution of funds in such cases when ordered by the court. Code Civ. Proc. § 773. Aden did not deliver the money to Magee or to Widenmann. He did deliver it to G. G. Halliday, the clerk of the court, but without any order or authority to do so. No order had been or ever was made for such money to be deposited in court or with the clerk. The money was handed to the clerk by Aden on or about August 13th, and it was trans-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ferred by the clerk to Weniger, the defendant, on or about August 15, 1908. This also was without any order of court or other authority.

Certain evidence was offered and apparently rejected, from which it appears that on April 27, 1908, in another action in said court, Catherine Magee and others recovered judgment against James Magee for \$4,877.82; that on August 18, 1908, an execution was issued on this judgment by the sheriff of said county, who on August 20, 1908, by virtue thereof, levied on the supposed interest of James Magee in the money then in the hands of Weniger, by serving on Weniger a notice of garnishment thereof; that Weniger answered to the effect that, as county treasurer, he was indebted to Magee in the sum of \$4,875; and that the sheriff thereupon advertised and sold the interest of Magee to T. T. C. Gregory, said sale being made on August 26, 1908. These documents further showed that Weniger refused to pay the money to Gregory; that thereupon, on August 28, 1908, Gregory filed a petition to the superior court in the partition suit, asking for an order directing Weniger, as treasurer, to pay to him said money; that the court thereon issued an order to show cause against Weniger, returnable August 31, 1908; that the matter was continued by consent until September 21, 1908; that Weniger and Gregory then appeared, the matter was heard, and the court thereupon made an order directing Weniger to pay the money to Gregory, which he accordingly did.

No notice of this proceeding was given to Widenmann or to Magee, and neither one of them appeared at the hearing. The minutes recited that Magee was "present in open court" on August 31st, when one of the continuances was had, but it is not otherwise shown that he appeared at the proceeding or had knowledge thereof. The present action was begun on September 19, 1908. On September 17, 1908, Weniger was informed of the assignment to Widenmann, and was cautioned not to pay the money to any other person. It does not appear that he had any previous notice of the assignment. The summons and complaint in the action had been served on Weniger prior to the hearing of Gregory's petition on September 21st. Whether or not the court, at that hearing, was advised of the assignment, the notice to Weniger, or the pendency of the present action, does not appear. There is no evidence that Gregory had any notice of the assignment at the time of the execution sale on August 28th to him.

The plaintiff claims that he obtained a perfect right to the payment of the money by reason of the assignment from Magee to him and the notice thereof given by him to Aden, who was then the debtor, that this right was not affected or divested by the subsequent transfer of the fund, first to the clerk

and then to Weniger, nor by the execution sale to Gregory, or the subsequent order of the court. The defendant claims that by the purchase at the execution sale, without notice of the assignment, Gregory acquired a title superior to that of Widenmann, and that, whether this was so or not, the order of the court directing payment to Gregory is binding and conclusive on Widenmann and all other interested parties.

[1] It is contended that this action is in the nature of an action of replevin to recover specific moneys in the hands of the defendant. But this is not the case. The money was not identified, nor was its amount ascertained at the time of the transfer. Aden was not the mere bailee of a specific fund or the custodian of earmarked money belonging to Magee. He was the custodian of funds held by him for the use of Magee and others, according to their interests, to be paid when the precise amounts due should be determined. The only appropriate action which Magee, or his agents, could maintain against Aden, or his successor, for the recovery of the money when due, would have been either an action of debt or for money had and received to the use of the plaintiff in the action. The claim assigned was therefore a pure chose in action. These propositions are settled by the following decisions: *Walling v. Miller*, 15 Cal. 38; *Wendt v. Ross*, 33 Cal. 650; *Dunsmoor v. Furstenfeldt*, 88 Cal. 522, 26 Pac. 518, 12 L. R. A. 508, 22 Am. St. Rep. 331.

[2] The title acquired by Gregory under his purchase at the execution sale was no better or worse than the title he would have obtained if he had bought the claim privately from Magee without notice of the prior assignment. The execution sale gave him no additional rights, and of itself it transferred to him only the title of Magee as it existed at the time of the levy. Code Civ. Proc. § 699. If, by reason of his ignorance of the prior assignment, he thereby took a title superior to that of Widenmann, this favorable situation comes from the fact that he was an innocent purchaser for value, and not from the fact that he bought at execution sale. There is no distinction in this respect between an execution sale and an ordinary sale. *Mitchell v. Hockett*, 25 Cal. 544, 85 Am. Dec. 151; *Harris v. Harris*, 64 Cal. 108, 28 Pac. 63; *Southard v. McBrown*, 63 Cal. 546. The case of *West Coast, etc., Co. v. Wulff*, 133 Cal. 315, 65 Pac. 622, 85 Am. St. Rep. 171, and similar cases, relating to the rights of second assignees of corporation stock, are cited by respondent on this point. They do not apply to the case. They rest entirely upon the provision of section 324 of the Civil Code, declaring that a transfer of such stock is invalid, except as to the parties thereto, unless it is entered on the books of the corporation. They depend upon the Code provision, and not upon the principle of the common law. Gregory



and Widenmann, therefore, with relation to each other, stand in the positions, respectively, of successive assignees in good faith for value of the same chose in action from the original purchaser. The question presented is which has the paramount title under the facts shown.

[3] The effect of such successive assignments and the rights of the successive assignees without notice, with respect to each other, were considered and decided in *Graham Paper Co. v. Pembroke*, 124 Cal. 117, 56 Pac. 627, 44 L. R. A. 632, 71 Am. St. Rep. 26. There is some conflict of authority on the subject, but this court approved and followed the English rule stated as follows: "As between successive assignees of a chose in action, he will have the preference who first gives notice to the debtor, even if he be a subsequent assignee, provided at the time of taking it he had no notice of a prior assignment." "In the case of a chose in action you must do everything toward having possession that the subject admits. You must do that which is tantamount to possession, by placing every person who has an equitable or legal interest in the matter under an obligation to treat it as your property. For this purpose you must give notice to the legal holder of the fund; in case of a debt, for instance, notice to the debtor is for many purposes tantamount to possession. If you omit to give that notice, you are guilty of the same degree and species of neglect as he who leaves a personal chattel, to which he has acquired title, in the actual possession and under the absolute control of another person."

It is suggested that the decision in *Curtin v. Kowalsky*, 145 Cal. 431, 78 Pac. 962, is contrary to the *Graham Case*. This notion finds no support in the *Curtin Case*. The rules governing the rights of successive assignees of the same chose in action were not involved in that case. *Curtin* was the first assignee, the second assignee was not a party to the action, and there was nothing to show that he had given a prior notice, nor was there any question in the case which made such notice material. The opinion expressly declares that "the rights of the second assignee are not involved and cannot be adjudged." We are at a loss to understand why the two cases are supposed to be in conflict. They discuss different rules, the parties stood in different relations, the facts are not the same, and there is nothing in the opinion in the latter case that is inconsistent with the language of the former.

The result of the rule thus stated is that Widenmann's title to the demand was perfect at the time the execution was levied, and Magee then had no interest therein. Widenmann had obtained the assignment for a valuable consideration and had given notice thereof to Aden, the debtor, thus doing all that he could do toward taking possession. Gregory purchased Magee's title

only, and, Magee having none, Gregory obtained none, unless some other fact in the case gives him the superior right.

[4] The transfer of the fund to Weniger did not operate to change the rights and priorities of the respective claimants. The possession by Aden of the fund, a part of which belonged to Widenmann, made him, to that extent, the debtor of Widenmann. The transfer of this fund to Weniger carried with it the burden of the obligation attending its possession, the obligation to pay it over to the owner. He was, in effect, a volunteer. He accepted the money with knowledge of its source and character and of the duty of its possessor to pay it over to the persons entitled. The transfer to him made no change in the person entitled, nor in the rights of that person.

We can perceive no good reason for holding that Widenmann was required to give a new notice to Weniger of his assignment, in order to preserve his prior right to the obligation thus assumed by Weniger, as against a possible subsequent assignee of Magee. It does not appear that Widenmann was informed of the transfer of the fund to Weniger until after the purchase by Gregory at the execution sale. He was informed of the transfer by Aden to Halliday, but he was also informed by Halliday at the same time that he, Halliday, knew of the assignment from Aden to Widenmann. Consequently no notice was necessary to hold Halliday liable, even if we concede that a new notice should have been given upon information of the transfer of the fund. So far as the question of laches or estoppel in favor of Weniger, arising from failure to notify Weniger, is concerned, Widenmann is completely exonerated by the fact that he gave such notice and presented his claim before Weniger paid the money to Gregory, and before the hearing upon which the court directed that payment, and, so far as appears, immediately after he learned of the transfer to Weniger.

The conclusion from these considerations is that Widenmann's title to the chose in action—that is, to the claim against Weniger—was superior to that acquired by Gregory at the execution sale.

[5] The order of the court, made upon the petition of Gregory, was clearly insufficient to protect Weniger against the claims of Widenmann. The court had already made its final order in the partition suit, confirming the sale and directing the distribution of the proceeds by the referees (*Code Civ. Proc.* §§ 773, 785), no money had been paid into court, and the action was not continued thereafter for the disposition of any such money as provided in section 774 of the *Code of Civil Procedure*. The order had become final in that court. Nothing remained to be done by the court, except to settle the account of the referees after they had made the payments as previously directed. The money was not even in custodia legis so as to be exempt

from execution. *Dunsmoor v. Furstenfeldt*, supra; *Estate of Nerac*, 35 Cal. 397, 95 Am. Dec. 111. The proceeding by Gregory had no place in or legal connection with the partition suit. Giving it the most favorable effect in his behalf, it was in the nature of an independent proceeding to determine the title to the fund, although entitled in the partition suit. Weniger was made a party to it, and notice was given to him. But Widenmann was not made a party. He was given no notice, and he did not appear. And, although Weniger then knew of Widenmann's claim and of his rights under the prior assignment, he did not ask that the latter be made a party, or that he be given notice, but, to the contrary, submitted to and obeyed an order made by the court in the absence of Widenmann and destructive of his rights. In order to place himself in a position to rely upon any order made in that proceeding, Weniger should have himself notified Widenmann of the proceeding and he should have asked the court to make Widenmann a party thereto and have him brought in by notice to defend his rights. Failing in this the order cannot avail Weniger as a protection.

[6, 7] It follows from the foregoing that, if the court had admitted the evidence which it rejected touching Gregory's acquisition of the title to the chose in action, it would not have established a title superior to that of plaintiff, and the refusal to admit the proffered evidence was without injury. Nor, under the circumstances here indicated, was a demand upon appellant necessary before the commencement of the action. It is manifest that the demand would have been refused, since, treating the complaint itself as a demand, and remembering that the complaint was served before payment over by the appellant of the fund, appellant still refused to recognize the assignee's rights. *Parrott v. Byers*, 40 Cal. 622.

The order denying a new trial is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.

164 Cal. 663

COFFMAN v. BUSHARD. (L. A. 3,006.)  
(Supreme Court of California. Feb. 11, 1913.)

1. APPEAL AND ERROR (§ 161\*)—RIGHT OF REVIEW—SATISFACTION IN PART.

Where the decree in an action to rescind an executed contract for the exchange of property, on the ground of defendant's fraud and misrepresentations, restored to each of the parties the property formerly owned by him, decreed that plaintiff pay to defendant an amount laid out by him upon the property conveyed by plaintiff, authorized defendant to retain the income from such property and struck out plaintiff's cost bill, plaintiff's acceptance of defendant's deed of his property did not estop him from prosecuting his appeal from the other parts of the decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 979-983; Dec. Dig. § 161.\*]

2. EXCHANGE OF PROPERTY (§ 8\*)—RESCISION—RIGHTS OF PARTIES.

Where the findings in an action to rescind an executed exchange of property showed that plaintiff had been defrauded and that he received no rent from the property conveyed to him, and was obliged to expend money in procuring the title and in payment of taxes, a decree allowing defendant to retain the income of the property conveyed to him and reimbursement for his outlay thereon should be modified by requiring defendant to account for and pay over such income to plaintiff.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 14-18; Dec. Dig. § 8.\*]

3. EXCHANGE OF PROPERTY (§ 8\*)—JUDGMENT—ALLOWANCE IN VIOLATION OF TERMS OF JUDGMENT.

Where a decree in an action to rescind an executed exchange of property required plaintiff to pay the amount expended by defendant for repairs on property conveyed by plaintiff, and for interest on the mortgage on such property, provided such amount was determined by agreement of the parties on proofs presented to the court within 10 days, and no agreement as to the amount was made, or any proof presented to the court, the court's arbitrary allowance of the amount expended by defendant should be stricken from the judgment, with direction to fix the amount after taking evidence thereon.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 14-18; Dec. Dig. § 8.\*]

4. COSTS (§ 16\*)—PREVAILING PARTY—"ACTION INVOLVING THE TITLE TO REAL ESTATE."

Under Code Civ. Proc. § 1022, subds. 1, 5, allowing costs as of course to the plaintiff prevailing in an action for the recovery of real property, or involving the title or possession of real estate, an action in equity to rescind an executed exchange of property, the real and declared purpose of which was to recover property out of which plaintiff had been defrauded, involved title to real estate, so that plaintiff prevailing was entitled to costs as a matter of right.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 26, 30-35; Dec. Dig. § 16.\*]

For other definitions, see Words and Phrases, vol. 1, p. 144.]

Department 2. Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by R. E. Coffman against L. W. Bushard. Decree for plaintiff, and plaintiff appeals. Superior court ordered to correct its decree.

F. C. Spencer, of Anaheim, for appellant. H. V. Weisel, of Anaheim, Roger C. Dutton, of Los Angeles, and Montgomery & Tarver, of Santa Ana, for respondent.

HENSHAW, J. Plaintiff and defendant had by deeds effected an exchange of properties, plaintiff conveying to defendant a house and lot at Riverside, Cal., in exchange for a house and lot at Goldfield, Nev., owned by defendant. This action was brought to rescind the sale upon the ground of fraud and deceit. The court found in accordance with the allegations of the complaint and decreed a rescission of the contract and a restoration to each of the parties of the property formerly owned by him. One of the frauds



and misrepresentations was to the effect that the Goldfield property was rented for \$42 a month. The court found that it was not rented, was not in a condition to be rented, that plaintiff had received no income of any kind from it, and had paid the taxes thereon, the amount so paid not being declared. It found that defendant had received \$352 rents from the Riverside property. It further found that defendant had made outlays on account of the Riverside property for repairs, taxes, and interest upon a mortgage. It decreed, as has been said, a restoration to each of the parties of the property formerly owned by him, decreed payment by plaintiff to defendant of \$225 laid out by defendant upon the Riverside property, and authorized the defendant to retain \$352, the amount of the income derived by him from the Riverside property. And finally it struck out plaintiff's cost bill, refusing to allow him costs.

[1] From these three several portions of the judgment plaintiff appeals. His appeal is met by a motion to dismiss. The facts upon which this motion is based are that, in accordance with the decree, defendant tendered the deed to the Riverside property, which plaintiff accepted, and plaintiff, in turn, made a like tender of his deed of the Nevada property. Upon this respondent insists that plaintiff has accepted the benefits of the judgment, and, upon familiar principles, has waived his right to complain of it and so to appeal from it. *San Bernardino v. Riverside*, 135 Cal. 618, 67 Pac. 1047. But plaintiff has appealed only from certain portions of the judgment. Defendant has taken no appeal. There is thus no controversy whatsoever over the decree ordering a re-exchange and transfer of the properties. In accepting this portion of the judgment plaintiff takes only that which indisputably he is entitled to receive. His appeal is from minor portions of the judgment, in no way depending upon the transfer of the property decreed by the court. He insists that in certain minor particulars the decree does not do equity. His acceptance of his property under the indicated circumstances, the taking of that which indisputably is his, does not estop him from prosecuting his appeal and asserting his rights to other allowances which the court refused to grant. *Hinchman v. Point Defiance Ry. Co.*, 14 Wash. 349, 44 Pac. 869; *San Bernardino Co. v. Los Angeles Co.*, 135 Cal. 618, 67 Pac. 1047; *Walnut Irrigation Dist. v. Burke*, 158 Cal. 165, 110 Pac. 517; 2 Cyc. 653. The motion to dismiss is therefore denied.

[2] 1. The findings disclose that plaintiff was defrauded, that he received no income from the Goldfield property, which was unrented and unrentable, and was obliged to expend some money in perfecting the title and in the payment of taxes. As against this, the de-

creed permits the defendant actually to profit by his own fraud. He is reimbursed for all his outlay upon the Riverside property, and is allowed to retain \$352, the income derived from it. This is clearly inequitable. When defendant is reimbursed for his outlay, he has received all that in good conscience he is entitled to receive. The decree should be modified in this respect, and defendant should be compelled to account for and pay over to plaintiff the \$352, rents of plaintiff's property.

[3] 2. The judgment decreed that plaintiff should pay the defendant "the amount expended by defendant for repairs of said real property at Riverside, Cal., and for interest on the mortgage on said property, provided said amounts are determined by agreement of the said parties or proofs to be presented to this court, within ten days from date hereof." The bill of exceptions shows that no agreement as to the amount so expended was entered into by the parties, and that no proof of the amount was presented to the court. Notwithstanding this, the court, upon motion of defendant's attorney, arbitrarily fixed the amount expended by defendant upon the Riverside property in the sum of \$225. It is insisted, and we think correctly, that an allowance so made without proof was in violation of the express terms of the judgment. The appeal upon this proposition is, therefore, well taken, and it is ordered that this item of \$225 be stricken from the judgment, and that the trial court be directed to fix the amount, after the taking of evidence upon the question.

[4] 3. The court refused plaintiff his costs, evidently under the belief that the action was one embraced in the provisions of section 1025, Code of Civil Procedure. *Gray v. Dougherty*, 25 Cal. 266; *Abram v. Stuart*, 96 Cal. 235, 31 Pac. 44; *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158. While the action was based upon fraud and deceit, its real and declared purpose was the recovery of real property out of which plaintiff alleged he had been defrauded. That the action involved the title of real estate may not for a moment be doubted. The case, then, notwithstanding that it was an action in equity, comes clearly within the purview of section 1022 of the Code of Civil Procedure, and plaintiff was entitled to his costs as matter of right. Code Civ. Proc., § 1022, subds. 1, 5; *Hart v. Carnall-Hopkins Co.*, 103 Cal. 142, 37 Pac. 196; *Murphy v. Crowley*, 140 Cal. 141, 73 Pac. 820; *Gibson v. Ham-mang*, 145 Cal. 454, 78 Pac. 953.

It is therefore ordered that upon the findings made by the court it correct its decree in the indicated particulars.

We concur: MELVIN, J.; LORIGAN, J.

164 Cal. 688

**WINSLOW v. GLENDALE LIGHT & POWER CO. (L. A. 2,844.)**

(Supreme Court of California. Feb. 13, 1913.)

**1. EVIDENCE (§ 99\*)—COMPETENCY—MATTERS IN ISSUE—OWNERSHIP.**

In many instances, as where agency or ownership of property is not in issue, it is permissible, for the purpose of curtailing inquiry, for questions to be asked and answered which, were issue joined thereon, would be incompetent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 123, 137-143; Dec. Dig. § 99.\*]

**2. EVIDENCE (§ 472\*)—CONCLUSION—OWNERSHIP—EMPLOYMENT.**

Where ownership or employment is itself in question, the statement of a witness that he owns certain property, or that he was working for such a person, amounts to allowing him to state a conclusion upon a matter in controversy; and in such cases the testimony must be limited to a statement of the person by whom the witness was employed, and the nature and surrounding circumstances of his employment, from which, with the other evidence, the conclusion as to who was in fact his employer may be drawn.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195; Dec. Dig. § 472.\*]

**3. MASTER AND SERVANT (§ 316\*)—LIABILITY TO THIRD PERSONS—EVIDENCE OF INDEPENDENT CONTRACT.**

The circumstance that upon occasions witness was paid by his employer with the check of a company for whom the employer worked, taken with evidence that such company paid by check, and that the check was not drawn to his employer's order, is without bearing on the question whether his employer was an employé of the other company, or himself an independent contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 316.\*]

**4. EVIDENCE (§ 574\*)—CONCLUSIONS OF WITNESS—WEIGHT.**

In an action against a light and power company for personal injuries, defended on the ground that the accident occurred through the negligence of an independent contractor, the conclusion of a witness, improperly admitted as competent, that he was employed by defendant, when in fact he was employed and paid by the contractor and knew nothing of any arrangement of his employer with defendant, and thought that his employer was merely defendant's foreman, as against uncontroverted evidence that his employer was an independent contractor, raised no conflict in the evidence as to the relations of the parties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2400; Dec. Dig. § 574.\*]

In Bank. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by Mary M. Winslow against the Glendale Light & Power Company. From a judgment of the Court of Appeals affirming a judgment for plaintiff, defendant appeals. Reversed.

Tanner, Taft & Odell, of Los Angeles, for appellant. Drew Pruitt, W. O. Morton, and M. A. Fleming, all of Los Angeles, for respondent.

**HENSHAW, J.** This action was brought to recover damages for personal injuries sus-

tained by plaintiff. She was 76 years of age at the time she received the injuries complained of, and these injuries were occasioned by her tripping over a wire stretched across the sidewalk. This wire was admittedly a wire of the defendant, the Glendale Light & Power Company. That company's principal defense to the action was that, having been ordered by the city to remove certain poles and wires, it employed an independent contractor to do the work; that the work was done wholly under the management and control of this independent contractor; and that it was through the negligence of his employés and not the employés of the defendant light and power company, that the accident occurred. Reference may here be made to a former appeal taken in this case and reported in 12 Cal. App. 530, 107 Pac. 1020. By the decision upon the first appeal, the judgment was reversed. A second trial followed, resulting in a judgment in favor of the plaintiff. From that judgment and the order denying defendant's motion for a new trial, an appeal was taken, resulting in an affirmance of the judgment and order by the Court of Appeals. Upon the first trial, one of the men at work removing the poles and wires was permitted to testify, over the objection of the defendant, that he was "working for the Glendale Light & Power Company." Upon the appeal reported in 12 Cal. App., it was held that the objection was not well taken, and that the question was permissible and its answer admissible. Upon the second appeal, the Court of Appeals, seemingly feeling itself bound under the doctrine of the law of the case, held that the same questions asked upon the second trial were permissible, and decided, further, that the answers to these questions presented evidence sufficient to raise a conflict upon the principal question in the case, namely, whether the work was being done by the defendant or by an independent contractor, for whose conduct defendant was not legally responsible. It was for the further consideration of this proposition that a hearing before this court was ordered.

[1] But, lest by our silence it may be thought that this court approves the determination as to the permissibility of the question discussed in the opinion in 12 Cal. App., it is proper to say that in many instances—as where the agency or the ownership of property is not in issue—it is permissible, for the purpose of curtailing the inquiry, to permit questions to be asked and answered, which questions and answers would be to the last degree improper, were issue joined upon the question of agency or ownership. Instances come readily to mind, and, indeed, in the courts are of daily or even of hourly occurrence. If the ownership of a piece of land is not in issue, it is not objectionable to ask the witness who owns that land. If the agency or employment is not in question,



it is equally permissible to ask the witness whose agent he was, or for whom he was working. It is but a time-saving method of presenting the truth upon a matter not controverted.

[2] Very different, indeed, must be and is the rule where the ownership or the agency is itself in dispute. For a man, under such circumstances, to be permitted to say that he owns the property is to permit him to state a conclusion which must be drawn from all the facts by court or jury. To permit, where the question of employment is itself in controversy, a witness to testify that he was working for this person is to allow in evidence the incompetent conclusion of the witness upon a matter of vital controversy. In such a case the rule limits the testimony of the witness to a statement of the person by whom he was employed, the nature, terms, and surrounding circumstances of his employment. From these, with such other evidence as the case presents, must the conclusion be drawn as to who in fact was the responsible employer.

So much we think it proper to say in pointing out the true rule. But the matter here in controversy will be considered under the doctrine of the law of the case, as that law was laid down, though mistakenly, in the opinion in 12 Cal. App., above cited. So treating it, the ruling amounts to this, but to this only: That it was competent for the witness to answer the question, and he did answer it by saying that he was working for the Glendale Light & Power Company. Nothing, however, in the decision of the Court of Appeals goes to the weight of this testimony; and a review of the evidence in the case satisfies us that this testimony is without weight, and is so wholly unsubstantial as not to raise a controversy over the fact. The evidence introduced on behalf of the defendant is clear, conclusive, and undenied, and establishes that Seaman was employed as an independent contractor to do the work, and did undertake its performance under his contract. The defendant had no control, and exercised no control, over the employes of Seaman; and two of those employes, who were actually engaged in the work, were Harvey and Allen. Neither Harvey nor Allen was ever in the employ of the defendant company. Such was the uncontroverted evidence of the defendant; and it remains to be considered whether the testimony of the witness Harvey is sufficient to raise a conflict. Harvey was asked the question, "By whom were you employed, and for whom were you working on February 27, 1907?" (the date of the accident) and made answer, "For the Glendale Light & Power Company." Again, testifying that he was at the scene of the accident, he concludes his answer by saying, "I was on duty." He is immediately asked the question, "On duty for whom?" and replies, "The Glendale Light & Power Company." The facts elicited

from the witness upon cross-examination show that these declarations were but the conclusion of the witness, and demonstrate that the conclusion is without basis in truth. Confronted with his testimony given upon the former trial, and with his statements therein contained to the effect that he was employed by Mr. Seaman, he discredits his former testimony, saying, as to some of his answers, that he did not remember; as to others that, when he said he was employed by Mr. Seaman, "I might have said he was the foreman who hired me." Asked further if he did not reply, upon being asked for whom he was working, that he was working for Seaman, he answered, "Well, I said he was my employer." Passing over his testimony upon the first trial, and coming to the testimony on the second trial, he was asked the direct question, "What person employed you?" and he replied, "Mr. Seaman." He testifies that nobody beside Mr. Seaman told him to do any work on the job; that no officer of the Glendale Light & Power Company ever ordered him to go on the work. He had no knowledge whatsoever of the contract Mr. Seaman had with the light and power company, and finally he answers, "Yes," to the question, "When you say you were working for the Glendale Light & Power Company, it was because you were working on their lines, was it not, and because Mr. Seaman there was evidently doing the work for them?" It is shown that Mr. Seaman had a shop in town, his own tools, wagon, and employes, and paid his own workmen, of whom the witness was one; that Harvey was engaged upon other work and jobs besides this one, and was always paid by Mr. Seaman.

[3] The circumstance that upon one or another occasion he was paid by Mr. Seaman with the check of the defendant company is without significance. It is in direct and undisputed evidence that the check was not drawn to his (Harvey's) order, and that the defendant company paid Seaman by checks. *Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 577, 93 Pac. 377.

The witness Harvey was not only permitted to testify that he was employed by the Glendale Light & Power Company, but he was allowed even greater latitude, and was permitted to testify that his fellow workman, Allen, was also working for the Glendale Light & Power Company at the time of the accident. But as, under cross-examination, he answers that his testimony as to Allen's employment is based upon the same knowledge and facts which he had related concerning his own employment, no amplification of this matter becomes necessary.

[4] What, then, results from this evidence? Nothing more than that the conclusion of the witness, which he has been allowed improperly to express, is shown to rest upon no basis of fact, the facts being that the witness was employed by Seaman and by no-

body else, was paid by Seaman and by nobody else, worked under the direction of Seaman and nobody else, knew nothing of any arrangement which Seaman might or might not have with the Glendale Light & Power Company for the doing of the work; but because the work was Glendale Light & Power Company work, the witness believed that Seaman was the foreman, and believed that the work was being done under the direction of the Glendale Light & Power Company, and believed that the Glendale Light & Power Company was his employer. No conflict is raised by evidence such as this.

All of the evidence establishes that Seaman was an independent contractor; and the judgment and order are therefore reversed.

We concur, MELVIN, J.; ANGELLOTTI, J.; SLOSS, J.; SHAW, J.

164 Cal. 676

CRANE v. FERRIER BROCK DEVELOPMENT CO. (S. F. 6,095.)

(Supreme Court of California. Feb. 13, 1913.)

**1. VENDOR AND PURCHASER (§ 35\*)—RESCISION—FRAUD**

Where a vendor fraudulently induces a purchaser to make a contract by representing that he has good title when he has no title, vendee, on discovering the false representations, may sue to rescind.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 45-51; Dec. Dig. § 35.\*]

**2. VENDOR AND PURCHASER (§ 334\*)—REMEDIES OF PURCHASER—RECOVERY OF PRICE PAID.**

Defendant corporation represented to plaintiffs that it owned in fee a certain lot, and offered to sell it to plaintiffs for \$1,500, \$500 in cash and the balance in installments, when defendant did not own the lot and knew that it did not, but plaintiffs believed the representation to be true, and, acting thereon, purchased the lot on such terms, but afterwards discovered that defendant did not own the same, and demanded the return of the purchase money paid. *Held*, that plaintiffs were entitled to a return of the purchase money paid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959-980; Dec. Dig. § 334.\*]

**3. VENDOR AND PURCHASER (§ 341\*)—RECOVERY OF PRICE PAID—PLEADING—POSSESSION BY PURCHASER.**

In the absence of an implication in the contract that the purchaser, under an executory contract, is to have possession of the land in question, he is not entitled to possession, so that, in an action by such purchaser to recover the price paid upon rescinding for fraud, the complaint need not allege that he offered to restore possession; there being no presumption that he had been put into possession, and it being for defendant to allege and prove that the purchaser was in possession when he demanded the return of the purchase money, if defendant desires to rely on failure to restore possession.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1008-1017; Dec. Dig. § 341.\*]

**4. VENDOR AND PURCHASER (§ 341\*)—RESCISION—ACTION FOR PURCHASE MONEY.**

The complaint, in an action to rescind a contract of sale of land and recover the price, need not refer to or describe stock accepted by the vendor as the equivalent of money in payment of the price, and is not materially uncertain for not doing so.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1008-1017; Dec. Dig. § 341.\*]

**5. VENDOR AND PURCHASER (§ 341\*)—RESCISION—RETURN OF PURCHASE PRICE—RETURN IN MONEY.**

Where a vendor accepted shares of stock as the equivalent of cash, the vendee, upon rescinding for fraud, was entitled to recover the amount of money for which the stock was accepted.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1008-1017; Dec. Dig. § 341.\*]

Department 1. Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by Arthur Crane against the Ferrier Brock Development Company. From a judgment for plaintiff, defendant appeals. Reversed.

Arthur Crane, of San Francisco, in proper. James M. Koford, of Berkeley, for respondent.

SHAW, J. The court below sustained a demurrer to plaintiff's fourth amended complaint, and thereupon gave judgment for the defendant, from which plaintiff appeals.

The complaint contains many unnecessary allegations, and these seem to have produced some confusion in the arguments. The following is a statement of the material facts alleged: On May 23, 1910, the defendant, a corporation, represented to plaintiff that it was seized in fee of a certain lot in a subdivision of land in Alameda county, known as "Cragmont," and thereupon offered to sell the same to plaintiff for the price of \$1,500, of which \$500 was to be paid in cash, and the balance in monthly installments of \$15 each; that in fact the defendant had no interest whatever in the lot; that the defendant, knowing that said representation was not true, made it to induce the plaintiff to enter into a contract to buy the lot from the defendant, on the terms above stated, and to make the cash payment thereon; that plaintiff believed said representation to be true, and, because of that belief, on the day above named executed the contract referred to, and paid to the defendant \$500 on the price thereof; that he would not have done so but for the belief aforesaid; that on July 15, 1910, plaintiff paid a monthly installment of \$15 on the price; that thereafter he discovered that said representation was false, and demanded the return of the money paid, which was refused. The contract, as alleged, provided that upon payment of the last monthly installment, which would become due on December 23, 1915,



the defendant should execute to plaintiff a grant deed for said lot. It was further stated that \$480 of the \$500 cash payment aforesaid was paid by delivering to defendant 1,650 shares in a corporation of the par value of \$1 each, which the defendant accepted as cash. The prayer of the complaint was for a judgment that the contract be rescinded, that the defendant return to plaintiff the said \$515 so paid upon the price, or the personal property delivered as aforesaid to the defendant, and for general relief.

[1] Where the vendor fraudulently induces the vendee to enter into the contract of purchase by representing that he has a good title to the land, when in fact he has none, nor any interest whatever in the land, the vendee, upon discovering the falsity of the representation, may sue to rescind the contract and obtain a return of the money paid thereon. There are numerous cases establishing this proposition. *Alvarez v. Brannan*, 7 Cal. 504, 68 Am. Dec. 274; *Wright v. Carillo*, 22 Cal. 604; *Easton v. Montgomery*, 90 Cal. 316, 27 Pac. 280, 25 Am. St. Rep. 123; *Morris v. Courtney*, 120 Cal. 65, 52 Pac. 129; *Muller v. Palmer*, 144 Cal. 312, 77 Pac. 954; 39 Cyc. 1264, 1417.

[2] The facts above stated bring the case within this rule. The complaint states a good cause of action to rescind the contract on the ground that it was procured by fraud, and for the return of the purchase money paid thereon. It does not appear that the plaintiff had received anything whatever in performance of the contract and consequently there was nothing for him to restore to the defendant.

[3] The objection was made that the complaint does not aver an offer by the plaintiff to restore possession. There is no presumption of law that the vendee, in an executory agreement for the purchase of land, has been put into possession. In the absence of anything in the contract from which it can be inferred or implied that he is to have possession, he has no right thereto. *Gaven v. Hagen*, 15 Cal. 211; *Stratton v. Land Co.*, 86 Cal. 364, 24 Pac. 1065; *Gates v. McLean*, 70 Cal. 49, 11 Pac. 489; 39 Cyc. 1620. There is nothing in the contract or in the allegations of the complaint to indicate that the plaintiff ever had possession, or that the contract gave him the right thereto, or that he had taken possession, or that he now has possession. If the defendant desires to rely on the failure to make an offer to restore possession, it is incumbent upon it, therefore, to allege and prove, by way of defense, that the plaintiff was in possession at the time he demanded the return of the purchase money or at the time the action was begun.

The defendant relies on *Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 320, and other cases of similar effect. These are cases where the contract was made in good faith and the vendee, upon discovering that the vendor had

subsequently parted with the title, brought an action to recover the part of the purchase money which had been paid, without having himself offered to perform the contract by paying, or offering to pay, the balance due upon the price. They rest upon the principle that one who is himself in default cannot rescind the contract, unless he has first offered to perform himself, and has unsuccessfully demanded for performance by the vendor, thereby putting the vendor in default. In the case we have cited, in arguing this question, the court said: "One may sell land which he does not own, but yet be able, when the time for performance arrives, to furnish a good title. In the meantime, the purchaser would not be at liberty to disaffirm the contract on the ground that then the vendor was unable to make a good title. It would be incumbent upon him to offer to perform, or to show that at the time of performance the vendor could not furnish the title." This is a true statement of the law, as applicable to a suit to rescind the contract, or to recover the money paid thereon after a rescission upon the ground that the vendor has himself broken the contract. It has no application to a suit for the rescission of a contract upon the ground that the vendor, having no title to the land, falsely represented to the vendee that he had the title thereto, and thereupon and thereby induced the vendee to purchase.

[4] The demurrer contains many specifications wherein it is claimed that the complaint was uncertain. Among other things, it specifies that it is uncertain because it does not give the name of the corporation, the shares of which were taken by the defendant as cash upon the payment of the first installment. Inasmuch as the shares were accepted as the equivalent of money, we do not think that it was necessary to mention them at all in the complaint, or to describe them more particularly. The uncertainty was not upon a material point.

[5] The fact that the shares were taken as cash was also sufficient to give the plaintiff the right to demand the return of \$500 in money. The other specifications of uncertainty relate to immaterial allegations in the complaint, and it is not necessary to discuss them. The demurrer to the complaint should have been overruled.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

164 Cal. 693

MARCUCCI et al. v. VOWINCKEL.  
(S. F. 5,789.)

(Supreme Court of California. Feb. 14, 1913.)  
1. APPEAL AND ERROR (§ 757\*)—BRIEFS—MATTERS TO BE INCLUDED.

Under Code Civ. Proc. § 953c, providing that in cases where a transcript of the testimony, etc., is prepared in lieu of a bill of ex-

ceptions as permitted in preceding sections, the parties must print in their briefs or in a supplement appended thereto such portions of the record as they desire to call to the court's attention, on an appeal by plaintiff in an action against a physician and surgeon for negligence and want of skill, where appellant's brief did not contain any evidence showing want of care or skill, nor refer to the part of the record where it might be found, and the question was not argued, it would be assumed that there was no such evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.\*]

## 2. TRIAL (§ 26\*)—ABSENCE OF WITNESS.

On a trial, plaintiff about 3:30 asked a continuance until the following morning to procure the attendance of additional witnesses. It was not shown that any subpoena had been issued or served on them; that they had promised to attend; that, if examined, they would testify to any material fact; that they knew anything about the facts or what plaintiff expected to prove by them; and their names or where they resided were not stated. The court offered to delay proceedings half an hour, but plaintiff's counsel claimed that, because of the witnesses' office hours, their presence could not be procured on that day. *Held*, that the denial of a continuance was not an abuse of discretion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 42; Dec. Dig. § 26.\*]

## 3. CONTINUANCE (§ 7\*)—DISCRETION OF COURT.

The granting or refusing of a continuance is usually a matter largely within the discretion of the trial court.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 17, 18; Dec. Dig. § 7.\*]

## 4. APPEAL AND ERROR (§ 966\*)—REVIEW—DISCRETIONARY MATTERS—CONTINUANCES.

To justify reversal of a judgment because of the denial of a continuance, an abuse of discretion must be shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. § 966.\*]

## 5. APPEAL AND ERROR (§ 417\*)—NOTICE OF APPEAL—SUFFICIENCY.

A notice to the clerk of the court under Code Civ. Proc. § 953a, providing that, in lieu of preparing a bill of exceptions, a party may file a notice with the clerk stating that he desires or intends to appeal or has appealed, and requesting that a transcript of the testimony, etc., be made up and prepared, is not a notice of appeal, and, if given in the form there prescribed without other appropriate words, is insufficient as a notice of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2140-2143; Dec. Dig. § 417.\*]

Department 1. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Maria S. Marcucci and husband against F. W. Vowinckel. From a judgment of dismissal, plaintiffs appeal. Affirmed.

Wal J. Tuska, of San Francisco, for appellants. Chickering & Gregory and Stanley Moore, all of San Francisco, for respondent.

SHAW, J. At the conclusion of plaintiffs' evidence, the court below, on motion of defendant, granted a nonsuit, on the ground that the evidence did not tend to show neg-

ligence or unskillfulness on the part of the defendant. From the judgment of dismissal thereupon given, the plaintiffs appeal.

[1] The plaintiffs seek to recover damages from defendant for injuries sustained by the plaintiff, Maria, wife of plaintiff, Antonio, from the alleged negligence and want of skill of defendant, as a physician and surgeon, in advising her that a surgical operation upon her was necessary and in the performance of said operation. The transcript on appeal consists of a copy of the judgment roll and a reporter's transcript of the evidence and proceedings at the trial, neatly typewritten, prepared, and certified, as provided by sections 953a and 953c of the Code of Civil Procedure. Counsel for the appellant does not print in his brief, or at all, any part of the testimony or evidence on the subject of want of care and skill on the part of the defendant, as he is required to do by section 953c, aforesaid, where he desires to call the attention of the court to the evidence. Nor does he in his brief point out or refer to such evidence on the part of the record where it may be found. He does not argue the question at all. We will therefore assume, for the purposes of this review, that there was no evidence of such want of care or skill.

[2] The only point worthy of mention presented in the brief is the claim that the court below improperly refused to continue the trial from the afternoon of the last day thereof until the following morning, to give the plaintiffs an opportunity to procure the attendance of three additional witnesses to testify on behalf of the plaintiffs. The record does not show at what time in the afternoon this refusal occurred. Plaintiffs' counsel say it was at half past 3 o'clock. There was no showing of any diligence whatever made in support of the application for the continuance. No affidavit was made, or proposed to be made. It was not shown that any subpoena had been issued or served on the proposed witnesses, or that they had promised to attend then, or at any other time, or that they would, if examined, testify to any material fact, or that they knew anything about the facts of the case, or what counsel expected to prove by them. Their names were not even stated. The court offered to delay the proceedings half an hour to enable plaintiffs to procure their attendance, but their counsel stated that the office hours of the witnesses were such that he could not procure their presence on that day, but he did not state where they resided, whether in San Francisco, or elsewhere.

[3, 4] Continuance should not be granted without good cause. The granting or refusing thereof is usually a matter largely within the discretion of the trial court. An abuse of discretion must be shown to justify a reversal of the judgment because of a ruling on such matters. It cannot justly be claimed



that good cause was here shown for a continuance. We cannot say that the lower court abused its discretion.

The other rulings complained of relate to the admission or exclusion of evidence. The trial was before the court, without a jury. None of the rulings operated to prevent the plaintiff from introducing any substantial evidence of the want of care or skill complained of, and all of them were upon trivial matters. They could not have affected the substantial rights of the plaintiffs. We do not think it necessary to discuss them. The failure to prove want of care or skill would justify the nonsuit even if these rulings had been favorable to plaintiffs.

[5] The transcript of the record does not contain any notice of appeal. There is a notice to the clerk requesting the preparation of a transcript on appeal, being the notice provided for by section 953a, aforesaid. Because of the frequent misunderstanding of the effect of this section, we repeat that it does not provide for a notice of appeal and that a notice given under it, in the form there prescribed and without other appropriate words, is not a good notice of appeal. *Smith v. Jaccard*, 128 Pac. 1026; *Boling v. Alton*, 162 Cal. 298, 122 Pac. 461; *Lent v. Cal. F. G. Ass'n*, 161 Cal. 719, 121 Pac. 1002. Counsel for respondent do not raise the objection, and we therefore assume that a proper notice of appeal was filed, and that its insertion in the record was waived.

The judgment is affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

164 Cal. 680

### HAYT v. BENTEL. (L. A. 3,291.)

(Supreme Court of California. Feb. 13, 1913.)

#### 1. VENDOR AND PURCHASER (§ 335\*)—ACTION BY PURCHASER—DEFENSE.

That the purchaser was in default in payments under the contract was no defense to her action, brought after rescission of the contract for defect in title, to recover the purchase money paid, where a payment was made and accepted after the expiration of the contract time for making all payments.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 981-983; Dec. Dig. § 335.\*]

#### 2. VENDOR AND PURCHASER (§ 335\*)—ACTION BY DEFAULTING PURCHASER—EFFECT OF BELATED TENDER.

A purchaser who, without excuse, fails to make payments of installments as they fall due cannot, by a belated tender, put the seller in default, and thus establish a right to recover back sums paid under the sale contract.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 981-983; Dec. Dig. § 335.\*]

#### 3. PARTIES (§ 76\*)—DEFECT—OBJECTIONS—SUFFICIENCY—WAIVER.

An objection that the plaintiff is not an unmarried woman, and hence should be joined by her husband, as required by Code Civ. Proc. § 370, being in effect a plea of defect of parties plaintiff, is waived when not specially set up

by demurrer or answer; and a mere denial of the allegation in the complaint that plaintiff is an unmarried woman is not a plea of defect of necessary parties.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 117-121; Dec. Dig. § 76.\*]

#### 4. VENDOR AND PURCHASER (§ 341\*)—COMPUTATION FROM DATE DUE.

In a purchaser's action for money paid under a sale contract rescinded because of defect of title, the plaintiff was entitled to interest only from the date of rescission and demand for repayment, even though the defendant had been guilty of fraud.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 1008-1017; Dec. Dig. § 341.\*]

#### 5. VENDOR AND PURCHASER (§ 117\*)—RESCISSI—OFFER TO RESTORE POSSESSION—NECESSITY.

A purchaser's notice of rescission was not ineffectual for want of an offer to restore possession, where it did not appear that she ever took possession, though the contract provided that she should do so.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 209; Dec. Dig. § 117.\*]

#### 6. PLEADING (§ 310\*)—SUFFICIENCY—RECITALS IN CONTRACT.

Recitals in a contract incorporated in the complaint will not supply the want of essential averments in the pleading.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 345, 944, 946, 947; Dec. Dig. § 310.\*]

#### 7. PLEADING (§ 310\*)—INSTRUCTION—RECITALS IN CONTRACT.

In a purchaser's action to recover the purchase money paid, the mere annexing to a complaint of a contract providing that the purchaser shall have possession is not equivalent to an averment in the complaint that possession was in fact transferred.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 345, 944, 946, 947; Dec. Dig. § 310.\*]

In Bank. Appeal from Superior Court, Los Angeles County; Geo. H. Hutton, Judge.

Action by Mrs. S. M. Hayt against George R. Bentel. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

For opinion of District Court of Appeal reversing judgment of superior court, see 126 Pac. 370.

H. C. Millsap and Millsap & Sparks, all of Los Angeles, for appellant. Smith, Miller & Phelps, of Los Angeles, for respondent.

SLOSS, J. On June 29, 1905, the parties entered into a written contract for the purchase by plaintiff from defendant of a lot in the city of Ocean Park, county of Los Angeles. The purchase price was \$825, of which \$275 was to be paid on the signing of the agreement, \$275 on or before the 29th day of June, 1906, and \$275 on or before the 20th day of June, 1907, deferred payments to bear interest at the rate of 7 per cent. per annum, payable semiannually. Time was made of the essence. By the contract, a copy of which is annexed to the complaint, the purchaser was to have immediate possession of the premises, and was to pay all taxes and assessments levied against the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

property. It was provided that, in case of default on the part of the plaintiff, defendant at his option might declare the whole sum due or might cancel the contract, re-enter and take possession of the premises, and retain all moneys paid by plaintiff as rent for use and occupation. Upon payment of all sums due from plaintiff, defendant agreed to execute and deliver to plaintiff a good and sufficient bargain and sale deed together with a certificate of title showing a title, free and clear of incumbrances, to be vested in plaintiff.

The complaint alleges that plaintiff made the following payments:

On June 29, 1905.....	\$275 00
July 16, 1906, as principal.....	275 00
July 16, 1906, interest on deferred payments.....	38 50
October 29, 1908, on principal....	50 00
October 29, 1908, interest on deferred payments to December 29, 1908.....	48 15
Total .....	\$686 65

It is alleged that on October 29, 1908, plaintiff paid and defendant accepted \$50 on the third installment, together with interest upon all deferred payments to and including December 29, 1908; that it was then understood and agreed between the parties that as soon as the deed was executed and delivered to plaintiff she would pay the balance due. Plaintiff has ever since, as she alleges, been ready and willing to pay such balance. On October 15, 1909, plaintiff tendered defendant such balance, and demanded a deed and certificate of title, but defendant refused to execute such deed, and informed plaintiff that he could not deliver a conveyance or certificate, inasmuch as the title to the property was incumbered and defective, and had been so at all times since the execution of the contract. A subsequent tender and demand in writing are set forth, together with refusal by defendant, followed by a notice of rescission from plaintiff to defendant, with a demand for repayment of all sums paid under the contract. The complaint alleges, further, that at the time of the execution of the contract the property was not free from incumbrances, but the title was then, and has ever since been clouded; that these facts had at all times been known to defendant, but not known by plaintiff until October 15, 1909; and that all moneys obtained by defendant from plaintiff had been taken and received in fraud of plaintiff's rights.

The prayer of the complaint was that the contract be rescinded, and that plaintiff recover the moneys paid by her under the contract, with interest.

The answer denied a number of the foregoing allegations. The findings were in favor of all the averments of the complaint. Judgment was given in favor of plaintiff for \$891.30, being the sum of the various amounts

paid by her under the contract for principal, interest, and taxes, together with interest from the date of each payment.

The defendant appeals from the judgment, bringing up the evidence by means of a bill of exceptions.

[1] There is no merit in the appellant's claim that on the facts alleged and found the plaintiff is not entitled to any relief, because she had been in default in making payments under the contract. In this regard reliance is placed upon *Glock v. Howard, etc., Co.*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17.

[2] In the opinion in that case the status of a defaulting purchaser under a contract for the sale of real estate is fully discussed, and the rule declared that such a purchaser, who has, without excuse, failed to make payment of installments as they fell due, cannot, by a belated tender, put the seller in default, and thus establish a right to recover the sum paid under the contract. But this undoubtedly sound doctrine does not apply to a case where the vendor has waived the delay in making payments. Such waiver is alleged and found here. On October 29, 1908, the plaintiff was in default. On that date she paid to the defendant, and the latter accepted, the sum of \$98.15, being \$50 on account of principal, and \$48.15 for interest to December 29, 1908. The time for the payment of all installments had then elapsed; indeed, the final payment was already, under the terms of the contract, past due. These facts bring the case precisely within the principle declared in *Boone v. Templeman*, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126. There the court declared the rule to be that where the vendor, under an agreement like the one before us, permits the entire contract price to become due, without exercising his option to declare a forfeiture, "the payment of the price then becomes a dependent and concurrent condition. Nonpayment alone does not put the vendee in default. The vendor must tender a deed as a condition to demanding payment of the price, and he cannot, without such tender, declare a forfeiture, or maintain a suit either for the whole price, or for an intermediate installment." The same case lays down the doctrine that, where the provision making time of the essence has once been waived, mere delay by the vendee, short of the statutory period of limitation, in making a tender will not constitute laches in the absence of a showing that the delay has prejudiced the vendor. In *Boone v. Templeman* the vendee was permitted to maintain a suit for specific performance. If delay in tendering payment did not deprive him of the right to this relief, the delay of the plaintiff in this case could not affect her right to rescind the contract for inability on the part of the vendor to make a good title. The waiver of the right to insist upon prompt payment is es-



tablished by the acceptance of a part of the final installment long after it was due. The allegation and finding that the parties then agreed that plaintiff would pay the balance upon delivery of the deed is immaterial. It is of no importance, therefore, to consider the point made by appellant that the evidence does not sustain this finding. The alleged agreement provided for no more than would, as we have seen, be implied in law from the waiver of the delay in payment. The views expressed render it unnecessary, also, to pass upon the respondent's claim that the party first in default was the defendant, who made the contract with knowledge that he could not give a good title.

[3] The complaint alleged, and the answer denies, that plaintiff is an unmarried woman. There is a finding in favor of the averment of the complaint. The appellant assails the finding as unsupported. The point made is that, if plaintiff was a married woman, her husband should have been joined with her. Code Civ. Proc. § 370. But this objection, if otherwise well founded, should have been specially set up by answer. It amounted to a plea of defect of parties plaintiff, which, if not taken by demurrer (where appearing on the face of the complaint), or by answer, is deemed waived. Code Civ. Proc. § 434; *Grain v. Aldrich*, 38 Cal. 514, 99 Am. Dec. 423; *Work v. Campbell*, 128 Pac. 943. A mere denial that plaintiff is an unmarried woman does not constitute a plea of defect of necessary parties plaintiff.

[4] It is argued that the court erred in allowing plaintiff interest on the sums paid by her from the dates of the respective payments. We think this position is well taken. In the absence of an agreement to pay interest, the law "only awards interest upon money from the time it becomes due." *City of Los Angeles v. City Bank*, 100 Cal. 22, 34 Pac. 510; Civ. Code, § 1917. Plaintiff's suit was not based upon any provision of the contract. It was an action for money had and received, in which the right was based upon a want or failure of consideration. *Thomas v. Pac. Beach Company*, 115 Cal. 136, 46 Pac. 899. Until rescission, or a demand for repayment, nothing was due, and interest was not allowable. *Hellman v. Merz*, 112 Cal. 661, 44 Pac. 1079. No different conclusion would follow if, as urged by respondent, the action be viewed as one based on fraud. Even in that aspect no money was due plaintiff until she exercised her right to demand the return of the sums paid.

[5] The point is made that since, under the contract, the plaintiff was entitled to possession of the premises, her notice of rescission was ineffectual for want of an offer to restore such possession. But there is no allegation, in either the complaint or the answer, that plaintiff ever did receive or take possession of the lot. The contract is annexed to the complaint and made a part thereof. But all that is averred is that the

parties made an agreement for possession, not that possession was in fact delivered.

[6] Recitals in a contract incorporated in a complaint will not supply the want of essential averments in the pleading. *Mayor, etc., of L. A. v. Signoret*, 50 Cal. 298; *Burkett v. Griffith*, 90 Cal. 532, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151; *Estate of Cook*, 137 Cal. 191, 69 Pac. 968. The rule is well illustrated by the case of *Hibernia S. & L. Soc. v. Thornton*, 117 Cal. 481, 49 Pac. 578. There an action was brought upon a promissory note. The complaint alleged the making of the note, setting forth a copy thereof, demand, and nonpayment. The note contained the following clause: "This note secured by a mortgage of even date herewith." The defendant contended that the recital showed that the note was secured by mortgage, and that plaintiff's only remedy being to sue for foreclosure (Code Civ. Proc. § 726), an action on the note alone could not be maintained. But the court declined to give such effect to the recital, saying: "There is \* \* \* no averment in the complaint that the note was secured by a mortgage, and the recital to that effect in the note cannot, as matter of pleading, be treated as the equivalent of such averment. It is only by inference or argument from this recital that it can be assumed that a mortgage was ever executed, and the rule is as much in force under the Code as at common law that argumentative pleading is not permissible." [7] For like, if not stronger, reasons, the mere annexing to the complaint of a contract providing that the purchaser shall have possession cannot be treated as equivalent to an averment that possession was in fact transferred. To give such effect to the language of the complaint would be, in effect, a holding that the mere pleading in *hæc verba* of a contract constituted an allegation that all of its terms had been performed. There is, therefore, nothing on the record to show in whom the possession of the lot was during the life of the contract or at the time of the judgment. We will not presume, for the purpose of overthrowing the judgment, that such possession was in plaintiff. If the defendant had desired to protect his rights in this regard, he should have made them appear by pleading or otherwise before the proceedings in the trial court were concluded.

We have not thought it necessary to consider whether plaintiff's rights accrued by reason of her notice of rescission. Even if the contract had not been rescinded before the commencement of the action, the complaint prayed that it be rescinded by the judgment of the court. This was a proper form of relief. Civ. Code, § 3406.

There are no other points requiring notice. The cause is remanded, with direction to the trial court to modify the judgment by deducting from the amount recovered all sums shown by the findings to have been

allowed as interest for any period prior to the 4th day of February, 1910, the date of the demand for repayment. As so modified the judgment shall stand affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

21 Cal. App. 1

BARBER ASPHALT PAVING CO. v. CRIST  
et al. (Civ. 1,014.)

(District Court of Appeal, Third District, California. Jan. 3, 1913.)

1. MUNICIPAL CORPORATIONS (§ 293\*)—STREET PAVING RESOLUTION—CONSTRUCTION—DESCRIPTION.

A street paving resolution, declaring an intention to pave an entire street as in the resolution specifically described, "excepting from said work the paving" of a certain crossing, "which crossing shall be repaved," was not open to the objection that it did not specify with what material such crossing should be repaved, but reasonably construed, meant that the crossing should be repaved so as to make it conform to the specific description given for the paving.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 773-775; Dec. Dig. § 293.\*]

2. MUNICIPAL CORPORATIONS (§ 293\*)—STREET PAVING RESOLUTION—SUFFICIENCY OF DESCRIPTION.

Street paving proceedings being in invitum, the resolution of intention must describe, with reasonable clearness, the work to be done, otherwise the contractor cannot recover, whatever his good faith or expenditures may have been.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 773-775; Dec. Dig. § 293.\*]

3. MUNICIPAL CORPORATIONS (§ 293\*)—STREET PAVING RESOLUTION—SUFFICIENCY OF DESCRIPTION—"BASALT BLOCK."

A street paving resolution declaring the intention of the city council to order the construction of basalt block gutters of a certain width, upon a concrete foundation of a certain thickness, was not objectionable for failure to fix the thickness of the gutters; the term "basalt block" implying and being understood by reasonably intelligent men to mean blocks of sufficient size for the purpose intended.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 773-775; Dec. Dig. § 293.\*]

4. MUNICIPAL CORPORATIONS (§ 565\*) — IMPROVEMENTS — ASSESSMENTS — JOINDER — TRANSACTION—FORECLOSURE OF LIEN.

Under the Vrooman Act (St. 1885, p. 157) § 12, providing that a contractor may sue the owner of the lots assessed for an improvement, a street paving contractor properly joined in one action against the owners in common of several lots, assessed for paving a single resolution of intention, his causes of action to foreclose his lien on all the lots.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1274; Dec. Dig. § 565.\*]

5. PLEADING (§ 216\*)—DEMURRER TO COMPLAINT—WAIVER—SCOPE.

Where the only grounds stated for demurrer were insufficiency of facts and that causes of action were improperly joined, the objection

that the causes of action were not separately stated was waived.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 535-539; Dec. Dig. § 216.\*]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by the Barber Asphalt Paving Company against Julius A. Crist and others. From a judgment for defendants, plaintiff appeals. Reversed, with directions.

Cooper, Gray & Cooper, of San Francisco, for appellant. Johnson & Shaw, of Oakland, for respondents.

CHIPMAN, P. J. This is an action to foreclose a lien claimed for street work done in the city of Oakland by appellant under the so-called Vrooman Act. A demurrer was interposed to the amended complaint on two grounds: First, for insufficiency of facts; and, second, that several causes of action have been improperly united in this: That causes of action to foreclose liens against 12 separate and distinct parcels of land have been improperly united. The demurrer was sustained, and judgment passed for defendants. Plaintiff appeals from this judgment.

In paragraph 5 of the amended complaint, it is alleged that on September 4, 1906, the city council of the city of Oakland "duly made and passed a resolution (No. 31,323) declaring its intention to order the work and improvement mentioned in paragraph 6 of this amended complaint to be done at said city, and determining and declaring that said work and improvement was of more than local or ordinary public benefit, and would affect and benefit the lands and district hereinafter described," and that the costs of said work "should be assessed upon said lands and district, which district is \* \* \* described as follows:" (Description follows.) It is also alleged that said resolution of intention and the superintendent's notice of the passage thereof were published as by the said resolution provided.

In paragraph 6 it is alleged that on December 20, 1906, the city council "duly made and passed its resolution No. 31,755, ordering the following street work to be done according to the specifications adopted by said council on October 22, 1906, to wit: That East Fourteenth street in said city, from the western line of Twenty-First avenue to the eastern boundary line of the city of Oakland, be graded, curbed with granite with a backing of concrete, and paved with asphalt in a layer two inches thick on a binder course one inch thick of asphalt and broken stone, and a concrete foundation six inches thick; also that basalt block gutters, four feet wide, upon a concrete foundation six inches thick, be constructed thereon as follows, to wit: On the southern side from the center line of Twenty-Second avenue to the



center line, produced, of Twenty-Fourth avenue, as said Twenty-Fourth avenue exists south of East Fourteenth street, and on the northern side from the center line of Twenty-Second avenue to the center line, produced, of Twenty-Fourth avenue, as said Twenty-Fourth avenue exists north of said East Fourteenth street; also that the existing culverts in the crossing of Twenty-Third avenue be removed; excepting, however, from the above-described work, such portions as are required by law to be kept in order or repair by any person or company having railway tracks thereon; also excepting from said work the curbing on the southern side of East Fourteenth street from the western line of Twenty-Third avenue to a point 75 feet easterly from the eastern line of said Twenty-Third avenue; and also excepting the curbing on the northern side of said East Fourteenth street from the eastern line of Twenty-Third avenue to a point 117 feet westerly from the western line of said Twenty-Third avenue; also excepting from said work the grading, paving, and guttering of the southern half of said East Fourteenth street from the eastern line of Twenty-Third avenue to a line parallel with and distant 75 feet easterly from said eastern line of Twenty-Third avenue; also excepting from said work the paving of the crossing of Twenty-Third avenue, which crossing shall be repaved; and also excepting the grading of the sidewalks from the western line of Twenty-First avenue to the eastern boundary line of the city of Oakland."

It will be observed that the plaintiff, in paragraph 5 of its complaint, does not set out in full the resolution of intention. Certain of its provisions are given, and, among others, that it declared the intention of the council to be "to order the work and improvement mentioned in paragraph 6 of this amended complaint to be done." We think the complaint must be treated as if it alleged, in express terms, that the resolution of intention declared the work to be done as it is described in paragraph 6; and the question as to the sufficiency of the description of the work is thus distinctly raised. It is therefore contended by respondents that "the resolution of intention did not name or describe the materials with which the crossing of Twenty-Third avenue should be repaved, and did not state the depth or thickness of the basalt rock gutters."

The street to be improved was East Fourteenth street from the westerly line of Twenty-Fourth avenue to the easterly boundary line of the city. Between these points was the crossing of Twenty-Third avenue.

[1] After describing the entire length of East Fourteenth street, which was to be graded and paved, and as in the resolution specifically described, we find, among other exceptions, the following: "Also excepting from said work the paving of the crossing

of Twenty-Third avenue, which crossing shall be repaved." Respondents' contention is that "the council intended by this language that the crossing of East Fourteenth street should not be paved in the same manner as the remainder of the street, but that the same should be paved with some other material not specified." Appellant's contention is that it is fairly inferable, from the provisions of the resolution, that the Twenty-Third avenue crossing, being a part of East Fourteenth street, was to be repaved with the same material as that used elsewhere on East Fourteenth street. This was the construction put upon the resolution by the contractor and by the city authorities, and all subsequent steps taken, as appears from the complaint, conformed thereto. The specifications for the work, prepared by the city engineer, the contract for its execution, the completion of the work, its acceptance by the superintendent of streets, the payment by the city of its proportion of the cost of the work, all show that this particular crossing was to be repaved, and was repaved, the same as other parts of East Fourteenth street.

[2] It is well settled that, the proceedings being *in invitum*, the resolution of intention must describe, with reasonable clearness, the work to be done, otherwise the contractor cannot recover, whatever his good faith may have been in doing the work, or however much money he may have spent. Speaking of the rule laid down in *Bolton v. Gilleran*, 105 Cal. 244, 38 Pac. 881, 45 Am. St. Rep. 33, the Supreme Court said in *McCaleb v. Dreyfus*, 156 Cal. 204, 103 Pac. 924: "*Bolton v. Gilleran* has been seized upon by property owners and used in every possible way to defeat the just recovery of the contractor, until, finally, this court felt impelled to voice its protests against these efforts in *Haughawout v. Raymond*, 148 Cal. 311, 312, 83 Pac. 53, where it said: "Notwithstanding that the proceedings for street work and sewer work, like proceedings in taxation, are *in invitum*, and therefore a fairly strict and accurate compliance with all the statutory requirements is necessary, this is the limit to which any court should be expected to go in disposing of the questions which are involved. The contractor who has honestly and substantially complied with his contract, of which the property owners have received and will continue to receive the benefit, is quite as much entitled to the protection of the law as are the property owners themselves, and, upon the other hand, an endeavor—even a successful endeavor—upon the part of the property owners to defeat the just claims of such a contractor, by a resort to the extreme technicalities of the law, can, upon the whole, operate only to the disadvantage of the property owners themselves, since it necessarily tends to increase the price at which any and all future contractors will be willing to engage in work, payment for which,

after having been duly performed, is met by harassment and vexatious delay, with the prospect at the end of utter failure of recovery.”

It will be noticed that certain exceptions were made of work to be done on the curbing from certain points on Twenty-Third avenue, and also certain paving and guttering for which no substitute was provided (i. e., that at these points no work was to be done), and then follows the exception in question, to wit: “Also excepting from said work the paving of the crossing of Twenty-Third avenue, which crossing shall be repaved”—and this is followed by another exception of grading, which was work taken out of the contract.

It is entirely clear that this crossing was to be repaved, and the resolution specifically directed how East Fourteenth street was to be paved. It seems to us reasonable to hold that, wherever any part of that street was to be paved or repaved, it was meant that the work was to conform to the specific description given for the paving. This street was to be improved for the entire length described and as specified; and the improvement in mind was an entire piece of work. It seems to us that a property owner observing by the resolution that this street was to be paved, and this crossing repaved, or, what would be the same, paved, he would reasonably conclude that the specifications as to paving the street would govern.

[3] Respondents say in their brief: “It further appears from the resolution that the council declared its intention to order the construction of basalt block gutters, four feet wide, upon a concrete foundation six inches thick; that the council carefully defined the thickness or depth of the concrete foundation and the width of the gutters, but failed entirely to fix the depth or thickness of the gutters.” It is argued that the depth or thickness of the gutters is as important to be stated as to fix the width, “because the cost may depend upon the depth as much as upon the width.” But the depth is fixed if the size of the basalt blocks was understood, for they were to be laid upon a concrete foundation six inches thick, and the depth would be six inches plus the basalt blocks. Webster defines basalt to be “a dark hard species of marble.” Also: “It is a very tough and heavy rock, and is one of the best materials for macadamizing roads.” The description was “basalt blocks,” not small broken pieces or fragments of basalt, such as are used in macadamizing streets. The terms “basalt blocks” imply, and would be understood by reasonably intelligent men to mean, blocks of sufficient size for the purposes intended. If the resolution had specified brick instead of basalt blocks, it would be unreasonable to say that the contractor could not recover because the size of the brick was not given. *Harney v. Heller*, 47 Cal. 15, 17. Had the

resolution used the terms “cobblestones,” a material frequently used for gutters, it would be unreasonable to hold the proceedings invalid because the size of the cobblestones was not given. Yet cobble, as used, varies in size somewhat. Appellant cites *Wells v. Wood*, 114 Cal. 255, 46 Pac. 96, and *Dowling v. Hibernia Savings & L. Socy.*, 143 Cal. 425, 77 Pac. 141. In the first of these cases the description read that a certain street be graded, and that “redwood curbs and rock gutterways be laid thereon, and that the roadway and sidewalks thereof be macadamized.” The terms “rock gutterways” are not more definite than the terms “basalt blocks.” In that case the principal ground for a reversal was that “the improvements were not properly or sufficiently described in the resolution of intention.” The judgment was affirmed. It is hardly conceivable that both court and counsel failed to consider the sufficiency or insufficiency of the description of the material used in the gutterways. In *Schwiesau v. Mahon*, 128 Cal. 114, 116, 60 Pac. 683, 684, it was said that, by using the description, “rock gutterways be constructed in the street, notice was given of the work and the materials to be used.”

In the *Dowling Case* the resolution read: “That granite curbs be laid on Henry street. \* \* \* and that the roadway thereof be paved with bituminous rock.” It is true that the objection discussed in the opinion did not touch upon the description of the material, and the question of its sufficiency seems not to have been raised. But it is not likely that the point escaped the notice of counsel for appellant, who doubtless considered it untenable and did not raise it. The judgment was affirmed. We are unwilling to declare the proceedings invalid because of the objection now being considered, and thus deprive the contractor of what is justly his due.

[4] Finally, it is claimed that the several causes of action set up in the complaint did not arise out of the “same transaction.” It is contended that each assessment upon the several lots of land constituted a separate and distinct “transaction” within the meaning of subdivision 8 of section 427 of the Code of Civil Procedure, citing *Himmelmann v. Spanagel*, 39 Cal. 392. While it was not necessary to the decision in that case, it was nevertheless held that “the assessment is the ‘transaction’ within the meaning of section 47 of the Practice Act (St. 1851, p. 57), out of which the cause of action must arise, which the defendants are authorized to set up as a counterclaim”; that “the owners of property adjacent to a street are not, in any sense, parties to the contract, for the improvement of a street, entered into with the superintendent of streets.” The counterclaim in that case was for piling dirt on plaintiff’s lot while doing the work on the street. The court said: “It



is apparent that the alleged demand did not arise out of the assessment, nor, indeed, out of the proceedings upon which it is based, and therefore are (is) not available as a counterclaim. The acts occasioning the damages complained of were naked trespasses, and would not be held to arise out of the contract considered as the 'transaction' upon, or in respect to, which the action was brought."

The causes of action which may be joined are defined in section 427 of the Code of Civil Procedure: "\* \* \* (8) Claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section. The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated. \* \* \*"

The complaint alleged "that defendants, Julius A. Crist, Frederick G. Crist, and Clara E. Crist, were on the 16th day of October, 1907 [the date of the assessment, diagram, warrant, and certificate of the city engineer], and still are, the owners in common of that certain parcel of land situated in said assessment district and particularly described as follows:" (Then follows a description of a parcel of land which it is alleged "embraced those certain lots shown on said diagram and numbered thereon and on said assessment numbers." Then follow also the numbers of all the lots fronting on East Fourteenth street and affected by the assessment.)

Section 12 of the Vrooman Act (Stats. 1885, p. 157) provides that "the contractor or his assignee may sue, in his own name, the owner of the land, lots or portions of lots assessed. \* \* \*"

Appellant contends, with much force, that under subdivision 8, section 427, of the Code of Civil Procedure, "the 'transaction' out of which the cause of action arises is the whole proceeding, commencing with the passage of the resolution of intention and ending with the recording of the assessment, warrant, diagram, and the contractor's return," and this because the assessment is of no effect unless the steps prescribed by the statute have been taken. We do not find it necessary to determine the point. In *McCaleb v. Dreyfus*, 156 Cal. 204, 210, 103 Pac. 924, 927, it is said: "Defendant was the owner of all the lots against which the liens were sought to be enforced in a single action. While the method of procedure is admissible under section 12 of the Vrooman Act, yet a single attorney's fee only can be recovered in such an action. *Hughes v. Alsip*, 112 Cal. 587, 44 Pac. 1027." No difference is perceivable where the action is brought against a single owner of all the lots, and where it is

brought against three owners in common of all the lots, which is the case here.

[5] The causes of action are not separately stated, but the demurrer was not on this ground. Code Civ. Proc. §§ 430, 431.

The judgment is reversed with directions to overrule the demurrer.

We concur: HART, J.; BURNETT, J.

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(21 Cal. App. 14)

**RYAN v. OAKLAND GAS, LIGHT & HEAT CO.** (Civ. 999.)

(District Court of Appeal, Third District, California. Jan. 13, 1913. Rehearing Denied Feb. 11, 1913. Denied by Supreme Court March 14, 1913.)

**1. MASTER AND SERVANT (§ 189\*)—FELLOW SERVANTS—VICE PRINCIPAL.**

The superintendent of a power company who employed and discharged the men who were working on an excavation with plaintiff and directed the work generally when present, and the foreman who directed and discharged the men in the superintendent's absence, were not fellow servants of a laborer engaged in the excavation work, being vice principals.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 427-435, 437-448; Dec. Dig. § 189.\*]

**2. MASTER AND SERVANT (§ 231\*)—CONTRIBUTORY NEGLIGENCE—RELIANCE ON CARE OF MASTER.**

A laborer engaged in excavating could assume that his superintendent was making the place of work safe by cribbing or bracing the walls as the work progressed; that being a part of the superintendent's duties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 675-677; Dec. Dig. § 231.\*]

**3. MASTER AND SERVANT (§ 185\*)—FELLOW SERVANTS—DELEGATION OF DUTIES.**

An employer cannot escape responsibility for the proper performance of a duty to his employes by delegating its performance to another servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.\*]

**4. MASTER AND SERVANT (§ 107\*)—PLACE OF WORK—CHANGING CONDITIONS.**

The rule that an employer is not bound to protect his employes from changes in the place of work necessitated by the character of the work as it progresses would not apply where employes engaged in excavation were not furnished with materials to brace the walls, and the walls were further weakened by a parallel covered ditch near to that being dug which was unknown to the employes.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.\*]

**5. MASTER AND SERVANT (§ 286\*)—INJURIES—JURY QUESTION—NEGLIGENCE.**

In an action for injuries to an employe by the caving in of the walls of a ditch which he was assisting in digging, whether it was his employer's duty to brace the ditch in the course of the work held a jury question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1050; Dec. Dig. § 286.\*]

**6. DAMAGES (§ 216\*)—INSTRUCTIONS—PHYSICAL AND MENTAL SUFFERING.**

The court instructed in a personal injury action that, in estimating the amount of pecuniary damages allowed, the jury might consider the physical and mental pain "suffered," if any, the nature, extent and severity of the injuries, "the extent, degree, and character of suffering, mental or physical, if any, its duration and its severity," and might also consider whether the injury was temporary. Held, that the instruction referred to past physical and mental suffering.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.\*]

**7. DAMAGES (§§ 32, 48\*)—ITEMS OF DAMAGES—PHYSICAL AND MENTAL SUFFERING.**

Where the person injured is himself suing for such injuries, damages for physical and mental suffering may be recovered contrary to the rule, where the suit is brought in a representative capacity.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 40, 41, 71, 100-103, 255; Dec. Dig. §§ 32, 48.\*]

**8. DAMAGES (§ 26\*)—PROSPECTIVE CONSEQUENCES—"NECESSARILY."**

"Necessarily" means "unavoidably," "indispensably," so that a thing which necessarily must happen may reasonably be said to be certain to happen.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 69, 236; Dec. Dig. § 26.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4703, 4704.]

**9. DAMAGES (§ 53\*)—PERSONAL INJURIES—MENTAL SUFFERING.**

Mental suffering, as an element of damage, is not confined to that resulting from such injuries as would from their character cause the injured person to be shunned or cause a feeling of humiliation, but may arise out of the fear of physical suffering reasonably certain to continue, and continued even after physical pain has ceased.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 100, 255; Dec. Dig. § 53.\*]

**10. DAMAGES (§ 149\*)—PERSONAL INJURIES—MENTAL SUFFERING.**

Mental suffering may be presumed to follow upon a serious physical injury causing pain and impairment of earning capacity, so that it need not as a rule be specially pleaded to be recovered for.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 149.\*]

**11. APPEAL AND ERROR (§ 171\*)—PRESENTATION BELOW—THEORY OF PLEADINGS.**

Though the complaint, in a personal injury action, merely alleged that plaintiff was rendered lame and incapable of performing labor by such injuries, and had undergone great physical suffering, and would be incapacitated from laboring for life, where the trial was conducted on the theory that physical and mental suffering were proper items of damage, if proved, defendant cannot object on appeal that damages for such items were allowed, though not more specifically pleaded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1063, 1066, 1067, 1161-1165; Dec. Dig. § 171.\*]

**12. DAMAGES (§ 185\*)—INJURIES—SUFFICIENCY OF EVIDENCE—EXTENT OF INJURIES.**

Evidence in an employe's action for personal injuries held to sustain a finding that the injuries were permanent, and incapacitated plaintiff for an indefinite time from doing manual labor.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 503-508; Dec. Dig. § 185.\*]

**13. DAMAGES (§ 132\*)—EXCESSIVE DAMAGES—EVIDENCE.**

Evidence in an employe's action for personal injuries held to show that an award of \$7,500 damages was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by Mathew Ryan against the Oakland Gas, Light & Heat Company. From a judgment for plaintiff, and an order denying



a motion for new trial, defendant appeals. Affirmed.

Myrick & Deering, of San Francisco, for appellant. Fitzgerald & Abbott, of Oakland, for respondent.

CHIPMAN, P. J. The complaint in this case was filed in December, 1904, and was brought to issue by answer in October, 1905. On appeal from the judgment at the first trial, it was held that the evidence was sufficient to support the verdict in favor of plaintiff, but the judgment was reversed because of an instruction which, in the opinion of the appellate court, took from the jury a question of fact. 10 Cal. App. 484, 102 Pac. 558.

Respondent contends that, so far as the facts are concerned, the decision on the first appeal is the law of the case, inasmuch as the evidence is substantially the same—indeed, differs only in the fact that some additional testimony favorable to plaintiff was introduced. It would occupy about as much time and space to determine whether or not respondent's contention is sound as it would to determine the facts for ourselves. Therefore, we shall not accept the law of the case upon the facts as having been established. Plaintiff brings the action to recover damages for personal injury while at work as a laborer digging a trench for defendant in the streets of Oakland. The injury complained of occurred July 5, 1904.

Paragraph 4 of the complaint is as follows: "That the said excavation and construction of said trench, at said time and place, was dangerous to the life, body, and limbs of plaintiff, while employed as aforesaid, unless the walls and banks of said trench were braced and secured from falling or caving in on plaintiff while standing in said trench, and engaged in his said employment as aforesaid; that said danger consisted in the liability that the walls and banks might fall and cave in on plaintiff while working in said trench, because of the character of the soil, as hereinafter stated; that said danger to plaintiff, while working and employed as aforesaid, unless said walls and banks were braced and secured as aforesaid, was at all times known and familiar to said defendant and its said superintendent and vice principal, but that despite said knowledge of said danger to plaintiff, while working and employed as aforesaid, said defendant and its said superintendent and vice principal did not brace, or in any way secure, said walls and banks from falling upon, or caving in on, plaintiff while engaged in said trench as aforesaid; but, on the contrary, willfully, knowingly, and carelessly failed and neglected to brace, or in any way secure, said walls and banks from falling or caving in on plaintiff while working as aforesaid; that, had said wall been braced and secured as aforesaid, the injuries to plaintiff here-

inafter alleged could, and would, not have happened."

Then follow averments particularizing at considerable length the character of the work plaintiff was doing, his inexperience in similar situations, the circumstances attending the accident, the character of the soil and its liability to cave, plaintiff's ignorance of the danger, defendant's failure to provide against the injury that befell plaintiff by carelessly and negligently failing to brace the walls of said trench to prevent their caving in and in failing to inform plaintiff of the dangerous character of his said work, by reason of which plaintiff "was violently jammed and pinned by said falling wall against the opposite wall of said trench, and suffered great bodily hurt and injury by the fracture in two places of the pelvis bone."

Paragraph 7 is as follows: "By reason of said injury received through the negligence and carelessness of defendant as aforesaid, said plaintiff has been ever since said time sick, sore, lame, prostrated, and rendered incapacitated from performing any labor, and from attending to any kind of business or duty whatever, and has undergone great physical suffering and agony, and will continue lame and incapacitated from performing any labor for the rest of his life." The answer is a specific denial of most of plaintiff's averments, except as to the fact that he was injured while working for defendant. As a separate defense, it is alleged that plaintiff and his fellow employes working in said trench were at all times cautioned to brace the walls and that defendant furnished lumber and materials for that purpose; that it was part of plaintiff's duty to prevent the walls of said trench from falling by bracing the same, of which plaintiff was fully aware, and that the accident resulted from plaintiff's neglect in this regard, and that he voluntarily assumed all risk. It is also alleged that the injury to plaintiff was not the result of the earth falling on him but of his struggle "to free himself without the assistance of his fellow employes, although cautioned by them to allow them to assist him and extricate him from the soil."

It developed at the trial that the walls of this trench were weakened by another parallel trench which had the year before been dug alongside and near to the trench in question which defendant well knew, and of which plaintiff was ignorant, and that this fact contributed to the accident. An amendment to the complaint was allowed to conform to these facts. An answer was also filed denying the averments of the amendment.

Plaintiff was employed by defendant in digging a trench which defendant was sinking, in Oakland, for the purpose of laying its pipes. The ditch began near First street, came up Brush to Second, then easterly on Second to Grove street, thence southerly on Grove. On Brush and Second streets the ditch was braced, and on Saturday, July 2,

1904, the ditch on Grove street had been run about 30 or 40 feet. It was between 4 and 5 feet deep and about  $3\frac{1}{2}$  feet wide. The men ceased work Saturday afternoon, the third was Sunday and Monday, the fourth, was a holiday. They resumed work on Tuesday morning. After the men had been working about two hours, the eastern bank of the ditch gave way, catching plaintiff, who was working in the trench. This ditch was parallel to a wall surrounding the defendant's property, about three feet away. A year or more prior to digging the trench a ditch had been dug between it and the wall parallel thereto for the purpose of laying a gas pipe about two inches in diameter. Kirk was superintendent of the company; "did the employing and discharging of men and directed the work generally when present." Welling was foreman, and, in Kirk's absence, "directed and discharged the men." Welling testified: "There was a carpenter employed by the company at that time. His name was Dillon. His work was to do such carpenter work as might be necessary in bracing up and timbering the ditch that should be braced. As a matter of fact, this ditch on Grove street where Ryan was hurt was not timbered up or braced. We timbered all the ditch on Second street as we came along Second street for two blocks." Dillon testified: "This ditch that was being constructed from Brush street up to Grove and down Grove street, in 1904, I braced it, or cribbed it, to keep it from caving. I know there was an accident July 5, 1904. I came up there that morning. I did some work there that morning. I went there to see if they wanted any more bracing put in. I saw Mr. Kirk, and Mr. Welling, I think, was there. I asked Mr. Welling if he wanted any more bracing done, and he said he did not think it was necessary. I don't think there was any lumber there that morning to do the cribbing. After Mr. Kirk told me that, I went on over to another job I was looking after. I didn't return until after the accident. I was not there at the time of the accident." On cross-examination he testified: "I don't know as I know precisely what the foreman said. Mr. Kirk said he didn't think it would need any bracing there, it was getting shallower, so I went over to the purifiers. \* \* \* Mr. Welling never gave me any instructions when Mr. Kirk was there, otherwise he acted in the capacity of foreman." There is conflict in the evidence as to whether there was cribbing material at or near the trench where plaintiff was at work. There was evidence justifying the jury in finding that such material was not there. And the fact that Kirk and Welling concluded that no bracing was necessary would account for there not being any material on hand to do the bracing. Moreover, the evidence showed that it was no part of plaintiff's work or duty in performing his task to do this bracing. Dillon was specially employed to do this under the

direction of either the superintendent, or, in his absence, of the foreman, and their relation to the work was such as not only gave them authority to determine whether cribbing should or should not be used as their judgment might dictate, but devolved this duty upon them.

[1] Nor can we admit the soundness of defendant's argument that Kirk and Welling were fellow servants with plaintiff, thus giving effect to the rule in such cases, and relieving the defendant from liability. That the place in which plaintiff was working was dangerous is not seriously disputed; that he had no warning of the danger, except such as his own judgment would suggest to him, is not questioned; that the superintendent knew of the danger is manifest from the fact that he caused the trench to be braced until Grove street was reached; and it was by his direction that the ditch along Grove street was not cribbed.

[2] Plaintiff had nothing to do with this part of the work except as directed by the superintendent or foreman. His work was with the pick and the shovel, and he had a right to assume that the superintendent was guarding his safety in the place where he was working so far as this particular work of cribbing or bracing was concerned. We entertain no doubt from the facts disclosed in this case that Kirk certainly, and we think, also, Welling was the agent of defendant, or its vice principal.

[3] What was said in *O'Connell v. United Railroads*, 124 Pac. 1022, 1030, is equally applicable here: "It may be said to be true that in a general sense, or generally speaking, the motorman and conductor of an electric work car are fellow servants, but the books are full of cases showing where one fellow servant, in the discharge of a particular duty for his employer, may become, by reason of the peculiar nature of such duty, the master's agent so as to bind the latter for any damage resulting from its negligent execution. The rule is that, where the master owes a duty to his employé, he cannot escape responsibility for its proper performance, or liability for an injury to one servant occasioned by a failure to perform such duty, by delegating its performance to another servant. *Tedford v. Los Angeles Elec. Co.*, 134 Cal. 79 [66 Pac. 76, 54 L. R. A. 85]." In the *Tedford* Case the court said: "The fellow servant to whom the performance of such duties is assigned becomes, with respect to that particular duty, the special representative of the employer—sometimes called a vice principal. In such case negligence of the servant is the negligence of the principal, for which the latter must answer." (Citing cases).

There was evidence that the parallel ditch referred to weakened the bank and added a further danger to the workmen on the ditch being dug and had a tendency to cause the caving. This was known to defendant, and was unknown to plaintiff. He had no special



knowledge or experience in ditch digging either along the streets of Oakland or elsewhere. It is contended by appellant that "where the place in which the employes are working is made by the employes themselves, and material suitable in quantity and quality to make it safe and suitable tools and competent men to assist are furnished by the master, if the place be not made safe through the omission to use or negligent use of such materials even though by a foreman or even by a superintendent, the negligence is that of a fellow servant, for which the master is not responsible." *Callan v. Bull*, 113 Cal. 593, 605, 45 Pac. 1017, *McDonald v. Hoffman*, 10 Cal. App. 515, 102 Pac. 673, *Kerrigan v. Market St. Ry. Co.*, 138 Cal. 506, 71 Pac. 621, are cited in support of this contention. In *Callan v. Bull* it was held that: "If the appliance is furnished by the master for the purpose of enabling the servants to perform the work in which they are engaged, he is required to see that it shall be reasonably safe for that purpose; but, if the preparation of that appliance is a part of the work which the servant is required to perform, the master is not liable for any defect in its preparation." In that case plaintiff and other workmen were building a jetty and the place where the work was to be done was prepared by the laborers themselves, for which suitable materials were supplied. In *McDonald v. Hoffman* plaintiff was one of a number of carpenters "engaged in the same general work in and about the construction of a building and warehouse." It became necessary for the workmen to construct a scaffold or platform on which to work. All of the materials necessary for the construction of the platform were there at their hands. *Kerrigan v. Market St. Ry. Co.* was a case where the plaintiff and others were engaged in loading ties on a platform car and the ties were held in place by stakes, on the front and sides of the car, which were made and adjusted by the men themselves from material at hand. It is not difficult to perceive that the facts in those cases were very different from the facts here. Neither *Kirk*, *Welling*, nor *Dillon* was engaged in the same work that plaintiff was doing, except in the most general way. They were especially charged with the duty of determining when and where the trench required bracing and to attend to having it done. Plaintiff's only duty was to do the work to which he was assigned, namely, to shovel dirt out of the trench. Besides, if there was any duty put upon him to do the bracing, the jury found on sufficient evidence that materials for that purpose were not furnished.

In this connection it is urged by appellant that the place of work changed with the work and that no omission of duty owed by the defendant to plaintiff is shown, and hence the verdict should have been for defendant. 2 *Labatt on Master and Servant*, § 588, is cited, where the author says: "Where the

work is of such a character that, as it progresses, the environment of the servant must necessarily undergo frequent changes, the master is not bound to protect the servants engaged in it against the dangers resulting from those changes." It cannot be said that the place of the work changed in the sense contemplated by the cases cited in support of the text so far as any danger attended the work. And had defendant continued to protect the workmen by bracing the sides of the trench as it had done up to the day before the accident, no injury would have occurred.

[4] The rule contended for does not apply in this case because materials were not furnished the men in the ditch to protect themselves, and there was a hidden danger in the covered ditch that had been dug alongside of the ditch in which plaintiff was working known to defendant and unknown to plaintiff, and there was evidence that this old ditch contributed to the caving in of the walls.

[5] Furthermore, the question whether it was defendant's duty to brace the trench was a question for the jury. "Whether the depth of the soil, the hidden causes known only to defendant, and the character of the soil, were such facts as to make it the duty of the defendant to brace the trench, was a question peculiarly for the determination of the jury." 10 Cal. App. 490, 102 Pac. 560, *supra*.

Error is claimed in the giving of the following instructions:

"(16) If you find that the plaintiff is entitled to recover, you may award him such damages, within the amount claimed, as in your opinion will compensate him for the pecuniary damages proved to have been sustained by him and proximately caused him by the wrong complained of. And, in estimating the amount of such damages, you may consider the physical and mental pain suffered, if any, the nature, extent, and severity of his injury or injuries, if any, the extent, degree, and character of suffering, mental or physical, if any, its duration and its severity, and medical expenses incurred or paid, the cost of nursing and attendance, if any, and the loss of time and value thereof, and the loss of earning capacity, if any. You may also consider whether the injury, if any, was temporary in its nature, or is permanent in its character. And from all these elements you will resolve what sum will fairly compensate the plaintiff for the injury sustained.

"(17) If you find that the plaintiff is entitled to recover, the measure of his recovery is what is denominated compensatory damages; that is, such sum as will compensate him for the injury he has sustained. The elements entering into this damage are the following: (1) Such sum as will compensate him for the expenses he has incurred in caring for and nursing him during the period that he was disabled by the injury, not exceeding the amount alleged in the complaint.

(2) The value of his time during the period that he was disabled by the injury. (3) If the injury has impaired the plaintiff's power to earn money in the future, such sum as will compensate him for such loss of power. (4) Such reasonable sum as the jury may award for pain suffered or to be necessarily suffered from the injury. The first two of these elements are the subject of direct proof, and are to be determined by the jury on the evidence they have before them. The third and fourth elements are from necessity left to the sound discretion of the jury, but the damages in all cannot exceed the amount alleged in the complaint."

Appellant seeks a reversal because the court in these instructions "makes no distinction between mental and physical suffering," and, furthermore, that "the vice of all this is that the complaint does not charge any mental suffering. It merely alleges past physical suffering, and does not allege future pain, physical or mental."

[6] Instruction No. 16, we think, should be read as in the past tense, and as referring to past physical and mental pain. The courts apply a different rule where the plaintiff sues in a representative capacity and where the victim of the injury is the plaintiff.

[7] In the latter case damages for physical and mental suffering may be recovered. *Melone v. Sierra Ry. Co.*, 151 Cal. 113, 116, 91 Pac. 522.

Paragraph 4 of instruction 17 is attacked on the ground that it makes no distinction between mental and physical suffering. The rule of damages is laid down in section 3283 of the Civil Code: "Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future." In *Melone v. Sierra Ry. Co.*, supra, the jury were instructed that an element of damage was "such reasonable sum as the jury shall award him on account of the pain and anxiety that he has suffered or *may suffer* by reason of his injuries"; also, that the jury may take into consideration "the physical and mental suffering he may have sustained or *may undergo* in the future by reason of his injuries." These instructions were held error, while it was also held that the true rule was given in an instruction that plaintiff was entitled to "recover not only such damages as he may have suffered, but also 'such damages as by the evidence it is reasonably certain he will suffer in the future.'" The erroneous instructions were condemned because they left out the element of certainty as to the future suffering, whereas the statute allows only such damages as are "certain to result in the future." The language used in the present case is—"pain suffered or to be necessarily suffered from the injury."

[8] "Necessarily" means "unavoidably"; "indispensably." Webster. A thing which necessarily must happen may reasonably be

said to be certain to happen. To say that from a given physical injury physical or mental pain must necessarily be suffered is only another way of saying that it is certain to result. The statute makes no distinction between physical and mental suffering, and, in a case where mental suffering is a proper element of damage at all, the damage is not necessarily confined to the date of the trial but "damages may be awarded \* \* \* for detriment \* \* \* certain to result in the future." So far as concerns damages for pain to be suffered in the future, this court held, in *Scallly v. W. T. Garratt & Co.*, 11 Cal. App. 138, 153, 104 Pac. 325, that they are recoverable, and that case had the sanction of the Supreme Court. Mental suffering can hardly be said to be susceptible of direct evidence.

[9] In personal injury cases mental suffering arises out of the physical injury and depends much upon the extent, character, and probable durability of the injury. It may also arise out of the dread of physical suffering reasonably certain to continue in the future; and this, it seems to us, would be something apart and different from the physical suffering itself. If one is conscious that a long period of physical suffering is in store for him, he must necessarily undergo mental anxiety and worry by reason of this feeling. We do not think that mental suffering which may be considered as an element of damages is confined to such injuries as would from their character cause the person to be shunned or would produce a feeling of humiliation and mortification. To be injured so as to cause total blindness would inspire in one's associates only pity and sympathy. But mental suffering would inevitably follow such a calamity, and such suffering would be something more than and apart from that form of mental suffering described as physical pain, referred to in *Merrill v. L. A. Gas & El. Co.*, 158 Cal. 499, 512, 111 Pac. 534, 540 (139 Am. St. Rep. 134), cited by appellant. So of one crippled for life and unable ever to engage in occupations to which he was accustomed, or for which he was fitted, he might well be said to suffer mental pain which is "something more than that form of mental suffering described as physical pain." He may in some classes of injuries no longer suffer physical pain, but his mental suffering may be none the less acute, and may be directly referable to the injury he has received. In the present case, as we shall see, the plaintiff was on crutches at the time of the trial and had been for over six years, and entirely incapacitated to perform physical labor and was still suffering pain from his injuries. He was over 40 years of age, and had no trade, and no sedentary occupation was open to him because his capacity was limited to that of a day laborer. Thus handicapped, his outlook into the world before him could not be otherwise than



accompanied by gloomy forebodings and more or less mental anxiety and suffering.

[10] As mental suffering is something which may be presumed to follow upon a serious injury producing physical suffering and impairment of one's capacity to earn a living, it has been held not necessary to be specially pleaded. There is a distinction between mental impairment and mental suffering. It has been held that in the former case it must be specially pleaded and proven (*Comaskey v. N. P. Ry. Co.*, 3 N. D. 276, 55 N. W. 732); but as said in an instructive opinion in *Gagnier v. City of Fargo*, 12 N. D. 219, 96 N. W. 841, after having pointed out the seriousness of the injury suffered and distinguishing the *Comaskey* Case: "Such evidence clearly shows physical injuries from which physical pain and mental suffering necessarily follow. Mental suffering is the natural and necessary result of physical injury, and equally as much so as physical pain. The physical injury being proved, pain and mental suffering are presumed. The physical pain and mental suffering need not be pleaded nor specially proved, but are taken to follow as a necessary consequence of the physical injury, and to be inseparably connected therewith. There is great uniformity in the authorities on this question"—citing 1 *Sutherland on Damages* (2d Ed.) §§ 419-421, and numerous cases. See 2 *Sutherland on Damages* (3d Ed.) § 421. Mr. Sutherland says: "The jury may consider the case with all its facts, and take into account, not only the physical pain, but also such mental suffering as they are satisfied must have been experienced as the natural result of the wrong done or the injury inflicted." 4 *Sutherland on Damages* (3d Ed.) § 1243, and a large number of cases in footnote. "When bodily pain is caused, mental suffering follows as a consequence, especially when the former is so severe as to create apprehension and anxiety; as where one is conscious of the impairment of his earning capacity." *Id.*

[11] Whatever may be the rule of pleading in this state, the trial in the present case was conducted on the theory that physical and mental suffering were proper matters of inquiry. The pleadings were sufficient to warrant the invocation of the rule that it is now too late to make the objection urged. *Tuf-free v. Polhemus*, 108 Cal. 670, 41 Pac. 806; *Cushing v. Pires*, 124 Cal. 663, 57 Pac. 572; *Larkin v. Mullen*, 128 Cal. 449, 60 Pac. 1091; *Merrill v. Pac. Transfer Co.*, 131 Cal. 582, 63 Pac. 915. The subject of plaintiff's injury, its nature and character, its extent, its probable durability, its effect as producing physical pain and suffering, and, at least by inference, its causing mental suffering, were gone into with great minuteness by quite an array of medical witnesses, without objection from either party. These medical examinations have been going on to some extent ever since

the accident, and were brought down almost to the day of the second trial. No question was raised at the trial that this evidence was outside or beyond the issues. There was evidence that for 6½ years plaintiff had suffered physical pain from his hurt, and was then suffering. Plaintiff testified that he was first taken to the receiving hospital, then to his home, and from there to the Providence Hospital. He was put in splints for a week or two and next in plaster—from the pit of his stomach to his toes, and so remained four or five months, taking medicine daily. "The skin all peeled off from me, every place the plaster was on." For a while he was wheeled around in a chair after the plaster was removed. He then went on crutches. "I carried crutches four or five years. \* \* \* I tried various times to get along without them, I couldn't. When the ditch fell in, I thought I could feel all my bones cracking. I thought it was the last of me. From that time and while I was in plaster cast I suffered pain around my hips, my legs and my knee. Continues yet at times. I feel it here in the groin, in the back, and in my knee. At the time of the accident there was no difference in the size of my legs. There is now. I don't exactly know what it is. The doctors measured them; the left leg is smaller than the right. I was receiving \$2.25 per day at the time of the accident. Since that time I have not been able to do any physical work. I am not able to lift anything. The difficulty seems to be in my back and hips and my leg, and am not able to use a pick and shovel at the present time. If I try to walk up an incline or upstairs, it hurts me in the knee, from the knee up, in my left leg. The hospital bill was \$400. \* \* \* I have never done anything but laboring work. I have no trade." On cross-examination he testified: "These medical examinations have been going on from time to time for the past six years, and up to three weeks ago. Some were made in an endeavor to cure me, others were made for the purpose of ascertaining whether or not I had suffered any fracture."

Dr. James P. H. Dunn and Dr. H. Koford attended plaintiff at the hospital. Dr. Dunn testified: "I determined what his injury was after making an examination of him. \* \* \* He remained in the hospital under my care until the 1st day of January, 1905, I think. I had a bed prepared especially for him, what we call a fracture bed, and the patient couldn't move, and we could not move the patient on account of the fracture of the pelvis, and I had a mattress made with a trap in it. We examined the fractures of the bones under the anesthetic, then put a bandage about the body, about the hip here, and then applied a split here from the axilla to the leg, in order to keep the body at rest and stop any movement of the patient,

\* \* \* when I was sure there would be no danger of abscess forming and then I placed a plaster cast on the patient from here, covering in that whole leg. [Illustrating.] The plaster cast extended from the lower ribs down to the toes of the left foot. \* \* \* When I examined him under the anesthetic, I found a fracture of the pelvis. \* \* \* I am positive that neither of these fractures which I found united. I am positive that they did not. \* \* \* I have examined him recently. I am still of the opinion that there is no union. I have examined him within a week. I will say that I do not think it advisable to perform the operation which is possible to create a union there on account of the danger, and then you don't know, you are not positive what result you will get. In my opinion Ryan in his present condition is not capable of doing any physical labor. In my opinion his injuries are permanent. Those fractures which he had are very rare. He was extremely tender over the left pubic bone, and he is tender now. There is a tenderness there now. That discoloration I spoke of extends to the thigh. My charge for treating was \$1,000. There were a number of physicians who saw the patient with me." Dr. Koford testified, corroborating the opinion expressed by Dr. Dunn. He testified: "After the cast was removed, we found him practically the same as when we put it on. The discoloration was gone, but he had his pain on pressure. He was unable to stand on his leg. He complained of pain. He was in the hospital six months altogether. When he left, he walked with crutches. \* \* \* I noticed no difference in the legs of Ryan when he went into the hospital. They are not the same now." The left leg, he testified, is smaller and shorter than the right. Dr. O. D. Hamlin testified: "There was an apparent shortening or tilting of the pelvis. \* \* \* I would say that the atrophy in Ryan's left leg was due to injury. From the fact that the atrophy has existed a number of years, I would say that the injury would probably be more or less permanent. Just how permanent or how long that would last it would be impossible to say. I would say that there was a tendency for it to last a very long time." Dr. Hamlin examined him three or four weeks before the trial. Dr. W. B. Coffey examined him. He testified: "I found that Ryan had a defective locomotion and wasting of his left limb, and the apparent motion at the junction of the back with one of the pelvic bones. In addition to that he suffered from an injury to the pubic end of the pelvis." Further describing his condition he said: "Any serious injury that would produce motion in that joint would render the individual practically disabled permanently. It would require a good deal of force to produce a separation at that point, but after the injury was received the slightest motion would permanently disable a man.

It is an uncommon injury." He assisted in an X-ray examination. He testified: "The picture here shows there has been a fracture. It is overlapping here on the left side of the body. Here is a thickening that nature has thrown out to repair the substance, what we call callous. Shows a complete union at that point with a slight overlapping. \* \* \* I had Ryan stand up and walk to see if we could detect any motion at this point that I have previously mentioned and observed his gait. I could not detect any motion. If there is motion and this wasting is still present, and if it is true that he has pain in that point, even without apparent motion, then he is permanently injured. There might be motion there and no one detect it. \* \* \* I do not know whether the man has pain because I cannot question his honesty or veracity. If he has pain (and he so claimed when the doctors were examining him) even if it were without motion, then he is permanently injured, and the man is in a serious condition. I would say worse now than when I examined him before because it has run a longer period." The skill of eight different physicians was sought in an effort to determine more particularly the permanency of plaintiff's injuries. That he had been seriously injured no one questioned. The controversy seemed to be how serious and how permanent was the injury.

[12] In the somewhat conflicting testimony there was ample to justify the jury in regarding plaintiff's injuries as permanent, and that he was incapacitated to do manual labor, and would so continue for an indefinite period of time. We may well imagine plaintiff's mental anxiety and worry and suffering as he was subjected to this antemortem examination by so many doctors, resulting at the best in grave doubt of his ultimate recovery or his ability ever again to earn a living by manual labor.

[13] Defendant's chief reliance for a reversal is that the jury were permitted to consider future mental suffering as an element of damage. When we take into account his physician's fee, \$1,000, and the hospital charges, \$400, and his earning capacity when he was injured at \$2.25 per day for the working days in six and a half years, the difference between that sum and \$7,500, the amount of the verdict, it will appear that the jury were not required to speculate as to future damage. The difference is readily accounted for by the physical and mental suffering he endured for this long period, not to speak of the advance in wages since 1904, which would itself more than make up the difference. From this point of view, assuming that plaintiff is entitled to damages, it seems to us inconceivable that defendant should undertake to escape liability altogether because of an imaginary uncertainty as to the period for which damages were awarded for physical and mental suffering. Without considering



that plaintiff is in all probability disabled for life, the verdict was reasonable, but if this injury is permanent, as the evidence shows it is, he is but poorly recompensed.

We are unable to take any view of the case that will justify a reversal. The judgment and order are therefore affirmed.

We concur: HART, J.; BURNETT, J.

21 Cal. App. 9

WHITNEY v. ARONSON. (Civ. 1,003.)

(District Court of Appeal, Third District, California. Jan. 13, 1913.)

1. EVIDENCE (§ 457\*)—PAROL EVIDENCE—AMBIGUITIES—"WINTER MONTHS."

A lease which provides that the lessor shall furnish heat during the "winter months," but does not show whether the term was used in its technical or popular sense, is ambiguous, and evidence should be admitted to show what was meant; the winter months in a technical sense being December, January, and February, in the popular sense being the cold months, while the astronomer would say that winter extended from the winter solstice, about December 21st, till the vernal equinox, about March 21st.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2104, 2107, 2108; Dec. Dig. § 457.\*]

2. EVIDENCE (§ 516\*)—"STANDARD OF HEAT."

In an action involving the question of heat between a lessor and lessee of offices, an answer to a question, "What is the standard temperature of offices that are required to be heated?" was improperly stricken by the court on the ground that there was no standard; the test being that degree of heat generally recognized and approved by the class of persons engaged in such a building for a similar purpose.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2325; Dec. Dig. § 516.\*]

Appeal from Superior Court, City and County of San Francisco; Geo. H. Sturtevant, Judge.

Action by Arthur L. Whitney against A. Aronson. Judgment for defendant, and plaintiff appeals. Reversed.

N. A. Eisner, C. H. Oatman, and H. W. Philbrook, all of San Francisco, for appellant. Hugo K. Asher, of San Francisco, for respondent.

BURNETT, J. The controversy is between a lessor and lessee. The former insists that rent is due, and the latter that, by reason of the lessor's failure to keep a certain covenant, the lease has been terminated and the lessee absolved from any further obligation. The covenant in question is as follows: "That the lessor agrees to supply the premises with heat during the winter months without cost to the lessee." It is claimed by the lessor that this covenant called for "heat" only during the months of December, January, and February, and that the term could not be extended by parol testimony. On the other hand, the lessee sought to introduce

evidence that the intention of the parties was to provide for the cold season, and not simply for the said three months. The learned trial judge agreed with the contention of the lessor and held that the parties had definitely and clearly expressed their intention in writing, and they must thereby abide, and he therefore sustained an objection to questions asked with a view of showing that the parties attributed a more comprehensive meaning to the term employed, and that the lessor actually so treated the contract, and also that there was a failure to supply heat, when needed, in other cold months.

[1] Assuming that the expression was ambiguous or uncertain, then it is not disputed that "it must be interpreted in the sense in which the promisor believed at the time of making it that the promisee understood it." Civ. Code, § 1649. It is also, of course, well settled that, "When the meaning of the language of a contract is considered doubtful, the acts of the parties done under it afford one of the most reliable clews to the intention of the parties." *Rockwell v. Light*, 6 Cal. App. 563, 92 Pac. 649; *Hill v. McKay*, 94 Cal. 5, 29 Pac. 406.

If the covenant in question admits of varying constructions, there is another rule also to be kept in view, stated by Mr. Justice Shaw in *Stein v. Archibald*, 151 Cal. 223, 90 Pac. 537, as follows: "It is a well-settled principle, applicable to the construction of contracts, that where one construction would make the contract unreasonable, unfair, or unusual and extraordinary, and another construction, equally consistent with the language, would make it reasonable, fair, and just, that the latter construction is the one which must be adopted. It is also a principle of construction, with respect to ambiguous contracts, that the circumstances surrounding and known to both parties at the time of the execution of the contract may be taken into consideration in determining the meaning to be conveyed."

Reverting now to the expression used, can it be said to involve any uncertainty or ambiguity? I am of the opinion that this should be answered in the affirmative for the reason that it does not appear whether the term "winter months" was used in a technical or popular sense. In the common language of the people, the "winter months" are the cold months; but, when they use the language with greater scientific accuracy, they mean the months of December, January, and February. The astronomer, on the other hand, would say that the winter, north of the equator, lasts from the winter solstice, about December 21st, till the vernal equinox, about March 21st. One of the definitions given in Webster's New International Dictionary of the word "winter" is "the season of the year, in any region, in which the noon-day sun shines most obliquely; the coldest

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

season of the year; hence, fig., cold weather." In common parlance the word "winter" is generally so used. In fact, in ordinary conversation, it is perhaps seldom that the term "winter months" is used with the limitation contended for by respondent. I think, therefore, that it cannot be said that the term reveals, definitely and clearly, the intention of the parties so as to exclude parol evidence.

Of course, if we are permitted to invoke the rule of reason or probability, there can be no question as to the result. It is not likely that the lessee of an office in the city of San Francisco, containing a heating plant, would be satisfied with an agreement on the part of the lessor to operate that plant and furnish heat to the office during the months of December, January, and February only. If the heat were confined to those months, it would not be disputed by one familiar with the climate there that, during a considerable period of time, the office would be untenable. It is to be supposed that the parties had in view the necessities of the situation and framed their agreement accordingly. Indeed, it does appear, from the following testimony of defendant, that he construed his covenant as conveying this larger and more reasonable signification: "Mr. Eisner: Q. During what months did you supply heat for that building? Mr. Aronson: A. Any time when it is cold. Q. Any time when it is cold? A. Yes, sir. That is the orders the men have got. We are not stingy with oil. Q. You are accustomed at all times to supply heat? A. Yes, sir." But, as already indicated, the court took a different view of the contract, and it cannot be said that this did not affect the result to the prejudice of plaintiff.

[2] Another ruling of the court in this connection demands consideration. William E. Leland, an expert witness for plaintiff, was asked these questions, "What is the standard temperature of offices that are required to be heated?" and "What is the standard temperature of office buildings?" The court sustained an objection to each, stating, "There is no standard." The agreement was to furnish heat, and that the premises were to be used for offices. The degree of heat was not specified; but it is apparent that the only fair construction of the provision is that plaintiff was to furnish sufficient heat for the contemplated use. It would not do to say that any degree of heat would satisfy the requirement of the contract. It would be equally unreasonable to hold that an excessive amount could be demanded by the tenant. There is also, undoubtedly, a difference in the degree of heat required by different persons to produce comfort, and likewise there is a difference in the requirement for an office and for premises occupied for other purposes. It would seem

that there must be some measure or test to apply to the covenant in question to determine whether it has been observed. It must be the degree of heat generally recognized and approved by the class of persons engaged in that particular business, or, what is probably the same thing, the amount of heat to make him comfortable, required by the average person occupying such a building for a similar purpose. The witness had testified, but the testimony was stricken out, that the standard temperature was about 70 degrees. There would probably be no dissent from this; and unless the court is to take judicial notice of it, as a matter of general notoriety, I think the answer of the witness should have been allowed to stand. Some other interesting questions are discussed by counsel, but it is deemed unnecessary to notice them at this time.

I think the judgment and order should be reversed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

(21 Cal. App. 33)

CITY OF OXNARD v. BELLAH, City Clerk.  
(Civ. 1,237.)

(District Court of Appeal, Second District,  
California. Jan. 17, 1913.)

1. MUNICIPAL CORPORATIONS (§ 918\*)—CREATION OF INDEBTEDNESS—ELECTION—SUBMISSION OF QUESTION.

A proposition which, as stated on the ballot, submitted to the voters of a city the question whether bonds should be issued in a certain sum for the acquisition, construction, and completion of a municipal street lighting system sufficiently submitted the question whether an indebtedness should be incurred for such purpose.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.\*]

2. MUNICIPAL CORPORATIONS (§ 918\*)—BOND ELECTION—VALIDITY.

The statute providing that propositions for incurring indebtedness for more than one object may be submitted at the same election permits the submission of various propositions, though the ordinances in relation thereto be passed at different times; and hence a city bond election was not invalid because called by separate ordinances, even though a single ordinance might have embodied all the propositions submitted.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.\*]

3. MUNICIPAL CORPORATIONS (§ 918\*)—ORDINANCE CALLING BOND ELECTION—SUFFICIENCY.

A city ordinance calling a bond election and providing that the ballots should contain the provision relative to incurring the indebtedness, and that connected therewith should be printed the words "Yes" and "No," sufficiently fixed the manner of voting.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.\*]



#### 4. MUNICIPAL CORPORATIONS (§ 918\*)—ISSUANCE OF BONDS—AMOUNT—ESTIMATE.

It is not essential that municipal bonds issued pursuant to an authorization of the voters, following an ordinance wherein the cost of the proposed improvements is estimated, shall be for the full amount of the estimate, but the bonds may be issued for a lesser amount if the board of trustees are of the opinion that such an amount only is necessary.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.\*]

#### 5. MUNICIPAL CORPORATIONS (§ 927\*)—VARIANCE BETWEEN BONDS AND ORDINANCES.

A city clerk could not refuse to sign municipal bonds because they differed from the bonds described in the preliminary ordinances in respect to the time when the bonds and interest thereon were made payable; it not being necessary or material that such time be specified in the ordinances.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1940; Dec. Dig. § 927.\*]

Original petition for mandamus by the City of Oxnard against G. R. Bellah, as City Clerk. Alternative writ made peremptory.

Chas. F. Blackstock, of Oxnard, and Merle J. Rogers, of Ventura, for petitioner. G. R. Bellah, of Oxnard, in pro. per. I. W. Stewart, of Oxnard, and Hiatt & Selby, of Los Angeles, amici curiæ.

**PER CURIAM.** In mandamus. The alternative writ was issued by this court upon the filing of an affidavit setting forth that the petitioner, a municipal corporation, through its board of trustees, employed certain engineers to assist in making estimates of the cost of a proposed municipal water system for the city; that, after consultation with such engineers, the board of trustees made an estimate that the cost of such proposed water system would amount to \$107,513.76; that thereafter the board, by an ordinance adopted February 6, 1912, determined and declared that the public interest and necessity demanded the acquisition, construction, and completion of such improvement; that the estimated cost of the same is \$107,513.76; that such cost is too great to be paid out of the ordinary annual income and revenue of said city; and that it is the intention of the board of trustees of said city to call a special election for the purpose of submitting to the qualified electors of the city of Oxnard the proposition of incurring a debt in the sum of \$100,000 for the purpose of acquiring, constructing, and completing such municipal waterworks, which ordinance was duly published. Thereafter the board of trustees by resolution called a special election to be held on the 5th day of April, 1912, for the purpose of incurring, on the part of said city of Oxnard, a debt for the purposes set forth in the ordinance above referred to. By section 2 of said resolution it was stated that said proposition, to be voted on at said election, is the following, to wit, the issuing of bonds

of the city of Oxnard in the sum of \$100,000 in accordance with the laws of the state; and further providing for the number and denomination of the bonds and rate of interest they were to bear, and that such interest should be payable semiannually on the 1st day of June and the 1st day of December of each year. On the 13th day of February, 1912, the board of trustees passed another and further ordinance determining that the public interest and necessity demanded the acquisition by said city of a certain other municipal improvement, to wit, the acquisition, construction, and completion of a municipal lighting system, the estimated cost of which is \$31,607.98, which ordinance was duly passed, signed, and published; and an election was to be held in said city of Oxnard on the 5th day of April for the purpose of voting thereat upon the proposition of incurring a debt upon the part of said city for the purpose set forth in said ordinance. By section 2 of said ordinance it was provided that bonds should be issued in the sum of \$30,000, giving the denomination thereof, the rate of interest, and when payable. The substantial form of the bond in each instance was set forth in the ordinance. The ordinance, in relation to the municipal street lighting system, called for an election to be held on the 5th day of April, and provided for the manner in which the votes should be cast, and provided further that said ballots, with respect to said public improvement, should contain the following proposition to be voted on by the voters:

Shall bonds of the city of Oxnard in the sum of \$30,000 be issued for the purpose of the acquisition, construction and completion by said city of Oxnard of a certain municipal improvement, to wit, a municipal street lighting system? * * *	Yes	
	No.	

The proposition, with reference to the vote upon the municipal waterworks system, was in practically the same form. The ordinances further provided that the ballots should be in all respects in accordance with the general election laws of the state of California, in so far as the same apply to a municipal corporation, and that the special election shall be conducted in accordance with the election laws of the state of California, in so far as applicable to municipal corporations. The election officers were duly selected and named, places for voting designated, and notice of said election given. The resolutions, with reference to the two municipal enterprises as to the election, the bonds, and matters connected therewith, were identical. The election, so called, was regularly held, and both propositions were submitted to the voters upon the same day and the same ballot. This pursuant to resolutions of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

board of trustees; and at said election more than two-thirds of the electors voting voted in favor of the issuance of the bonds of both kinds, and a canvass of the vote was regularly held, and such result declared. Thereafter the board of trustees duly adopted an ordinance providing for the issuance of the bonds for said improvements, directing the signing thereof by its officials, the sale thereof, and the publication of the proceeds for the purposes expressed in the general intention; that said city, through its boards, caused to be prepared and presented said bonds, signed by the president and treasurer of said city, as by the ordinances provided, and presented the same to said respondent Bellah, the clerk of said city, with a demand that he countersign said bonds, as by the ordinances theretofore required, which the said clerk fails, declines, and refuses to do. It is further made to appear that the bonded indebtedness is within the limits established for the creation of municipal indebtedness; and provision has been made for the proper sinking fund and the levying of taxes for the payment of said bonds. A writ of mandate is asked directing the city clerk to countersign said bonds that the same may be utilized for the public purposes intended.

Respondent Bellah justifies his action in refusing to countersign said bonds upon the following grounds: First, that the proposition of incurring a debt has not been submitted to the voters; second, that two elections were called, and only one was held; third, that the ordinance calling the election did not fix the manner of voting for or against the debt; fourth, that the ballot prescribed by the ordinance was not used at the election; fifth, that notice was not given as required by section 4459 of the Political Code; and, sixth, that the amount of the bonds differed from the estimate upon which the necessity for the incurring of an indebtedness was based.

[1] We see no merit in the contention that the incurring of a debt has not been submitted to the voters. It is clear that the authority to issue bonds evidencing a debt was submitted, and that the voters directed the issuance thereof, the effect of which would be to create and establish an indebtedness; and it should follow that a proposition to issue bonds evidencing a new and independent indebtedness is a proposition to incur an indebtedness, and comes within the purview of the statute which provides that the proposition of incurring a debt for the purposes set forth in said resolution, and no question other than the incurring of an indebtedness for the purpose, shall be submitted. There is presented no question with relation to the renewal of an existing indebtedness by new evidence, which question was before the court in the case of *City of Los Angeles v. Teed*, 112 Cal. 327, 44 Pac. 580.

[2] The statute provides that propositions

of incurring indebtedness for more than one object or purpose may be submitted at the same election. We think this statute, properly construed, permits the submission of various propositions involving the creation of indebtedness, even though the ordinances in relation thereto be passed at different times, and that the election is not invalidated because of separate ordinances calling the election, even though a single ordinance calling such election might embody all of the propositions to be submitted. We are unable to conceive how any misunderstanding could arise through the call for election by separate ordinances. The proceedings in this case calling the election seem to have been substantially within the statute.

[3] The statute provides that the ordinance calling an election shall fix the manner of voting for or against the proposition submitted. The ordinances under consideration, we think, did provide such manner. They provided that the ballots should contain the proposition relative to incurring the indebtedness, and that connected therewith should be printed the words "Yes" and "No." This is the manner and form provided by the general election laws of the state for the submission of public questions to the electors, and, to our minds, clearly fixing the manner of voting for or against the propositions. There is nothing in the record indicating that there was any material variance between the form of ballot prescribed by the ordinances and the one actually used. The affidavit discloses, without contradiction, that the ordinances were duly and regularly passed. This contemplates a due performance of all acts in the mode and manner provided by law.

[4] The ordinances declared in apt language what was the estimated cost of each improvement. This must be accepted as a declaration and finding that such estimates had been previously made. The law provides no particular manner of fixing estimates. *Clark v. Los Angeles*, 160 Cal. 30, 116 Pac. 722. We do not construe the statute as making it obligatory upon the trustees to issue bonds for the full amount of the estimate. In our opinion, bonds may be issued for a lesser amount, if in the opinion of the board such amount only is necessary for the accomplishment of the purpose.

[5] Finally, it is claimed by respondent that the bonds differed from those described in the ordinances. This difference is only in relation to the time when the bonds and interest thereon are made payable—a matter not material or necessary to be included in the call for election or other preliminary ordinances. It is a matter for determination by the board of trustees, after authority to issue is given. *City of Santa Barbara v. Davis*, 6 Cal. App. 342, 92 Pac. 308.

As a summary, then, we feel constrained to hold that the matters and facts alleged and



established by the affidavit and record evidence such a compliance with the law, in all material respects, as to justify us in holding that the validity of the bonds is established, and that respondent's refusal to countersign was an omission to perform a plain ministerial duty devolving upon him by law.

The alternative writ of mandate is made peremptory.

21 Cal. App. 30

**Ex parte HART. (Cr. 277.)**

(District Court of Appeal, Second District, California. Jan. 16, 1913.)

**1. HABEAS CORPUS (§ 99\*)—JURISDICTION—ADOPTION OF CHILD.**

The Court of Appeal, on habeas corpus by parents to recover the custody of a child claimed to be illegally restrained by respondents, who seek to adopt the child as an abandoned child, has no jurisdiction to determine whether the best interests of the child demand that it be given to petitioner or respondents, but only to determine the right of present custody; the superior court alone having jurisdiction in adoption matters.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84; Dec. Dig. § 99.\*]

**2. ADOPTION (§ 7\*)—CONSENT OF PARENTS—RELINQUISHMENT OF CHILD—"ABANDONMENT."**

A father's relinquishment of a minor child, without the mother joining therein, would not operate as an "abandonment" of the child; Civ. Code, § 224, as amended by St. 1911, p. 899, requiring a relinquishment to be executed by both parents, unless there has been a previous adjudication of adultery or cruelty resulting in divorce—the fact that adultery of the mother was subsequently adjudicated not validating such relinquishment.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 7-10; Dec. Dig. § 7.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 4-13; vol. 8, p. 7559.]

In the matter of the application of Lester Hart for habeas corpus. Writ granted.

Frank C. Dunham, of Pasadena, for petitioners. G. F. McCulloch, of Los Angeles, for respondents.

**PER CURIAM.** The petition for the writ is signed by the father and mother of Lester Hart, an infant, alleging their parentage and the illegal restraint by respondents of said child.

The record discloses these facts: The parents of Lester Hart separated in February, 1912, on the 3d day of which month the father, without the mother joining therein, executed an instrument in writing to the Children's Home Society, through which he attempted, because of his inability to properly provide for and bring up said Lester Hart, to relinquish and abandon to said society his right of custody, services, and earnings of said child, authorizing said society to place said child in a home, at its discretion, and waiving all notice of proceedings in adopting and consenting to adoption. It further appears that before the date of such attempt-

ed relinquishment, to wit, on the 1st day of February, 1912, the husband instituted an action for divorce, charging his wife with adultery; than on the 25th day of April, 1912, an interlocutory decree of divorce was granted, from which no appeal has been taken; that thereafter in June the parents became reconciled and in September resumed their marital relations; that in December following, upon their application, the interlocutory decree of divorce was vacated and the action dismissed, and on the same day the parents remarried. Custody of the child, at a date not appearing, was surrendered by the Children's Home Society to respondents, who, by the return to the writ, claim that under the facts of the case the child was an abandoned child to which the parents had relinquished all right, and that the best interests of the child demand that they be permitted to adopt the same.

[1] In this proceeding this court is not called upon, nor, in our opinion, has it jurisdiction or authority, to hear evidence with reference to the best interests of the child—a matter which might be for consideration before the superior court, which court alone has jurisdiction in matters of adoption. Upon this application the only question for consideration is as to the right of present custody.

[2] We think it clear that under the facts of this case such right of custody is in the parents. The mere relinquishment by the father, without the mother joining therein, could have no effect, except, where there had been a prior adjudication with reference to her adultery, under section 224 of the Civil Code, as amended April 12, 1911. Stats. 1911, p. 899. Here there had been no adjudication, and at the date of the execution of the instrument the mother possessed the right to be heard and to resist any attempt to relinquish parental control of the child to the Children's Home Society. The subsequent adjudication of her previous adultery would not have the effect to destroy that right. The child, then, was in the custody of the Children's Home Society by the sufferance of the father alone, without the mother's consent; and respondents, by assuming custody under authority of the Children's Home Society, acquired no right as against the mother. In *Ex parte Jonie Becknell*, 119 Cal. 496, 51 Pac. 692, it is said by our Supreme Court: "Parents are the natural guardians, and cannot be deprived of their right to the care, custody, society, and services, except by a proceeding to which they are made parties, and in which it is shown that they are unfit or unwilling or unable to perform their parental duties." Further, under section 224 of the Civil Code, a relinquishment, duly signed and acknowledged, must be executed by both parents, unless there has been a previous adjudication of adultery or cruelty, on account of which a divorce has been granted.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

It affirmatively appears that the attempt to abandon by the father had not extended to the period of a year, nor had the society for a year cared for the child and supported it, which questions might arise in proceedings for adoption, but do not arise where, as in this case, no proceedings for adoption have been instituted, and the present custody of the child is alone for consideration.

The writ is granted.

20 Cal. App. 737

**PITZEL v. MAIER BREWING CO.**  
(Civ. 1,167.)

(District Court of Appeal, Second District, California. Dec. 30, 1912. Rehearing Denied by Supreme Court Feb. 28, 1913.)

**1. PLEADING (§ 209\*)—SPECIAL DEMURRER—EFFECT.**

Where a pleading states a good cause of action or a good defense, the effect of sustaining a special demurrer to part thereof is the same as though motion to strike out had been sustained, and hence, in an action to recover over payments on account, claimed to have been made through mistake, sustaining a special demurrer to a counterclaim did not affect the issues framed upon defendant's denials of the allegations of the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 520; Dec. Dig. § 209.\*]

**2. PLEADING (§ 142\*)—SUFFICIENCY OF COUNTERCLAIM.**

In an action to recover money overpaid on account, a counterclaim based on a note secured by deed of trust on real property was insufficient, where it failed to show release of defendant's obligation to foreclose the mortgage in an independent action before pursuing a personal action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 290, 291, 297, 300; Dec. Dig. § 142.\*]

**3. PLEADING (§ 142\*)—SET-OFF AND COUNTERCLAIM—IMPROPER JOINDER.**

A counterclaim setting up claims for goods sold, for rents, and for money lent is demurrable under Code Civ. Proc. § 444, as improperly joining several causes of counterclaim.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 290, 291, 297, 300; Dec. Dig. § 142.\*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Dan Pitzel against the Maier Brewing Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

For opinion of Supreme Court denying rehearing, see 130 Pac. 706.

Mott & Dillon, of Los Angeles, for appellant. C. F. Culver, of Los Angeles, for respondent.

**JAMES, J.** Plaintiff brought this action to recover a large sum of money alleged to have been paid to defendant through mistake. The cause of action as alleged rested upon a certain written contract which in the part most material to the alleged right of recovery referred to the purchase by plain-

tiff from defendant of beer. In this contract it was agreed that beer sold by defendant to plaintiff should be at the prevailing market price, whereas plaintiff alleged that he had paid the sum of \$8 per barrel for the beer, when, in fact, the market price was \$7 per barrel, and that he made settlement at the rate of \$8 per barrel through misapprehension, and because of lack of information as to the market price of beer, which he alleged was peculiarly within the knowledge of defendant. He further set up that, after an open account had been running for some time, on the 1st day of June, 1909, a statement was rendered showing a balance due defendant of \$5,459.05, that settlement thereof was made, and that the whole of the amount of difference between the market price and the price actually paid was the sum of \$6,200. Defendant made answer to the complaint, which contained specific denials of all of the material allegations thereof. As to the market price of beer, plaintiff in his complaint alleged that such market price was the sum of \$7 per barrel and no more, and defendant in its denials denied that the market price was the sum of \$7. Plaintiff by his allegation admitted that the market price was the full sum of \$7 per barrel and the denial of defendant was sufficient to put plaintiff upon proof as to his allegation that the market price was no more than \$7 per barrel. However, after making denials in the form mentioned, defendant alleged that divers settlements had been made between the parties since on or about the 1st day of May, 1907, at which times it had been mutually agreed that the price of \$8 per barrel was the market price of beer, and that settlements were made accordingly. It was also alleged in the answer that plaintiff at the time said accounts were adjusted and settled well knew that the price of \$8 per barrel was the market price of beer. The plea was also made that the statute of limitations had interposed to bar plaintiff's cause of action, and statement of two counterclaims was then made, one for an alleged indebtedness in the sum of \$6,000 which had been secured by a deed of trust, the second being a claim for the sum of \$1,092 for "goods, wares and merchandise sold and delivered to said plaintiff by said defendant, and for rents of the premises described in the contract and lease set forth in the complaint and for sums of money loaned by defendant to plaintiff, and for sums of money advanced and paid by defendant to and for the use and benefit of plaintiff." To this answer plaintiff specially demurred, first, on the ground that the counterclaims were improperly joined and that the several causes of defense and counterclaim were not separately stated, and that the answer was uncertain in that it could not be told when the various alleged accountings had been



made, or what real property was given as security for the deed of trust, or when or in what manner plaintiff became indebted to defendant in the sum of \$1,092. The further grounds of demurrer were made that in neither of the counterclaims was there alleged facts sufficient to constitute a cause of action. The court made a general order sustaining the demurrer, and, defendant failing to amend its answer, judgment was taken against it by default, and this appeal followed.

[1, 2] By the denials contained in the answer of defendant, issue was made of the material facts alleged in plaintiff's complaint, and these issues were so raised by denials which were sufficiently clear and free from ambiguity or uncertainty. The defense that at various times settlements had been made and the market price of beer agreed upon between the parties we think was sufficiently definite and certain; at least, it was as complete in its statement of particulars as the allegations contained in the complaint referring to transactions had between the parties; as to the purchase of beer and settlement made therefor. The grounds of plaintiff's demurrer to the answer were those provided by the Code as special causes of demurrer, and, even though all of such grounds should be held to have been properly taken, still there would remain sufficient in the answer to entitle defendant to require plaintiff to make proof on trial of his allegations. Where a pleading contains sufficient to make a good cause of action or a good defense, the effect of sustaining a special demurrer thereto is no different than that which results where a motion to strike out has been granted. Where such a demurrer is sustained and the party affected fails to amend, then the portions of the pleading so specially demurred to will be taken out of view for the purposes of trial and be deemed to have been stricken out. However, the order sustaining a special demurrer should be specific in pointing out what portions of the pleading are to be affected by it. *Jones v Iverson*, 131 Cal. 101, 63 Pac. 135. The decision in the case of *San Francisco Paving Co. v. Fairfield*, 134 Cal. 220, 66 Pac. 255, cited by respondent, does not in our opinion make any different statement of the law than that contained in the case first cited. We are of the opinion that both of the alleged counterclaims were properly subject to objections raised by the demurrer.

In the first cause of counterclaim it was alleged that plaintiff and his wife executed in favor of defendant their promissory note for the principal sum of \$6,000, payment of which had been secured by a "deed of trust of certain real property in the city of Los Angeles," and which note was past due and had not been paid. By these allegations it appeared that real property had been made

holden as security for the payment of this debt. It was alleged that the form in which security was given was by deed of trust, but the nature of the contract was not set forth. Where real property is charged as security for the payment of a debt, it is so charged ordinarily by a contract of mortgage. Whether the instrument denominated by defendant a "trust deed" conveyed title to a trustee with power of sale, or whether it was such in terms as to require an action of foreclosure to be brought in order to have subjected the security to the discharge of the debt, cannot be told from the allegations of the answer. If the latter action would be required to be resorted to in case of default in payment of the promissory note, then the counterclaim could not be set up in this action. Section 726, Code Civ. Proc. Therefore, in order that facts sufficient to constitute a good cause of counterclaim be set up, it should have been made to appear that the contract of security was such as to relieve the creditor from the obligation of exhausting his security before pursuing a personal action. As the Supreme Court has intimated in the case of *Kraft Co. v. Bryan*, 140 Cal. 73, 73 Pac. 745, even though a contract for security of this nature lacks the essentials of a mortgage, still the engagements of the parties may be such as expressed in the terms of their contract—call it a trust deed or what not—as to entitle the debtor to insist that the creditor shall first resort to the security in obtaining satisfaction of the debt. The demurrer on the general ground to this alleged cause of counterclaim we think should be sustained.

[3] The second alleged counterclaim contained the statement of several causes of counterclaim, one for goods, wares, and merchandise sold, one for rents, and one for money loaned and advanced. These causes should have been separately stated, and that objection was properly raised by the demurrer. Section 444, Code Civ. Proc.

The judgment is reversed, with direction to the trial court to overrule the demurrer to defendant's answer, except as to the alleged causes of counterclaim set up in said answer and as to which to sustain the demurrer of plaintiff.

We concur: ALLEN, P. J.; SHAW, J.

20 Cal. App. 737

PITZEL v. MAIER BREWING CO.  
(L. A. 2,931.)

(Supreme Court of California. Feb. 28, 1913.)

PLEADING (§ 224\*)—SPECIAL DEMURRER—EFFECT OF SUSTAINING.

Treating a special demurrer as being limited to some particular detailed part of an answer as a counterclaim, the answer, also, denying the allegations of the complaint, sus-

tention of the demurrer does not affect the remainder of the answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 568; Dec. Dig. § 224.\*]

On petition for rehearing. Petition denied.

For opinion in District Court of Appeal, see 130 Pac. 705.

**PER CURIAM.** The petition for a hearing in this court after decision by the District Court of Appeal of the Second District (130 Pac. 705), is denied. In denying such petition, we deem it proper to say that we consider the following portion of the opinion, viz.: "Where a pleading contains sufficient to make a good cause of action or a good defense, the effect of sustaining a special demurrer thereto is no different than that which results where a motion to strike out has been granted. Where such a demurrer is sustained, and the party affected fails to amend, then the portions of the pleading so specially demurred to will be taken out of view for the purposes of trial and be deemed to have been stricken out"—correct if the term "special demurrer" be limited to a demurrer to some particular detached portion of the answer, as for instance, if a demurrer be limited to a counterclaim set up in the answer, the answer also denying the allegations of the complaint, the sustaining of the demurrer and failure to amend would not affect the remainder of the answer.

The opinion and judgment show that the term "special demurrer" was used in this limited sense in the opinion.

164 Cal. 718

**NAKAGAWA v. OKAMOTO.** (L. A. 2,805.) (Supreme Court of California. Feb. 19, 1913.)

**1. BILLS AND NOTES (§ 92\*)—CONSIDERATION.**

Where defendant was not a party to an agreement between other members of an association, pursuant to which notes were given to the association binding the parties to pay the notes, if they breached their agreement to deal with a certain market, and did not receive any benefit in consideration of his note, there was no consideration to support it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166-173, 175-212; Dec. Dig. § 92.\*]

**2. BILLS AND NOTES (§ 496\*)—ACTION BY ASSIGNEE—BURDEN OF PROOF.**

The burden is on an assignee suing upon a promissory note to show an assignment to him.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1669-1674; Dec. Dig. § 496.\*]

**3. ASSOCIATIONS (§ 18\*)—AUTHORITY OF OFFICERS.**

That a member of an unincorporated association, who indorsed a note executed to the association, was also its treasurer, would not make the assignment of the note one by the association, especially where he did not sign as such.

[Ed. Note.—For other cases, see Associations, Cent. Dig. §§ 31-35; Dec. Dig. § 18.\*]

**4. ASSOCIATIONS (§ 18\*)—POWERS OF OFFICERS.**

The assignment of a note is not within the usual powers of a treasurer of an unincorporated association.

[Ed. Note.—For other cases, see Associations, Cent. Dig. §§ 31-35; Dec. Dig. § 18.\*]

**5. DAMAGES (§ 85\*)—PENALTY.**

If a provision in a contract is in the nature of a penalty and not liquidated damages, it is not enforceable; only the actual damages sustained being recoverable in case of breach.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 179-181, 183-187; Dec. Dig. § 85.\*]

**6. DAMAGES (§ 77\*)—LIQUIDATED DAMAGES OR PENALTY.**

In determining whether a provision in a contract is for liquidated damages or a penalty, the intention of the parties, as shown by the entire contract construed in view of the circumstances, should be determined.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 156; Dec. Dig. § 77.\*]

**7. DAMAGES (§ 78\*)—CONTRACTS—LIQUIDATED DAMAGES.**

Defendants were members of an unincorporated association known as the "Japanese Farmers' Association" and were engaged in raising produce for sale in the city markets. There were two markets in the city, known as the "Ninth" and "Third" Street Markets, and they executed an agreement by which they should deal only with the Ninth Street Market, the agreement reciting that it was necessary that they work for the success of that market and protect it, and in order to show their good faith, and that none of them might be persuaded to return to the Third Street Market, each of the parties agreed to put up \$500 in promissory notes which should become due in case either of them violated the agreement by returning to the Third Street Market. *Held*, that the provision making the notes due upon breach of the agreement was a penalty and not liquidated damages, so that the notes executed pursuant thereto were not enforceable.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 157-163; Dec. Dig. § 78.\*]

In Bank. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Consolidated action by E. Nakagawa against M. Okamoto; by M. Yamaguchie against F. A. Kasuyama; by K. Akutagawa against U. Abe; and by K. Akutagawa against M. Matsuno. From a judgment for plaintiff in each case, and an order denying a motion for new trial, several defendants appeal. Reversed.

Ingall W. Bull, of Los Angeles, for appellants. Isidore B. Dockweiler and Walter R. Leeds, both of Los Angeles, for respondents.

**ANGELLOTTI, J.** The four actions above specified were tried together, all involving the same questions. The defendant in each action appeals from a judgment given in favor of the plaintiff therein and from an order denying his motion for a new trial. The motions for a new trial in the four cases were heard upon a single statement, and the record on the four appeals is contained in one transcript. The original complaints were in the usual form of a complaint on a promissory note, each alleging substantially: That



on or about July 22, 1909, the defendant executed and delivered to the "Japanese Farmers' Association" his promissory note in the following words, viz.: "Los Angeles, Cal., July 22, 1909. One day after date I promise to pay to the order of Japanese Farmers' Association, five hundred dollars, for value received, with interest at ..... per cent. per ..... from ..... until paid, both principal and interest payable only in United States gold coin, and in case suit is instituted to collect this note, or any portion thereof ..... promise to pay such additional sum as the court may adjudge reasonable as attorneys' fees, in said suit. \$500.00." That no part thereof has been paid. And that prior to the commencement of the action the Japanese Farmers' Association duly transferred and sold said note to plaintiff. The answer in each case, among other things, denied the alleged transfer of the note to the plaintiff therein, and set up as a defense want of consideration. The trial was commenced upon these pleadings.

The evidence developed the fact that the circumstances attendant upon the execution of the notes were substantially as follows: In June, 1909, there were located in the city of Los Angeles two market houses, one known as the Third Street Market and the other as the Ninth Street Market. At that time there was a large number of Japanese farmers engaged in raising garden vegetables to be sold in the markets of said city, many of whom were members of what was called the Japanese Farmers' Association. This body was an unincorporated association, and, so far as the record shows, had no business or purpose defined by any agreement of any kind or character, or any articles of association whatever, was not engaged in business of any kind, and had no property. The president testified that he could not explain "what it is." There is absolutely nothing in the record to indicate what were the duties or powers of any of the officers thereof. Prior to June, 1909, most of the Japanese farmers so associated were doing their individual business and selling their produce at the Third Street Market. In that month they agreed among themselves that they would move to the Ninth Street Market, and discontinue doing business at the Third Street Market, and they so did. Some of them purchased stock of the corporation conducting the Ninth Street Market. After this, while these Japanese were so established at the Ninth Street Market for the sale of their produce, some of them owning stock in the corporation conducting the same, a so-called agreement in writing was signed by some 80 of them, including, according to some of the evidence, three of the defendants. It was stipulated that defendant Matsuno never signed this paper and had no knowledge thereof. The so-called agreement, as shown by an alleged reproduction thereof from the memory of the person who prepared it, entered upon the

minutes of the Japanese Farmers' Association, was as follows: "Agreement. We, the undersigned, since moved to the Ninth Street new market, we must pray for the success of the said market, and it became necessary to provide for the expansion of the said market. Therefore, each of us agrees to protect new market and furthermore in order to show their good faith, not to be persuaded by the Third Street old market under any inducement, each of us hereby agree to put up five hundred dollars in promissory notes, and at the same time it is agreed that in case of violation of the agreement, the note at once become due; and it is understood and agreed that there would be no objection for the members of the association to attach the property. In witness whereof, each of us do hereby sign our names."

The so-called agreement as entered in the minutes was preceded therein by the following preamble: "July 22nd. Since Japanese farmers, Chinese and white farmers moved to the Ninth Street new market the old market is in very lonesome condition. They feel especially in the scarcity of vegetables. They bought up Japanese farmers with money, or bought up farmers by inducing Chinese with money, and attempted to buy with several hundred dollars. We, the Farmers' Association, tried to prevent it, and also in order to prevent it we provided that each member of the association to give a five hundred dollar note payable one day after date, and after each signed an agreement we took the note. The agreement and the note are as follows." The notes in suit were signed by the defendants except Matsuno solely in pursuance of this so-called agreement, and there was no other consideration therefor. So far as Matsuno's note is concerned, there is no basis whatever for any claim that there was a sufficient consideration. Subsequently, in the latter part of August, 1909, each of the defendants, being dissatisfied with the conditions existing at the Ninth Street Market, left the same, and re-established himself for the sale of his produce at the Third Street Market. Thereupon T. Izumi, who testified that he was the treasurer of the Japanese Farmers' Association, indorsed these notes to the respective plaintiffs. The indorsement in the first case, the others being similar in form, was as follows: "Pay to F. Nakagawa, Japanese Farmers' Ass'n. By T. Izumi." Izumi testified substantially that he was never formally directed or authorized to make any such transfer. He said that "the board of directors have nothing to do with the assignments in these cases," and that "there wasn't any meeting about it," and he did not intimate that he had any authority to transfer any property of the association.

At the close of the trial, the plaintiffs were allowed, over the protest of the defendants, to file amended complaints, setting up the so-called agreement, according to their construction of the same, and the notes, together

with the circumstances under which it was claimed the agreement was entered into and the notes were given, and asked for judgment on the notes as specifying the amount of damage agreed upon by the parties for a violation of the agreement. It was stipulated that the allegations of the amended complaints should be deemed denied by the defendants, and that the defendants should have the benefit of the affirmative defenses set up in their original answers. The findings were in favor of the plaintiffs as to everything alleged by them, and against the affirmative defenses set up in the answers.

As might well be expected from a reading of the foregoing, many points are made against the judgment.

[1] It is obvious from what we have said that the judgment in the action against Matsuno is erroneous. As to him, at least, the note given was absolutely without consideration. He was not a party to the so-called agreement, and neither received nor was promised anything of benefit in consideration for his note.

[2-4] As was held by the District Court of Appeal of the Second District in deciding these cases, there was not sufficient evidence to show an assignment to the respective plaintiffs by the "Japanese Farmers' Association" or the members thereof of any of the notes or obligations. Therefore the finding on the issue of assignment in each case should have been in favor of the defendant instead of the plaintiff; the burden of proof being on the plaintiff to show his alleged assignment. The mere fact that the individual member who made the indorsement on each of the notes was the treasurer of the association is not sufficient to sustain a conclusion that there was an assignment, or to shift the burden of proof, as suggested. He did not even sign expressly as treasurer; confessedly he had not been expressly authorized by the association or the governing body thereof to make these particular assignments, there was no showing that under the articles of association or any by-law or resolution the treasurer had any authority to sell or dispose of the assets of the association, or to assign any of its obligations; or even that the articles of association provided for a treasurer; or even, indeed, that there were any articles of association. Nor do we understand, as suggested by learned counsel for plaintiffs, that such assignments are acts within the usual powers of a treasurer.

[5, 6] There was no proof of actual damage to the Japanese Farmers' Association, or any of the members thereof, resulting from the withdrawal of defendants from the Ninth Street Market and their return to the Third Street Market. Judgment for any of the plaintiffs can be sustained only on the theory

that the case is one where the parties have agreed upon the amount of \$500 as the amount of damage that will be sustained by a breach of the so-called agreement, in view of the fact that from the nature of the case it would be impracticable or extremely difficult to fix the actual damage (section 1671, Civ. Code); in other words, that the provision is one for liquidated or stipulated damage, which may be recovered upon a simple showing of breach of the agreement without any showing of damage. "But where it appears that the parties intended the sum named to be a forfeiture or penalty, it has been generally held that the party in whose favor the penalty or forfeiture exists must prove his damage." *Muldoon v. Lynch*, 66 Cal. 540, 6 Pac. 417. If in the nature of a penalty, rather than liquidated damages, it is not an actual debt, and cannot be recovered, but only the real damages which have to be proved. 1 *Sutherland on Damages*, § 283. In determining whether a provision in a contract is for liquidated damage or for a penalty, "the fundamental rule, so often announced, is that the construction of these stipulations depends, in each case, upon the intent of the parties, as evidenced by the entire agreement construed in the light of the circumstances under which it was made." *Id.*

[7] To our minds it is impossible to read the so-called agreement in the light of the circumstances that we have set forth without being convinced that the provisions as to the notes were intended purely by way of penalty or forfeiture, and without any reference to the question of damage. The sole design of these provisions was apparently to furnish a club to be used to prevent any person signing the agreement from returning to the Third Street Market, by making him liable to a penalty or fine of \$500 if he so did, absolutely irrespective of any question of damage. This object is plainly avowed in the preamble on the minutes of the Japanese Farmers' Association, which we have hereinbefore set forth. It is furthermore expressly avowed, in effect, in the agreement itself, and there is nothing in the circumstances shown by the evidence to detract in the slightest degree from the effect of the language used in the writing. In the absence of proof of actual damage, there could therefore be no recovery either on the agreement or on the notes.

In view of our conclusion on the questions already discussed, it is unnecessary to notice any of the many other points made for reversal.

The judgment and order denying a new trial in each of the cases are reversed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.



164 Cal. 724

Ex parte ZANY. (Cr. 1,771.)

(Supreme Court of California. Feb. 19, 1913.)

## 1. HABEAS CORPUS (§ 113\*)—REVIEW.

The Supreme Court has no power to review a determination of the superior court in habeas corpus; the superior court not acting as an inferior court in such proceedings, and not even being bound to follow precedents of the Supreme Court.

[Ed. Note.—For other cases, Habeas Corpus, Cent. Dig. §§ 105–115; Dec. Dig. § 113.\*]

## 2. HABEAS CORPUS (§ 113\*)—REVIEW—TRANSFER FROM DISTRICT COURT OF APPEAL.

The Constitution authorizes District Courts of Appeal to issue writs of habeas corpus within their jurisdictions, and also gives the Supreme Court appellate jurisdiction in all cases and proceedings pending before a District Court of Appeal, which shall be ordered by the Supreme Court to be transferred to it for decision, and further provides that the Supreme Court shall have power to order any cause pending before a District Court of Appeal to be heard by the Supreme Court, and that such order may be made before judgment is rendered by a District Court of Appeal, or within 30 days thereafter; and Penal Code, § 1475, recognizes the right to make an original application to the Supreme Court for a writ of habeas corpus, in case relief is denied by a District Court of Appeal. *Held*, that the Supreme Court could not review a determination of a District Court of Appeal in habeas corpus proceedings; and hence could not review an order denying the writ on transfer from the District Court of Appeal.

[Ed. Note.—For other cases, Habeas Corpus, Cent. Dig. §§ 102–115; Dec. Dig. § 113.\*]

## 3. HABEAS CORPUS (§ 109\*)—PROCEEDINGS—UNANIMOUS AWARD OF COURT.

It is a proper practice of the District Courts of Appeal to remand petitioner for habeas corpus to custody, upon the ground that the justices cannot agree upon his discharge, where they are unable to agree upon the merits of the application.

[Ed. Note.—For other cases, Habeas Corpus, Cent. Dig. §§ 97, 98; Dec. Dig. § 109.\*]

Shaw, J., dissenting.

In Bank. In the matter of the application of Charles Zany for writ of habeas corpus. On application for hearing in the Supreme Court on attempted transfer by the District Court of Appeal after decision in that court (129 Pac. 295) discharging petitioner from custody. Application denied.

Ben. Berry and Gordon A. Stewart, both of Stockton, for petitioner. L. J. Maddux, Dist. Atty., of San Francisco (J. E. Pemberton, of San Francisco, of counsel), for respondent.

ANGELLOTTI, J. An order denying the application for a hearing in this court, after decision by the District Court of Appeal for the Third district discharging the petitioner from custody, was made by this court on January 13, 1913. We deem it proper to say that the order denying the application was made without regard to the merits of the decision of the District Court of Appeal, which we have not considered, and as to which we express no opinion, and solely upon the ground that this court has no such power

of transfer in habeas corpus proceedings.

Such has been our ruling as to all such applications heretofore made; there having been several such applications since the establishment of our District Courts of Appeal. The court however, has never heretofore stated in writing the ground upon which such denials were ordered.

[1] It has always been the law in this state that the decision of any court in a habeas corpus proceeding, provided the court has jurisdiction, cannot be reviewed by any other court in any way. The right of appeal has never been given, and no other method for such review has ever been provided. We are speaking now without regard to the provisions of our Constitution relative to District Courts of Appeal, which we will consider later. The result has been that, with reference to such proceedings, the Supreme and superior courts, to each of which was given the power to issue writs of habeas corpus, stood upon the same plane; neither being inferior to the other in any other sense than that a superior court, in determining any such matter, would naturally follow a precedent established by the highest court in the state, if any such precedent had been established. It, however, had the power to disregard it; and its determination, whether in accord with the law as laid down by the Supreme Court or not, was an end of the particular proceeding, and in case of a discharge of the petitioner from custody was final and conclusive. Such is still the law with relation to the superior court of the state, as was recently decided by this court in bank; Mr. Justice Shaw writing the opinion. See *In re Hughes*, 159 Cal. 360, 113 Pac. 684. Where a petitioner was remanded to custody by a superior court, and the proceeding instituted in that court was thus terminated, and was no longer a matter *pending therein*, he could inaugurate a *new proceeding* for relief in another court, and can still do so, but is now limited in the making of a new application, by statutory provision, to a higher court; either the District Court of Appeal having jurisdiction, or the Supreme Court. Such was the only remedy afforded by our law to the petitioner when remanded, and, as we have said, a discharge from custody by a superior court was final and conclusive.

[2] When our District Courts of Appeal were established, power was expressly conferred upon them by the Constitution "to issue writs of \* \* \* habeas corpus" within their respective jurisdictions. As was already the situation with reference to Justices of the Supreme Court, each of the Justices of the Court of Appeal was given power to issue such writs returnable "before himself." It is self-evident that by these provisions it was intended to place such courts and the justices thereof in the same position.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

with reference to habeas corpus matters that the Supreme and superior courts were already in. It is not conceivable that it was intended that these appellate courts should have less power than the inferior superior courts in such matters, as would be the case if their determination in habeas corpus proceedings were reviewable by the Supreme Court. As a matter of fact, the power to issue writs of habeas corpus was conferred in practically the same language as is used with reference to superior courts and the Supreme Court; and the language used must be taken as indicating the intention to confer the same power that had already been given to the superior and the Supreme Courts, with all the incidents thereof.

It is by reason of certain other provisions of the Constitution, relative to District Courts of Appeal, that reliance is placed for the claim that the Supreme Court may review a decision of a District Court of Appeal in a habeas corpus proceeding, although it may not review a decision of a superior court in such a matter. The first of these is the provision that the Supreme Court "shall also have appellate jurisdiction in all cases, matters and proceedings pending before a District Court of Appeal which shall be ordered by the Supreme Court to be transferred to itself for hearing and decision as hereinafter provided." It is obvious that it was not the design of this provision to create a right of appeal in any matter, or to give appellate jurisdiction to the Supreme Court in any matter, where no right of appeal was given by some other provision of law. The whole design was simply to give to the Supreme Court the *appellate jurisdiction of the District Court of Appeal* in any case, matter, or proceeding which might be legally transferred from such District Court of Appeal to the Supreme Court. The other provision relied on is the following: "The Supreme Court shall have power \* \* \* to order any cause pending before a District Court of Appeal to be heard and determined by the Supreme Court. The order last mentioned may be made before judgment has been pronounced by a District Court of Appeal, or within thirty days after such judgment shall have become final therein. The judgments of the District Courts of Appeal shall become final therein upon the expiration of thirty days after the same shall have been pronounced." To hold this provision applicable to habeas corpus proceedings would be productive of some peculiar results. As we have already seen, it would render a determination of a superior court in such a proceeding one of greater dignity and more effective than that of a District Court of Appeal, in so far as the possibility of any review by the Supreme Court is concerned. The determination of a superior court would not be so reviewable; while that of a District Court of Appeal could be so reviewed.

Likewise, it would make the decision of a single justice of a District Court of Appeal in such a matter, where he had made the writ returnable before himself, more effective and of greater dignity than the decision of three justices of such court sitting as a *court*. It would, moreover, seriously impair the efficacy of the remedy of habeas corpus, in so far as the District Courts of Appeal are concerned, first, by preventing one who was improperly remanded to custody by such a court from immediately inaugurating a new proceeding in the Supreme Court, and requiring him to remain in custody at least 30 days before the order for a transfer could legally be made by the Supreme Court and the inquiry as to the legality of his custody be commenced by such court; and, second, by preventing any judgment of discharge from being effective as a judgment until the expiration of the time within which such an order of transfer might legally be made by the Supreme Court, viz., 60 days; and this without any provision under which the person found by the District Court of Appeal to be illegally confined could, pending further proceedings, be temporarily released from such custody. It goes without saying that an intention to accomplish any such result, so absolutely at war with the whole purpose and scheme of the remedy by habeas corpus, which was designed to summarily release a person from an unlawful custody, should be most clearly and unequivocally expressed, before this court should declare the law to be so written. In view of what we have said as to the well-settled law relative to habeas corpus proceedings, we feel that it is a reasonable construction of the provision of the Constitution under discussion that it does not include such proceedings. The words "any cause pending" used therein may reasonably be read, in the connection in which they are used, as not intended to include, and as not including, any matter as to which the well-settled law excludes the idea of any right of review, except where there is a lack of jurisdiction. Such clearly is a habeas corpus proceeding. But, at any rate, the power of the Supreme Court to order a transfer is expressly limited to "any cause *pending* before a District Court of Appeal." A habeas corpus proceeding cannot fairly be said to be so "pending" at any time after judgment by such court. Such a proceeding is finally and definitely ended by the judgment; and if the petitioner be ordered discharged thereby he is at once restored to liberty. The constitutional provision should be considered in the light of this well-recognized law, and so considered it appears to us to be a reasonable construction thereof to hold that it does not include habeas corpus proceedings.

[3] Besides uniformly denying such applications for transfer of such matters as have heretofore been made, we have also uniform-



ly, without dissent, immediately entertained original applications for writs on behalf of persons remanded to custody by District Courts of Appeal, made at any time after such remand and within 60 days thereof, which we would have no right to do if the power of transfer existed. It has also been the uniform practice of our District Courts of Appeal in habeas corpus proceedings, where the justices of any such court were unable to agree upon the merits of the application, to remand the petitioner to custody, upon the ground that they are unable to agree upon his discharge; those courts, under the Constitution, having no power to decide any matter except by unanimous vote. This is a practice fully authorized by the views expressed in such cases as *Santa Rosa, etc., Co. v. Central St. Ry. Co.*, 112 Cal. 436, 44 Pac. 733, *Frankel v. Deidesheimer*, 93 Cal. 73, 28 Pac. 794, and *Luco v. De Toro*, 88 Cal. 26, 25 Pac. 983, 11 L. R. A. 543, which practically authorize an affirmance of proceedings below, where the concurrence of the necessary number of justices in any other action cannot be obtained. Such a remand, of course, terminates the proceeding in that court. It may further be said that the Legislature has practically construed the constitutional provision as not including habeas corpus proceedings by recognizing, in section 1475, Penal Code, the right to an original application to the Supreme Court, in the event of a denial of relief by a District Court of Appeal.

No very dire results are to be apprehended from this construction of the constitutional provision. Certainly the situation is no worse by reason thereof than it has been during all the period preceding the establishment of our District Courts of Appeal. If it develops that there is any substantial conflict between decisions of different District Courts of Appeal on any question presented on an application in habeas corpus, consideration of the question can be had by this court on an original application for writ of habeas corpus to this court by the person remanded to custody. The general questions involved in this particular case are already before this court for consideration in a proceeding of another character transferred from the District Court of Appeal of the Second district.

For the reasons stated, we have always heretofore ruled that we have no such power to transfer in habeas corpus proceedings, and we adhere to such conclusion.

We concur: HENSHAW, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.

SHAW, J. (dissenting). A majority of this court has heretofore in several instances tacitly held that the Supreme Court has no power to transfer a case in habeas corpus from a District Court of Appeal to the Su-

preme Court for a rehearing. I have never agreed to such construction of the Constitution. In my opinion, it is directly contrary to the constitutional provisions on the subject. The language conferring the power is so clear and plain that no interpretation is necessary. The District Courts were created by a constitutional amendment adopted in 1904, amending several sections of article 6. Section 4 contains this clause: "The Supreme Court shall have power \* \* \* to order any cause pending before the Supreme Court to be heard and determined by a District Court of Appeal, and to order any cause pending before a District Court of Appeal to be heard and determined by the Supreme Court. The order last mentioned may be made before judgment has been announced by a District Court of Appeal, or within thirty days after such judgment shall have become final therein. The judgments of the District Courts of Appeal shall become final therein upon expiration of thirty days after the same shall have been pronounced. The Supreme Court shall have power to order causes pending before a District Court of Appeal for one district to be transferred to the District Court of Appeal of another district for hearing and determination."

This provision expressly gives the Supreme Court power to transfer *any cause*. This includes cases in habeas corpus as clearly as it includes any other kind of action. The word "cause" includes proceedings in habeas corpus. Bouvier defines the word "cause," when used to refer to judicial proceedings, as: "A suit or action. Any question, civil or criminal, contested before a court of justice." Volume 1, p. 295. See, also, Webster's Dic. and Standard Dic. There are many decisions of like effect. *Taylor v. United States (C. C.)* 45 Fed. 531; *Erwin v. United States (D. C.)* 37 Fed. 470, 2 L. R. A. 229; *In re Farnum*, 51 N. H. 383; *Nacoochee H. M. Co. v. Davis*, 40 Ga. 320; *Bridgton v. Bennett*, 23 Me. 425. The two cases first cited hold that a proceeding to punish a witness for contempt of court is a "cause." In the *Bridgton Case* the court said: "A term more comprehensive could not have been readily selected."

The context of section 4 shows that proceedings in habeas corpus were intended to be included in the term "cause" in the paragraphs above quoted. The first paragraph of the section defines the appellate and original jurisdiction of the Supreme Court. With respect to the latter, it declares that it shall have "power to issue writs of mandamus, certiorari, prohibition and habeas corpus." Following are provisions defining the boundaries of the several districts of the state. Then comes a paragraph defining the original and appellate jurisdiction of the District Courts of Appeal. Their original jurisdiction is declared to include "power to issue writs of mandamus, certiorari, prohibition

and habeas corpus." Then follows the clause first above quoted, giving the Supreme Court power to transfer "any cause" to or from either court. In cases of mandamus, certiorari, and prohibition, begun in the District Court, the Supreme Court has always recognized and has frequently exercised this power of transfer. By the above-quoted clauses the proceeding in habeas corpus is placed in the same category with the classes of cases just mentioned. It seems indisputable that the court must have the same power to transfer in habeas corpus as in the other cases. If a case in one of the classes first named is a "cause," a proceeding in habeas corpus must also be a "cause," within the meaning of the section.

Furthermore, section 24 of the same article, being a part of the same amendment, provides that if the justices of a District Court "are unable to concur in a judgment, they shall give their several opinions in writing and cause copies thereof to be forwarded to the Supreme Court." It does not provide for a transfer to the Supreme Court in such cases. The paragraph of section 4, first quoted, has always been considered to authorize such transfer, and transfers are made accordingly. It was evidently intended to include cases where there was a disagreement in the District Court, as well as other cases, in order to avoid the predicament of absolute inability of the District Court to dispose of the cause, or the imperative necessity, under the reasons given in *Luco v. De Toro*, 88 Cal. 26, 25 Pac. 983, 11 L. R. A. 543, for some of the justices to concur in a judgment which they believe to be erroneous, merely to end the litigation. There is absolutely no good reason for forcing the justices of that court to do this in habeas corpus cases alone, when it can be avoided by allowing section 4 to have the effect which its words express.

The fact that the Supreme Court has heretofore entertained original applications in habeas corpus by persons who have been remanded on a similar application to the District Court, and the fact that the Legislature has recognized its power to do so, is without argumentative force. The power is given by the Constitution. The Legislature can neither take it away nor confer it; nor does legislative sanction strengthen it. A judgment in habeas corpus, refusing to discharge a person in custody on a criminal charge, is no bar to a subsequent writ in any court for the same cause. It is a bar only where there is a discharge, or where two persons are contending for the right to the custody of a third person. 1 Freeman on Judgments, § 324; *Ex parte Perkins*, 2 Cal. 424; *Ex parte Ring*, 28 Cal. 251. This principle gives this court full power to entertain such applications after a judgment of remand in the District Court, and the exercise of this power heretofore has been wholly attributable to this reason, and not to the theory that no

power existed to order a transfer. No application for a transfer to this court from a District Court has ever been made in a case where the right to custody of a third person was in issue, and the District Court had given judgment upon it. Being a former adjudication, there would be no right or power of review in any court, unless this court has power, under section 4, aforesaid, to vacate the decision of the District Court of Appeal and transfer the cause to the Supreme Court for a rehearing. If the power exists in that case, it must exist in all cases.

The argument that the provision should not be given effect to allow transfers from District Courts, because hitherto no appeal has ever been provided in this state from a decision in habeas corpus by a superior court or judge thereof, or by a justice of the Supreme Court, I cannot understand. If the words are unambiguous, as I think must be admitted, and the power of transfer is given thereby, the giving or withholding of the right of appeal from decisions of other tribunals by other statutes or parts of the Constitution has no bearing upon the meaning of this particular part of the Constitution. Such analogies are significant only when there is an ambiguity to clear up. That there should be a right of appeal by the state from the judgment of the superior court discharging a prisoner is shown by the result of the *Hughes Case*, 159 Cal. 360, 113 Pac. 684, where a prisoner in Folsom state prison, regularly convicted and sentenced by the superior court of one county, was released without legal cause by the superior court of another county, and the state was declared to be remediless. Moreover, the Legislature could at any time destroy this argument by providing for an appeal in such cases. The argument amounts to only this: That since a defect in one part of our judicial system has been suffered to continue so long although it has caused some miscarriages of justice, it must be assumed that a constitutional provision designed to avoid a similar defect in the District Court system does not mean what it plainly says, because to give it such effect would make the system different in that respect from any that has heretofore been established. It seems to me that the obvious defect existing as to superior courts furnishes a good reason for avoiding it in the newly created jurisdiction, and for giving the provision that effect, even if it were not clear, but might reasonably be so construed.

The decision defeats to a very large and important extent one of the main objects for which this power of transfer was given. In *People v. Davis*, 147 Cal. 348, 81 Pac. 718, this court declared that the power to transfer was given to make the Supreme Court the court of final decision upon all important questions of law, and to enable it to super-vise the decisions of the several District



Courts of Appeal, in order to secure a uniform rule of decision throughout the state. The proceeding in habeas corpus is resorted to, more than any other form of action, to obtain decisions upon the construction, constitutionality, and effect of penal laws. The result of this decision is that we may have in this state three independent judicial systems, each construing and giving effect to statutes, charters, and the Constitution in their own way and differently from the others, without there being any means of revising or harmonizing their decisions, except upon the chance that some other person may bring a case in the Supreme Court involving the same question. The experience of eight years which have elapsed since the District Courts were created demonstrates that this chance never happens when a decision of the District Court is against the state.

For these reasons, I am of the opinion that the power to transfer exists in cases of proceedings in habeas corpus as fully as in any other kind of action or proceeding; and that to hold otherwise is contrary, not only to the letter, but also to the purposes, of the constitutional provision.

164 Cal. 751

**KERN RIVER CO. v. LOS ANGELES COUNTY.** (L. A. 3,007.)

(Supreme Court of California. Feb. 21, 1913.)

**1. TAXATION (§ 156\*)—CORPORATE FRANCHISES—OCCUPANCY OF HIGHWAYS.**

Right of occupancy of highways by an electric light and power company by its transmission lines is a taxable franchise.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 276; Dec. Dig. 156.\*]

**2. TAXATION (§ 276\*) — CORPORATE FRANCHISES—OCCUPANCY OF HIGHWAYS.**

In assessing an electric company's franchise to use public highways in a county, the requirement under Const. art. 13, § 10, that property be assessed in the district in which it is situated, etc., was substantially complied with by valuing the franchise in each school district according to the number of miles of transmission lines in that district, without reference to the extent of the public highways over which the lines were erected.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 453, 466-468; Dec. Dig. § 276.\*]

**3. TAXATION (§ 458\*)—ASSESSMENT—IRREGULARITIES—EFFECT.**

In the absence of fraud, mere irregularities in a tax assessment do not vitiate it.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 814; Dec. Dig. § 458.\*]

**4. TRIAL (§ 396\*)—FINDINGS—NECESSITY.**

A trial court need make no finding upon an issue raised by the pleadings but not by the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 935-938; Dec. Dig. § 396.\*]

**5. TAXATION (§ 490\*)—EQUALIZATION—CONCLUSIVENESS.**

Action of a board of equalization, in confirming an assessment on the franchise of an electric company to use the public highways of a school district, is void, if the company did

not use any part of the highways in that district.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 872, 873; Dec. Dig. § 490.\*]

Department 2. Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by the Kern River Company against the County of Los Angeles. From part of the judgment, plaintiff appeals. Partly affirmed and partly reversed, with instructions.

Gibson, Dunn & Crutcher, of Los Angeles (Edward E. Bacon, of Los Angeles, of counsel), for appellant. J. D. Fredericks, Dist. Atty., and Hartley Shaw, both of Los Angeles, for respondent.

MELVIN, J. Plaintiff sued, with partial success, to recover certain taxes for the fiscal year 1908-09, which had been paid under protest. This appeal is from that part of the judgment which was adverse to plaintiff.

Plaintiff is a corporation engaged in the business of producing electricity for light and power. From its power plant in Kern county it transmits its product over its lines to a transforming station in the city of Los Angeles, where all of its electricity is delivered to another corporation. No local service is given along the course of its transmission lines.

The tax which was paid under protest was levied upon plaintiff's "franchise to use the public highways of the county of Los Angeles." This franchise to use the highways of the county outside the city of Los Angeles was assessed for the aggregate sum of \$28,900, the total amount being distributed by the assessor among the various school districts through which plaintiff's lines extended in proportion to the mileage in each district, without regard to the actual use of the public highways therein. In Delsur district plaintiff's lines extended entirely over private rights of way, and not a foot of any county road was used. In Elizabeth Lake, Castiac, Newhall, and Vinedale the only use of public highways was in crossing; nine public roads being so used for an aggregate distance of 360 feet. In four other districts (Morningside, Burbank, West Glendale, and Tropic) more than 14 miles of the public roads were occupied longitudinally by plaintiff's power line, yet in the districts wherein the roads were merely crossed for an aggregate distance of 360 feet the assessment was more than twice as much as in the four wherein 14 miles of highways were utilized in part for plaintiff's benefit.

Plaintiff presented its objections to the board of equalization, but that tribunal affirmed the assessment.

[1] Appellant's first point is that its occupancy of the highways of Los Angeles county by its transmission lines is not a franchise, and not assessable as such. In

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

this behalf it calls attention to the fact that it is merely a manufacturer of electric power, which it delivers to a single consumer, and that it does not use its transmission lines for the purpose of collecting tolls. Further, it submits that the assessment of its transmission lines in their entirety should be deemed to include whatever rights of way it possessed in the public roads. In support of this position, Spring Valley Water Works v. Barber, 99 Cal. 36, 33 Pac. 735, 21 L. R. A. 416, is cited. There is, however, a difference between that case and this. In that case, the permission granted by the supervisors of Alameda county to lay pipes along the highways of said county did not authorize the water company to sell water in that county and to collect tolls. "It had a mere right of way in common with all other persons, entirely unconnected with any privilege granted by the county to take tolls, collect water rates, or enjoy any other special prerogative or advantage." In the case at bar the findings show that in 1896 the board of supervisors of Los Angeles county by ordinance granted a franchise to plaintiff's predecessor to construct a line or lines along certain designated highways of Los Angeles county, for the purpose of conducting and distributing electrical energy along said route. The franchise carried with it "the right to collect rates or compensation for the use of electrical energy." It is true that this part of the franchise was not being used at the time of the assessment here attacked, and that was a matter proper for the consideration of the board of equalization in fixing the value of plaintiff's privilege for the purposes of taxation. The mere fact that the right to collect rates was not asserted did not make it valueless, however. Plaintiff's position as a going company, traversing a rich territory, was of some increased value in keeping out possible competitors, in view of the fact that at any time it might have undertaken to supply electricity to the residents along the lines of its transmission system. It possessed an assessable franchise.

[2-4] Appellant's next contention is that the assessor violated the constitutional mandate of section 10 of article 13 in failing to assess the property in the districts in which it was situated. While we must concede that the method followed by the assessor was, to say the least, unscientific, in that he valued the franchise in each school district according to the number of miles of transmission lines in that district, without reference to the extent of the public highways over which said lines were erected, we find that the assessment in each instance purported to be upon the franchise used in a particular school district. This was a substantial compliance with the requirement of the Constitution. In the absence of fraud, mere irregularities in an assessment do not vitiate it. While there were allegations of fraud in the complaint, and denials thereof in the an-

swer, no evidence thereon was introduced, and the court made no finding upon the subject. This did not constitute error. *Kaiser v. Dalto*, 140 Cal. 170, 73 Pac. 828. In the absence of fraud on the part of the assessor, his method of arriving at the valuation of property is a matter committed entirely to his determination. *San Jose Gas Co. v. January*, 57 Cal. 614; *Los Angeles v. Western Union Oil Co.*, 161 Cal. 206, 118 Pac. 720.

[5] Respondent is of the opinion that the case of *Los Angeles Gas & Electric Co. v. County of Los Angeles*, 162 Cal. 165, 121 Pac. 384, is decisive of the problems presented here. In that case, as in this, the public service corporation had appealed to the county board of equalization to correct the alleged inequalities in the assessment of its properties. The board had refused to reduce the assessment, and it was held that in the absence of fraud the action of the board of equalization was absolutely binding upon this court. That case is therefore conclusive against appellant with reference to the assessments made in school districts where there was property in the nature of "franchises to use the public highways of the county of Los Angeles." But we do not think the action of the board of equalization is conclusive with reference to the assessment of such "franchise" in Delsur school district, wherein not one foot of the public roads was utilized by the plaintiff in the operation of its lines. The action of the board of equalization upon a subject not properly within its jurisdiction is not beyond review. Even a body possessing powers so enormous, and in certain instances final jurisdiction, may not validate an assessment upon nonexistent property. Public highways are easements, and when they are enjoyed in part by a public service corporation in a way creating a special privilege, and derogating to that extent from the public servitude, the corporation becomes subject to an assessment for such a franchise as that here sought to be taxed. Where no such use appears within the territory covered by an attempted assessment, obviously there is nothing to assess, and a charge by the assessor would be as much without jurisdiction as his effort to assess property mortgaged to the state, without deduction for the mortgage. In such a case the board of equalization is not the only tribunal to which the taxpayer may apply for relief. *Brenner v. Los Angeles*, 160 Cal. 77, 116 Pac. 397.

That part of the judgment refusing plaintiff's demand for a return of the taxes paid under protest upon the assessment of its "franchise to use the public highways," in that part of Los Angeles county embraced within the territory of Delsur school district is reversed, with instructions to the lower court to enter judgment accordingly. In all other particulars the judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.



(164 Cal. 743)

**DANIELSON et al. v. NEAL.** (L. A. 2,974.)

(Supreme Court of California. Feb. 21, 1913.)

Rehearing Denied March 19, 1913.)

**1. REFORMATION OF INSTRUMENTS (§ 24\*)—ACTION—NECESSITY OF DEMAND.**

A demand by plaintiff that the mistake be corrected is not essential before suing to reform a deed by correcting a mutual mistake therein.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 83; Dec. Dig. § 24.\*]

**2. ACTION (§ 11\*)—CONDITIONS PRECEDENT—DEMAND.**

Where a demand is an essential part of a cause of action, it must be made before the action is brought; but the action itself is the only demand necessary where it is defendant's unconditional duty to perform an act, to compel a performance of which is the object of the action.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 53-75; Dec. Dig. § 11.\*]

**3. REFORMATION OF INSTRUMENTS (§ 36\*)—ALLEGATIONS OF COMPLAINT—MUTUAL MISTAKE.**

A complaint alleged that plaintiff purchased three acres of land from defendant, which were to be bounded on the east by defendant's land, on the south by a railroad right of way, and should be so located as to embrace just three acres, but that, by mutual mistake and oversight, the courses and distances given in the deed fell short of containing three acres, and that the mistake in the amount of acreage arose because the lines and courses were not run at right angles, but were run as stated. *Held*, that the complaint was sufficient as against demurrer and sufficiently alleged a mutual mistake as to the amount of land conveyed.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 141-146; Dec. Dig. § 36.\*]

**4. EQUITY (§ 34\*)—RIGHT TO RELIEF—TRIVIAL MATTERS.**

The fact that the amount of land omitted from a deed by mutual mistake in description was only about  $\frac{1}{27}$  of an acre, valued at \$83, would not prevent plaintiff from obtaining the relief prayed on the ground that equity would treat the discrepancy as too minute to be material.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 98; Dec. Dig. § 34.\*]

**5. REFORMATION OF INSTRUMENTS (§ 23\*) — ACTION—LIMITATION.**

The fact that an error in the description in a deed could have been discovered from the face of the deed did not necessarily charge the grantee with laches in failing to discover it so as to bar a suit for reformation of the deed.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 82; Dec. Dig. § 23.\*]

Department 2. Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Hattie C. Danielson and another against Ann M. Neal. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

Day & Day, of Santa Barbara, for appellants. G. H. Gould, of Santa Barbara, for respondent.

HENSHAW, J. Plaintiffs seek by their action the correction of two deeds made to

them by defendant, the one for three acres of land, the other for one acre of land. The facts touching the first deed sufficiently indicate the character of the mutual mistake which it is alleged existed in the making of both deeds. Those facts are that plaintiff Hattie C. Danielson bought of defendant three acres of land. It is alleged that these three acres were to have a southern frontage of 417.4 feet and "should be bounded on the east by the easterly line of defendant's land and on the south by the Southern Pacific Railroad Company's right of way, and should be so located that the lines should embrace just three acres of land, but that the lines should be in the proportion of two to three, so that two acres should front to the south and the one acre lying back should be just half the width of the other two acres." It is then alleged that by mutual mistake ignorance, and oversight, the courses and distances actually given in the deed fell short of containing three acres; the allegation in this respect being the following: "That the mistake in the amount of acreage as aforesaid, arose from the fact that the distances given in the deed and the length of the boundary lines would, if run at right angles, include the three (3) acres, but the lines and courses were not run at right angles to each other, and not being so run at right angles to each other, decreased the amount of acreage; the north and south lines, instead of running at right angles to the east line, which is a due north and south line with the deflection of only 15', varied from a right angle to said east line 7° and 53' and from the west line of said tract as designated in said deed to the same extent, leaving the southeast angle and the northwest angle obtuse ones 7° and 53' in excess of right angles and the southwest angle and the northeast angle 7° and 53' less than right angles, and by reason of such deflection of lines the east and west lines are brought much nearer together on a measurement on right angles than four hundred and seventeen and four-tenths (417.4) feet, which was intended, but leaves the north and south lines, three hundred and thirteen (313) feet apart as was intended." The deeds so made were dated, one in July, 1906, the other the 21st of November, 1907; but plaintiffs allege that they did not discover the mistake until the 15th day of December, 1910, after survey made by the county surveyor. A demurrer, general and special, was interposed and sustained to the complaint. Judgment followed for defendant, and plaintiffs appeal.

[1] In support of the judgment respondent contends that this action for reformation will not lie without a demand previously made, which demand is not here alleged. There is authority supporting this view, but such is not the rule of decision in this state, nor is it the rule of general adoption.

[2] Wherever a right arises or is dependent

upon demand—in other words, when the demand is an integral part of the cause of action—it must be made before action brought. But when it is an unconditional duty of a defendant to perform a certain act, the suit itself is the only demand necessary. *Gray v. Dougherty*, 25 Cal. 266; *Cox v. Delmas*, 99 Cal. 104, 33 Pac. 836; 9 Cyc. 725. In some cases, no other consequences follow a failure to make demand before suit brought, than that the plaintiff will not be allowed to recover his costs. *Jones v. Petaluma*, 36 Cal. 230; *Heinlen v. Martin*, 53 Cal. 321.

[3] The first deed, after the description of the land, declared that it contained "three acres of land more or less." It is argued from this that the grantor did not intend to convey an exact three acres, and therefore it is apparent that there was no mutuality of mistake. It is quite true, as said in *Commissioners v. Younger*, 29 Cal. 179, that expressions used in such deeds, "about so many acres" or "so many acres more or less," are openly indeterminative and uncertain and show that they are not of the essence of the contract, and that reliance, so far as quantity is concerned, is placed, not upon them, but upon the description by metes and bounds. But this action is for a reformation because of mistake, a part of which mistake was the use of these very words. We think, without elaboration, that the complaint is sufficiently free from ambiguity to pass demurrer.

[4] There was omitted from the deeds about  $\frac{1}{27}$  of an acre. The value of the omitted land, upon the basis of the purchase price, respondent points out is \$83; but we cannot agree with respondent that, because these are the facts, equity will treat the omitted land as a minute discrepancy of no material importance. The price or value of omitted lands is, of course, an element in determining whether or not equity will take cognizance of a suit to recover the omitted portion. *Backus v. Jeffrey*, 47 Mich. 127, 10 N. W. 138. But in a suit for land, it is by no means the all-controlling and determinative consideration. The omitted land may be of great importance to the value of plaintiff's remaining land. It may have a peculiar value, pretium affectionis, in plaintiff's eyes. Many other considerations may enter into the matter, making it of importance to plaintiffs to recover that which is rightfully theirs.

[5] The demurrer that the cause of action is barred by the statute of limitations is not well taken. The argument upon this point is addressed to the fact that the error was patent upon the deed; that the means of discovery were therefore at hand to plaintiffs, and their failure to discover charges them with laches and brings them within the bar of the statute of limitations. But the contrary view is expressed in *Allen v. Reed*, 51 Cal. 362; *Sheils v. Haley*, 61 Cal. 157;

*Breen v. Donnelly*, 74 Cal. 301, 15 Pac. 845; *Stonesifer v. Kilburn*, 122 Cal. 659, 55 Pac. 587; *Hart v. Walton*, 9 Cal. App. 502, 99 Pac. 719.

It is therefore ordered that the judgment is reversed, and the cause remanded; defendant to be permitted to answer to the merits.

We concur: MELVIN, J.; LORIGAN, J.

164 Cal. 696

PEOPLE v. BAUWERAERTS. (Cr. 1,744.) (Supreme Court of California. Feb. 18, 1913.)

1. HOMICIDE (§ 253\*)—EVIDENCE—SUFFICIENCY.

Evidence on a trial for murder in the first degree held sufficient to support a conviction.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 523-532; Dec. Dig. § 253.\*]

2. CRIMINAL LAW (§ 742\*)—QUESTIONS FOR JURY—CREDIBILITY OF WITNESS.

Where on a trial for homicide a witness for the state testified to facts tending to show accused's guilt, while accused attempted to show that such witness was himself the murderer, the credibility and veracity of the witness was for the jury.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1138, 1719-1721; Dec. Dig. § 742.\*]

3. CRIMINAL LAW (§ 738\*)—QUESTIONS FOR JURY—ABSENCE OF MOTIVE.

The absence of motive on the part of a person accused of crime should be considered by the jury in weighing the evidence, but does not establish his innocence as a matter of law, or necessarily raise a reasonable doubt of his guilt.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1705, 1707; Dec. Dig. § 738.\*]

4. CRIMINAL LAW (§ 706\*)—MISCONDUCT OF COUNSEL.

Where a person accused of homicide was evidently unfamiliar with English, especially with legal phrases, and his answers furnished some indication of an intent to evade a direct answer, a repetition by the district attorney of a question on cross-examination whether he had not been convicted of a felony in a foreign country after he had denied such conviction was not misconduct requiring a new trial, although the district attorney had no legal evidence of such conviction.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1661; Dec. Dig. § 706.\*]

In Bank. Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Frank Bauweraerts was convicted of murder in the first degree, and he appeals. Affirmed.

A. Heber Windler and Richard L. North, both of Riverside, for appellant. U. S. Webb, Atty. Gen., and Lyman Evans, Dist. Atty., of Riverside, for the People.

PER CURIAM. The defendant was charged with the murder of one Harriet Guyot, in Riverside county, convicted of murder in the first degree, and sentenced to death. He appeals from the judgment and an order denying his motion for a new trial.



As grounds for a reversal it is claimed by appellant that the evidence is not sufficient to sustain the verdict, and that he was precluded from having a fair and impartial trial through prejudicial misconduct on the part of the district attorney.

[1] The evidence in the case shows that the defendant, a native of Belgium, came to the United States a few years ago, and toward the end of the year 1911 located in Portland, Or. He worked in different capacities in Portland, and during his stay there stopped at a lodging house kept by one Andre Guyot, son of the woman he was convicted of having murdered. All of these parties became quite friendly. About January 1, 1912, the defendant, who claimed to have some knowledge of prospecting and attracted by reports of gold discoveries in Imperial county, this state, induced the deceased, Mrs. Guyot, to furnish the money for a prospecting tour in that locality. The deceased, a woman aged about 59 years, agreed to go with the defendant, and at her request a friend of hers, a Miss Julia Francois of The Dalles, Or., was to accompany them under an arrangement that all should share equally in whatever successes the enterprise attained. All of the parties were natives of Belgium, though unrelated to each other. The defendant was about 37 years of age, and Miss Francois about 19 years of age. Mrs. Guyot furnished \$550 for the necessary expenses of the enterprise, which was about the only money the party had. This she turned over to the defendant, who acted as treasurer of the expedition, paying all the bills, purchasing all the supplies, and retaining control and possession of the money. The party left Portland in January, 1912, and in due time arrived in Brawley, in Imperial county. On investigation it was ascertained that the reports of discovery of gold mines there were without merit, and, after some further investigation, it was determined that the party should go up into the Chuckawalla Mountains in the eastern part of Riverside county, where some prospecting had been done and some mining locations made. Proceeding by train part of the way and the rest by wagon, the party made their permanent camp about 3½ miles from Chuckawalla Springs, which point they reached about February 1, 1912. The locality where their camp was made was a remote, lonesome spot, the surrounding country for miles in every direction being a desolate waste of mountains and desert, visited only by occasional prospectors. The three members of the party occupied a single tent, the women sleeping together in the rear, while the defendant occupied a bed at the entrance of the tent. They prospected for gold in the nearby canyons for about six weeks, but without success, and their supply of money had diminished to about \$117. About the 1st of March, 1912, one M. D. C. Putman, an American, came into the hills, making his camp

about two miles from the camp of the defendant. Putman was a prospector, and had theretofore located mining claims near where he camped, and had come up for the purpose of looking after them. He met the defendant and the women at their camp a day or so after he arrived. All along after the party had left Portland defendant, when occasion called for it, represented the elder woman as his mother and the younger as his wife, himself going under the name of Frank Guyot, and so stated such relationship to Putman. No particular importance, however, is to be attached to these representations; they being doubtless made, as stated by defendant, to avoid possible comment and talk while the party was together. On Friday, March 15, 1912, the defendant, accompanied by the younger woman, came to Putman's camp, and Putman asked the defendant if he could let him have some salt, of which he was in need. Defendant promised to let him have it, and on the following Sunday, March 17th, about 9 o'clock, Putman went over to the camp of defendant and got it. When within a short distance of the camp, he perceived the defendant moving rapidly backwards and forwards carrying sand in a bucket, and scattering it near the tent. When defendant discovered Putman approaching, he called to him to wait, and he would bring him the salt, which he did. He appeared nervous and excited. After handing him the salt, defendant stated he would go to Putman's camp with him, and they both started in that direction. As they proceeded Putman asked defendant how his wife and mother were, and defendant told him that they were down at the dry washer which the defendant had set up about a mile below his camp. This statement surprised Putman, as he had passed the dry washer on his way to defendant's camp, and, assuming that he might be in that vicinity, had called and had got no answer from any one. He further stated that his wife and mother were going over to Chuckawalla Springs the next morning, and there catch a wagon that would take them to the railroad, as his mother was to meet a government engineer in Yuma. Putman testified that his suspicions were aroused from the peculiar action and conduct of the defendant. He had no weapon in his camp of any character, and he knew that defendant was armed. About noon of that day—Sunday—Putman left his camp and took his station on a high hill some distance from the camp of the defendant, and where he could look down upon it. He remained at this point until about 5 o'clock in the afternoon, observing the actions of the defendant. When he first reached his point of observation defendant was engaged with a pick and shovel caving down a bank some 25 feet high a short distance from the tent. After he accomplished this, the defendant then engaged in burning up rags and papers which he brought from the tent at a small furnace located near it.

While so occupied he walked around the tent, looking up and down the wash. When Putman left the hill to return to his own camp, defendant was seated near his tent. At no time during the afternoon did Putman see either of the women about the place. Early the next morning, satisfied that there was something wrong, Putman walked about 12 miles to a camp where two men were working, told them of his suspicions, and tried to get them to come back with him and investigate the disappearance of the two women. They could not do so as they expected visitors that day to their camp, but they loaned Putman a rifle and cartridges. Putman returned to his camp that night and the next morning—Tuesday—started for the camp of the defendant. On the way he stopped at Chuckawalla Springs where he met two men—Heyman and McCarty—with the former of whom he was acquainted. Putman told them of the apparent disappearance of the women and his suspicions, and the three proceeded to the defendant's camp which they found deserted. With a pick and shovel found in the tent Putman and Heyman dug into the gravel that had been caved down from the bank, and, when they had dug about ten inches, struck a blanket, which they ripped open with a penknife, and found that it enveloped a human body. No further investigation was made and the grave was covered up. It was then agreed that Heyman, who had seen the defendant the day before, should go to the railroad station and telegraph the defendant's description in order to secure his arrest. Putman, after investigation for that purpose, found in one of the dry washes the tracks of the defendant leading towards Putman's camp. He followed it that far and found on the table in his tent a note from defendant which the latter had left there Tuesday morning. Subsequently a note was also found in defendant's tent which had been left there by him for Putman. In these notes defendant stated that his wife and mother had left the camp on the Sunday Putman was over there, but that he was too sick to go with them; that he had been over to Chuckawalla Springs the day before (Monday); that he had found no trace of a wagon there, and that he thought the women had followed the wagon train of Putman (the latter had come out in a wagon on a return trip from Brawley with provisions a few days before) or the Palo Verde trail; that he was going to find out which trail they had taken, and, if he did not return in five or six days, to take such provisions from his tent as he could use. Putman took up the trail of the defendant from where it left his camp, and followed it on foot for about 30 miles towards Imperial Junction, to which defendant also on foot was evidently proceeding. Night overtook Putman near Iris, a telegraph station about 10 miles east of Imperial Junction. He proceeded to Iris, and had the operator there telegraph to Imperial Junction to

arrest the defendant for killing his mother and wife. In pursuance of the dispatch the defendant was apprehended on the train as he was about to take it at that place, and Putman that night took the train to Imperial Junction. When arrested, the defendant stated that he was on the way to Yuma to employ men to work his mines. After being informed that he had been arrested at the instigation of Putman, and when the latter came into his presence at Imperial Junction that night, he accused Putman of having killed the women, and compelling him to bury their bodies. After the arrest of the defendant, he made a plat for the officers showing about where the bodies of the women had been buried and where other things had been hidden by him, and the coroner and sheriff, accompanied by Putman and others, went over to the camp of the defendant where they exhumed the bodies of both Mrs. Guyot and Miss Francois. The body of Mrs. Guyot was found buried under a bank about 100 feet from the tent at the spot where Putman, Heyman, and McCarty had discovered it Tuesday morning. The body of Miss Francois was found buried at another spot about 30 feet from the tent. Both bodies were attired in nightgowns. A shawl strap had been buckled and some cordings wrapped about the remains of Mrs. Guyot, and her body was entirely enveloped in a blanket which was held closely in place by hammock cords tied about it. She had been killed by a pistol bullet fired into the base of her brain. Immediately above the spot where the body of Miss Francois was buried a large quantity of ashes were found, the remains evidently of quite a large fire. Her body was also wrapped in a blanket, and in addition a mattress was wrapped around it tightly corded. She had been shot through the right arm and through the head. There was also found buried near the tent two suit cases containing women's clothes, and some women's clothing and a man's overcoat were also found buried. All the bedding used by the women had been buried with their bodies, and in and about the tent were no articles of clothing or effects to indicate that any women had ever occupied it, and fresh sand and gravel had been strewn about the floor inside the tent. It appears further that the defendant on Monday morning, March 18th, went to Chuckawalla Springs, where persons going and coming through the country necessarily stopped for water. He met the witness Heyman there, who with the witness McCarty had reached the wells the day previously about 1 o'clock in the afternoon and were camped there. McCarty was away when the defendant came. Defendant asked Heyman if there had been a light wagon there drawn by two horses, and was told that there had not. Defendant then said that his wife had told him at 1 o'clock Sunday that the wagon had come, and that "they had got ready right away and left." Hey-



man and defendant looked around for possible tracks of a wagon, but found none. Heyman told the defendant that, if he believed the women had become lost, he would aid him in trying to find them, but defendant said they had probably taken another trail, and let the matter rest at that. He remained about an hour, and started back to his camp. There were other circumstances of minor importance tending to show the defendant's guilt which we do not think it necessary to mention.

[2, 3] The facts related in the foregoing statement constitute legal evidence of the defendant's guilt sufficient to justify the verdict. The testimony of the defendant, and his claim prior to the trial, to the effect that Putman was the guilty person, is not entirely credible in itself, and it is in many respects inconsistent with the facts established by the testimony of other witnesses at the trial. The question of Putman's credibility and veracity was for the determination of the jury. They believed Putman, as they had a right to do. The attempt to impeach Putman's reputation for truth resulted in disclosing that, after the homicide and after the defendant's statement that Putman had committed the murder had got abroad in the village of Brawley, the tongues of a few gossips became busy and made a reputation for Putman which he did not have before. The attempt was met by that of a number of witnesses who had known him for many years to the effect that he was a man of good repute and character. The proof does not show any adequate motive for the crime. The absence of motive is a fact favorable to one accused of crime, and is to be considered in weighing the evidence against him. But of itself it does not as matter of law establish innocence or necessarily raise a reasonable doubt of guilt. Its effect is a question for the jury to decide. We find no reasonable ground for the claim that the evidence does not sustain the verdict.

[4] During the cross-examination of the defendant, the district attorney asked this question: "I ask you if you were not in the first tribunal court of Brussels, Kingdom of Belgium, on or about the 26th of February, 1904, convicted of a felony, embezzlement?" He answered: "No, sir." Afterwards he was recalled by his counsel for further examination, and thereupon the district attorney made a further cross-examination. At the close of this cross-examination he asked leave to renew the above inquiry as to a former conviction, saying that he did not think the witness had understood the question. Leave being given, the defendant was then asked: "Do you know what a felony is?" He answered, "No, sir." The court then, at the district attorney's request, explained to the defendant the meaning of the word "felony." Thereupon the following examination took place: "Q. Were you not in Brussels, Belgium, just a year or so before

you came to Canada, convicted of a felony? A. No, sir; I never noticed it. Q. Were you ever convicted in the criminal court of Brussels, Belgium, sentenced to punishment in the state prison for five years? A. No, sir; by golly, no. I stand right up upon that. Five years? No, sir. Q. Were you not in the criminal courts of Belgium convicted of a felony and sentenced to the state prison? A. No, sir. No. Q. You were not? A. I know nothing about that." The district attorney had received from the commissioner of police in Brussels a letter, the date of which does not appear, stating in substance that the defendant had there been convicted of a felony. The information was filed on March 29, 1912, and the trial was begun on May 21, 1912. No record of the conviction of such felony was introduced or offered in evidence. It is not claimed that there was time within which to obtain such record after the receipt of the letter.

Where the defendant offers himself as a witness, he may be asked, for the purposes of impeachment, if he has not been convicted of a felony. Code Civ. Proc. § 2051; *People v. Johnson*, 57 Cal. 573; *People v. Crowley*, 100 Cal. 482, 35 Pac. 84; *People v. Sears*, 119 Cal. 271, 51 Pac. 325. The defendant's counsel concede this, but they argue that the repetitions of the question in different forms, after the negative answer had been given to the first question, would naturally lead the jury to infer that the district attorney had in his possession some authentic information to the effect that the defendant had been so convicted, and that, therefore, such repetition constituted misconduct prejudicial to the defendant, depriving him of a fair trial. They do not assert that the district attorney intended to produce this belief by the jury, but they claim that it is prejudicial misconduct of itself, regardless of his motive or purpose. The previous examination of the witness, his unfamiliarity with the English language, and the form of the answers to the questions as above given, sufficiently exonerate the district attorney from any charge of an improper purpose. There was no impropriety in the repetition of the question, under the circumstances existing. The defendant, while able to speak fluently, was evidently unfamiliar with English, especially the legal phrases used in a courtroom. The answers furnish some indication of an intent by him to evade a direct answer. The cases from this state, cited by counsel in support of this point, involved questions put by the district attorney tending to elicit incompetent or irrelevant evidence of a character injurious to the defendant. Whether the repetition of a proper question may constitute misconduct in any circumstances, sufficient to call for a reversal, we need not determine. We are satisfied that under the circumstances shown in this case no cause for reversal upon that ground exists.

The claim that the district attorney was guilty of misconduct in exhibiting to the jury, while he was asked the foregoing questions, the letter from the commissioner of police of Brussels, above mentioned, is not sustained by the record. The letter was written in the French language, and it does not appear that it would have conveyed any information to any juror had he seen it. The evidence taken on the hearing of the motion for a new trial on this subject shows that the district attorney did not mention the letter, or show it to the jury, or have it in his hands while asking these questions. In the examination no reference was made to such letter. The affidavits of the jurors state that they knew nothing about the letter, and that it was not referred to during their deliberations. There is also a claim that the district attorney was guilty of misconduct in exhibiting the same letter to a newspaper reporter immediately after the jury was charged and while they were filing out of the courtroom, this being done in close proximity to their line of march. The affidavits of the jurors above referred to show that this exhibition, if it was known to them at all, produced no effect upon them. Counsel's surmise that it may have done so is not worthy of consideration. These are all the points made in support of the appeal. An examination of the record discloses no other objections worthy of mention.

The judgment and order are affirmed.

BEATTY, C. J., does not participate in the foregoing.

(164 Cal. 735)

Ex parte POTTER. (Cr. 1,749, 1,750.)

(Supreme Court of California. Feb. 19, 1913.)

# 1. POISONS (§ 2\*)—SALE—REGULATION—STATUTES.

The state board of pharmacy, empowered by Poison Act (St. 1907, p. 124) § 4, to further restrict or prohibit the retail of any poison by rules "not inconsistent with the laws of this state," and by Pharmacy Act (St. 1905, p. 535) § 7, "to regulate the sale of poisons," may not, in view of St. 1909, p. 1013, amending section 16 of the pharmacy act to provide that certain articles, including "ant poison," may be sold by grocers without restriction, when sold in the original packages, labeled with the official poison labels, prohibit sale of ant poison, except by licensed pharmacists; such acts being in pari materia, and to be harmonized, if possible.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 1; Dec. Dig. § 2.\*]

# 2. POISONS (§ 2\*)—SALE — REGULATION—REPEAL BY IMPLICATION.

The effect of the amendment by St. 1911, p. 1106, of the poison act (St. 1907, p. 124), by provision regulating the sale of opium and other like drugs and poisons, is not to re-enact the poison act as of the date of the amendment, and thus repeal by implication the authority in pharmacy act (St. 1905, p. 535), as amended by St. 1909, p. 1013, for the sale of certain poisons, including ant poison, by grocers; ab-

solute repugnancy between the laws, necessary for repeal by implication, not existing.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 1; Dec. Dig. § 2.\*]

In Bank. Applications by E. S. Potter for writ of habeas corpus prayed to be directed against Charles E. Sebastian, Chief of Police, City of Los Angeles. Petitioner ordered discharged from custody.

See, also, 126 Pac. 1135.

Parker & Moote, of Los Angeles, for petitioner. John D. Fredericks, Dist. Atty., Guy Eddie, City Prosecutor, Frank W. Stafford, Asst. City Prosecutor, and L. H. Roseberry, Special Prosecutor, all of Los Angeles, for respondent.

HENSHAW, J. Petitioner is held under arrest by virtue of two criminal complaints; the one charging him with a violation of the so-called "poison act," the other with a violation of a resolution and regulation prescribed by the state board of pharmacy under and by virtue of certain provisions of the poison act. The legal questions presented under the two applications are intimately related and may be considered together.

The so-called "poison act" is "an act to regulate the sale of poisons in the state of California and providing a penalty for the violation thereof." It was approved March 6, 1907. Stats. 1907, p. 124. It has been amended in 1909 (Stats. 1909, p. 422), and again in 1911 (Stats. 1911, p. 1106). But these amendments do not affect the original act as to any of the legal questions herein to be considered. The poison act enumerated many poisonous, deleterious, and injurious drugs and other substances in a list called "Schedule A." It regulated the sales of the articles in Schedule A, and in section 4 provided: "When in the opinion of the state board of pharmacy, it is in the interest of the public health, they are hereby empowered to further restrict, or prohibit the retail sale of any poison by rules not inconsistent with the provisions of this act, by them to be adopted, and which rules must be applicable to all persons alike. It shall be the duty of the board, upon request, to furnish any dealer with a list of all articles, preparations and compounds, the sale of which is prohibited or regulated by this act." A violation of any of the provisions of the act was declared to be a misdemeanor and an appropriate penalty was prescribed. Standing at the head of the list enumerated in Schedule A is "arsenic, its compounds and preparations."

The pharmacy act—"An act to regulate the practice of pharmacy in the state of California"—was originally adopted in 1905 (Stats. 1905, p. 535). It declared in section 1: "From and after the passage of this act it shall be unlawful for any person to manufacture, compound, sell, or dispense any drug, poison, medi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
130 P.—46



cine or chemical, or to dispense or compound any prescription of a medical practitioner, unless such person be a registered pharmacist or a registered assistant pharmacist within the meaning of this act, except as hereinafter provided." Amongst the powers conferred upon the board of pharmacy created thereby was the power "to regulate the sale of poisons." In 1909 (Stats. 1909, p. 1013) section 16 of the act was amended. This amendment contained much new matter. Thus it made provision for the board of pharmacy to issue a permit to general dealers in rural districts to sell drugs and ordinary household remedies until such time as "a registered pharmacist shall establish a pharmacy within three miles by the shortest road from the place of business of such general dealer," when no further permit was to be granted. It then provided (and this is the provision bearing upon the questions before the court) that "the following drugs, medicines and chemicals may be sold by grocers and dealers generally without restriction." Then followed an enumeration of many articles, the list concluding with "insect powder, fly paper, ant poison, squirrel poison, and gopher poison, and arsenical poisons used for orchard spraying, when prepared and sold only in original and unbroken packages and labeled with the official poison labels."

The state board of pharmacy adopted a regulation as follows: "Whereas, complaint and knowledge has come to this board that during the year last past not less than two deaths have come to children from Kellogg's Ant Paste (an arsenical preparation); and it appearing to this board that to more fully protect the public health the delivery and sale of this preparation should be more strictly safeguarded, it is hereby resolved by this board: That the sale of this preparation will hereafter be permitted only when said sales are made as required for all sales of arsenic and its preparations (vide Schedule A) and in absolute compliance with sections 1, 2 and 3 of the 'Act to regulate the sale of poisons in the state of California.'" The effect of this resolution, if valid, is to deprive grocers of their right to sell any ant poison which might be an arsenical compound, and to limit the right of sale of such poisons to regular licensed pharmacists.

The laws have thus been set out. The facts are that petitioner is a grocer and was arrested for selling Kellogg's Ant Paste, an ant poison containing arsenic. He bases his right so to do upon the above-quoted provision of section 16 of the pharmacy act, and contends that the regulation of the board of pharmacy, by which he is forbidden so to do, is an illegal effort to deprive him of a right accorded him by positive law. Upon the other hand, respondent contends that the power to regulate the sale of poisons is expressly conferred upon the board of pharmacy, and that, in the exercise of that power,

it is legal to regulate the sale of arsenical compounds and to place the sale of such compounds exclusively under the control of registered pharmacists, under the provisions of sections 1 and 4 of the poison act.

Sections 1, 2, and 3 of the poison act, to which reference is made in the resolution of the board of pharmacy, throw certain precautionary limitations and restrictions around the sale of poisons. A book for the entry of sales is required, with the name, address, and signature of the purchaser, and the quantity of poison sold; a form of label is prescribed which shall bear a skull and crossbones and contain the word "poison"; the name of an antidote, or of suitable common antidotes, shall be printed on the label; and the board of pharmacy shall have power to revise and amend the list of antidotes. But, besides being regulatory in the matter of the vending of poisons, sections 1, 2, and 3 of the poison act are also restrictive. They limit the right to sell to registered pharmacists alone.

[1] It is manifest, from a reading of the pharmacy act and the poison act, that they are statutes in *pari materia*, dealing in many particulars with the same subject-matter, and are to be construed and harmonized, if possible. And, so reading and construing them, the power is expressly conferred upon the board of pharmacy to promulgate "regulations not inconsistent with the laws of this state as may be necessary for the protection of the public" in the sale of poisons. But the very apparent and declared limitation upon the power of the board in this respect is to adopt such regulations as are "not inconsistent with the laws of this state"; and the conclusion cannot be avoided that the regulation here under consideration is in direct conflict with an express law of the state—a law which expressly empowers grocers, such as the defendant, to sell ant poisons "when prepared and sold only in original and unbroken packages and labeled with the official poison labels." For, upon most manifest considerations of public welfare, we construe the phrase last quoted to apply to all poisons permitted to be sold by grocers. Little difficulty would be experienced if the regulations here under consideration went no further than to require grocers and dealers generally to adopt the same measures and precautions exacted of registered pharmacists under sections 1, 2, and 3 of the act. Regulations such as these, in the nature of things, would not be held unreasonable. But the regulation in question unfortunately goes further and, as we have said, bars the grocers and dealers generally from an express right conferred upon them by statute. For, construing these two acts by their terms, they amount to this: That restrictions are cast around the sale of poisons, both as to the persons who may sell and the methods by which the sales may be made. These

sales, generally speaking, may be made only by a registered pharmacist or a registered assistant pharmacist; and the board of pharmacy may make reasonable regulations in addition to those prescribed by the state, and may add to the list contained in Schedule A, of poisonous, deleterious, and injurious substances, any other such as in its view should properly be placed there. But with this limitation, however, that certain designated articles may be sold by grocers and dealers generally, amongst which is ant poison in original and unbroken packages. Indeed, so far as the safety of the public is concerned, if the board of pharmacy had seen fit to impose upon the grocers and dealers the same restrictions and regulations that are or may be imposed upon the registered pharmacists, everything desirable would have been accomplished. The same safeguards and precautions would then attend the sale, whether by pharmacist or grocer; and no one would contend that any greater safety to the public would arise if the original package of poison were handed out by a drug clerk than would attach if it were delivered by a grocery clerk.

Under the view thus expressed, we need not be at pains to follow counsel through their discussion of the law touching the power of the Legislature to delegate its functions, or touching the power of some designated inferior board or tribunal to create or declare a crime. For, having determined that the regulation itself is not one within the power of the board of pharmacy to pass, all other considerations become subordinate and unnecessary. In passing, however, it is proper to say that no doubt, of course, can be entertained of the legislative power to delegate to proper authority the making of suitable rules and regulations for the conduct and transaction of any branch of the business of the state, and for the same legislative power to declare a violation of those rules a penal offense. *United States v. Moody* (D. C.) 164 Fed. 269; *United States v. Grimaud*, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563. What has already been said sufficiently indicates our views and the reasons therefor, to the effect that the poison act itself is not unconstitutional.

[2] In 1911 the poison act was amended by provision regulating the vending of opium and its derivatives, cocaine, chloral hydrate, and other like drugs and poisons. Respondent argues that the legal effect of this amendment is to re-enact the poison act as of the date of the amendment, and thus to repeal by implication the authority in the pharmacy act for the sale of certain poisons by grocers. But this would be carrying the doctrine of repeals by implication to a most extraordinary length, and would do violence to the express terms of the law. Pol. Code, § 325; *Swamp Land, etc., v. Glide*, 112 Cal. 90, 44 Pac. 451. Counsel admit their inability to

furnish authority sustaining the doctrine of such a repeal; and the absence of such authority is a strong argument against the soundness of the doctrine. The law, of course, is that repeals by implication are not favored, and they are declared only where an absolute repugnancy between laws exists. Here no such repugnancy exists, and it is the duty of the court to reconcile rather than to destroy. The harmony between, and the reconciliation of, the terms of the two statutes is abundantly established by treating the authority to the grocers to vend certain poisons as an exception to the general law.

It follows herefrom that the criminal complaints against this defendant charge no crime, and that therefore he is entitled to his liberty.

It is therefore ordered that the petitioner be discharged from custody.

We concur: SHAW, J; SLOSS, J; ANGELLOTTI, J.; MELVIN, J.

164 Cal. 705

#### CAKE v. CITY OF LOS ANGELES.

(L. A. 2,980.)

(Supreme Court of California. Feb. 18, 1913.)

#### 1. MUNICIPAL CORPORATIONS (§ 514\*) — STREET OPENING PROCEEDINGS—STATUTORY REQUIREMENTS—EFFECT.

Even if the requirement under Street Opening Act March 24, 1903 (St. 1903, p. 381) § 19, that "like proceedings" for a new assessment of benefits shall be had as in the case of an original assessment includes the 60-day limit for completion of the assessment provided by section 16, as amended by St. 1909, p. 1040, for original assessments, such provision must be deemed directory and not mandatory.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1207-1215; Dec. Dig. § 514.\*]

#### 2. STATUTES (§ 227\*) — CONSTRUCTION — "SHALL."

The word "shall" when found in a statute will not be deemed to be mandatory, unless the legislative intent that it be so construed is clearly evidenced, by express declaration or by negative words forbidding an act after the time fixed.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 308, 309; Dec. Dig. § 227.\*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6459-6469; vol. 8, p. 7799.]

#### 3. MUNICIPAL CORPORATIONS (§ 514\*) — STREET OPENING ASSESSMENTS—VALIDITY.

An assessment of benefits under Street Opening Act of 1903 (St. 1903, p. 376) is not invalid because made by the board of public works under instructions by the city council; the power to so instruct not being lost by sustaining objections to the original assessment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1207-1215; Dec. Dig. § 514.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 493\*) — STREET OPENING ASSESSMENT—CONCLUSIVE-NESS.

An assessment of benefits, under Street Opening Act of 1903 (St. 1903, p. 376), con-



firmed by the city council is conclusive in the absence of fraud in the assessment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1091-1093, 1160-1165; Dec. Dig. § 493.\*]

**5. MUNICIPAL CORPORATIONS (§ 524\*) — STREET OPENING ASSESSMENTS—PENALTY FOR DELINQUENCY—COMPUTATION.**

The 5 per cent. penalty on a delinquent street opening assessment, prescribed by Street Opening Act March 24, 1903 (St. 1903, p. 382) § 22, should be based on the total assessment of benefits, and not on the balance remaining after deducting an award of damages for land condemned.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1237; Dec. Dig. § 524.\*]

Department 2. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Mary E. Cake against the City of Los Angeles. Judgment for defendant, and plaintiff appeals. Affirmed.

Hester, Merrill & Craig, of Los Angeles, for appellant. John W. Shenk, City Atty., and E. R. Young, Asst. City Atty., both of Los Angeles, for respondent.

HENSHAW, J. After general demurrer sustained to her complaint, judgment was entered for defendant, and plaintiff appeals upon the judgment roll.

By her complaint she seeks to recover from the city of Los Angeles moneys paid by her under a street assessment, which moneys she alleges were paid by compulsion and under protest. The complaint charges in two counts. In the first, allegations are set forth upon which it is contended the assessment was void. By the second, the illegality of the assessment is not asserted, but it is alleged that plaintiff was compelled to pay a sum greater than that for which she was legally liable.

The facts disclosed by the complaint are the following: The city of Los Angeles, defendant herein, under the Street Opening Act of 1903 (St. 1903, p. 376), undertook to widen one of its streets named Hill street. A portion of one of plaintiff's lots lay within the proposed street as widened, and under condemnation proceedings plaintiff was awarded \$8,475.81 for this land. The street work was done and an assessment upon the land within the district was made and returned by the board of public works. Objections were filed to the assessment, and on May 24, 1910, the committee on streets and boulevards of the city council of the city of Los Angeles recommended that the assessment "be referred back to the board of public works for modification." This recommendation was adopted by the council. The objections to the assessment were then sustained, and the assessment referred to the board of public works. On August 23, 1910, the council by resolution instructed the board of public works to make the new or modified assessment in accord-

ance with a memorandum prepared by its committee on streets and boulevards. In pursuance of such resolution the board of public works, on August 25, 1910, filed with the city clerk of the defendant a new assessment. This new assessment was made in strict conformity with instructions of the city council, and, it is alleged, not in accordance with the free and uninfluenced judgment of the board of public works. Plaintiff was assessed upon three parcels of land, the assessment upon the first being \$8,810.40, the second \$4,360.35, and the third \$438.35. It is alleged that the first two items of assessment were disproportionate to and in excess of the benefits that would be derived from the improvement, and were likewise disproportionate to and in excess of the assessments upon other properties within the assessment district which were of greater value and would receive larger benefits from the improvement. Upon the filing of the new assessment, notice thereof and of the time for filing objections thereto was given in accordance with the requirement of section 18 of the street opening act. Pursuant to notice, objections to the assessments were filed by certain owners of the land, of whom plaintiff was one. The objections were overruled, and the new assessment was confirmed. Afterward, and in accordance with the provisions of the street opening act, the board of public works fixed the 16th day of December, 1910, as the time when all unpaid assessments should be and become delinquent, and fixed the 13th day of January, 1911, as the time when lands subject to the lien of the delinquent assessment should be sold. Under the conviction that the assessment was void plaintiff did not pay the amounts assessed against her lands before the date of delinquency. On January 5, 1911, she commenced proceedings in the superior court to have the proposed sale of her lots enjoined, upon the ground that the assessment was void, and on the 9th day of January moved the court for an order restraining the sale until her action could be heard upon its merits. This motion was on the 9th day of January denied by the court, and the board of public works declared that it would sell plaintiff's property upon the date fixed for sale, unless plaintiff would execute to the board a receipt for the sum of \$8,475.81, awarded to her as the value of her property taken for the purposes of the improvement, and additionally should pay the sum of \$5,824.64. This latter sum was made up of three separate items: First, the sum of \$5,142.24, the difference between the total assessment of \$13,618.10 and the \$8,475.81 award in the condemnation proceedings; second, \$1.50, the cost of advertising the sale; and, third, \$680.90, the amount of the 5 per cent. penalty provided by law, estimated upon the total sum of \$13,618.10. To protect her property from this forced sale, after pro-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

test and under compulsion, plaintiff gave the receipt and paid the full amount demanded. Thereafter and before the commencement of the action plaintiff filed her claim against the defendant in the manner provided therefor by the charter of the defendant, and upon the refusal to allow or pay her claim commenced this action.

[1] 1. Under her first count, charging upon the invalidity of the assessment, appellant contends that the new or second assessment was not returned within the time limited by the law. The proceedings upon an original assessment are prescribed by section 16 of the act as amended in 1909. Stats. 1909, p. 1040. There it is declared that: "The street superintendent, upon receiving the said diagram, shall proceed to assess the total expenses of the proposed improvement upon and against the lands \* \* \* within said assessment district \* \* \* in proportion to the benefits to be derived from said improvement. The street superintendent shall complete said assessment within sixty days after the receipt by him of said diagram; provided, however, that the city council may by order extend the time for the completion of said assessment for a period not exceeding ninety days additional."

Section 19 of the same act further provides: "And said council shall hear all such objections at said meeting or at any other time to which the hearing thereof may be adjourned, and pass upon such assessment, and may confirm, modify or correct said assessment, or may order a new assessment, upon which like proceedings shall be had as in the case of an original assessment; or if there be no objections the council shall, at any regular meeting after the expiration of the time for filing objections, confirm such assessment and the action of the council upon such objections and the assessment shall be final and conclusive in the premises."

It is conceded that the action of the city council upon the protests raised against the original assessment amounted to an order upon the board of public works to prepare a new assessment. Appellant points out that the original assessment is to be completed within 60 days after the receipt by the street superintendent (here, board of public works) of the diagram, or within such extended period not exceeding 90 days' additional time, as the council may award. Further, appellant points out that when a new assessment is ordered, it is declared that upon this "like proceedings shall be had as in the case of an original assessment." Appellant construes this language to limit the time within which the new assessment must be prepared, and as the new assessment was not prepared within 60 days from the date of the order of the council upon the board of public works so to prepare it, and as no extension of time was given by the board of public works for this purpose, the conclusion, appellant argues, is

irresistible that the assessment is void. The conclusion, however, does not necessarily follow. It is at least a reasonable construction of the declaration that "like proceedings shall be had as in the case of an original assessment" to say that it has reference to the new assessment when completed, and that "like proceedings" therefore mean the proceedings that are or may be taken after the return of the new assessment to the council, the appeal, notice of the hearing of the appeal, the determination thereof, and the like. But aside from this, and in full recognition of the fact that the proceedings for the improvement of streets are proceedings in invitum, we are of the opinion that, even if it be held that the time limit is applicable to the new assessment, still the language fixing this time limit is directory and not mandatory.

[2] It is a general rule of construction that the word "shall" when found in a statute is not to be construed to be mandatory, unless the intent of the Legislature that it shall be so construed is unequivocally evidenced. This evidence, found in the statute itself, may be of different kinds. It may be found in a declaration that the word is of mandatory import, as we find in our own Constitution; that its declarations are all mandatory and prohibitory unless the contrary is expressly declared. Const. art. 1, § 22. It may be evidenced by negative words forbidding the doing of the act after the time fixed. Or it may be evidenced by words withdrawing the power to do the act after the time fixed. Or, finally, it may be evidenced by a showing that a right dependent upon the doing of the act within the time fixed is lost or impaired by the nonperformance of that act. *Wheeler v. Chicago*, 24 Ill. 105, 76 Am. Dec. 736; *Pond v. Negus*, 3 Mass. 232, 3 Am. Dec. 131; *In the Matter of Broadway Widening*, 63 Barb. (N. Y.) 579; *Fay v. Wood*, 65 Mich. 390, 32 N. W. 614. A reading of the statute here under consideration discloses that there are no negative words denying the power to return the new assessment after the indicated time; that no undue advantage is gained to the city or to the contractor, and no benefit either to the public or to any individual thereof is impaired or lost by the return of the assessment after the indicated time, and, under these circumstances, in accordance with the rules of construction above announced, it is held that the provision is directory.

[3] Plaintiff's next objection to the validity of the assessment rests upon the allegation of her complaint that it was not made in accordance with the free and uninfluenced judgment of the board of public works, but was made solely under the memorandum of instructions furnished to the board by the city council. If this were true, it would be no ground for overthrowing the assessment. The city council sits as a quasi court of appeal to pass upon the complaints and objections which the interested parties, contrac-



tors, or property owners may make to the assessment. Having found that certain objections are well taken, and, on account of them, having ordered the board of public works to prepare a new assessment, it is not only unobjectionable, but quite commendable, for the council, in so ordering the new assessment, to direct the form which it shall take. It is precisely what a court of appeals is called upon to do in many of the matters which come before it. Thus a court of appeals is enjoined by the laws of this state, in the event that an appeal is deemed well taken and a new trial ordered, to discuss all objections presented upon the appeal, and that may arise in the course of a new trial, to the end that the inferior tribunal may avoid the repetition of error. It does not appear that the city council did more than this in the present instance, and the property owner still had his right of objection and protest to the new assessment when returned to the council.

Appellant's third objection is to the effect that, even if the council had authority to instruct the board upon the manner of making the assessment, it lost jurisdiction in the matter upon May 24th; that is to say, that its authority was lost when it made its order sustaining the objections and ordering the new assessment. We see no force to this objection. The council had heard the objections of the property owners, weighed them, and passed upon them. Nothing in the statute forbids, and no right of a property owner is impaired by the giving of information or instruction upon the subject of the new assessment to the board of public works at any time after the date of sustaining the protest to the original assessment.

[4] Plaintiff's allegation that the assessments upon her two lots were inequitable was a matter upon which she had the right to be heard, and was heard before the council. She makes no charge of fraud in connection with the assessment of her property, and, without such a charge, the determination of the council is final. *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661; *Los Angeles, etc., Co. v. County of Los Angeles*, 162 Cal. 164, 121 Pac. 384.

[5] 2. The second count is based entirely upon the following facts: Plaintiff, having allowed her assessment to become delinquent, became liable for the 5 per cent. penalty, with costs, provided by the law. Street Opening Act, § 22. Plaintiff concedes that she thus became liable for this penalty, but insists that the penalty should be imposed upon the net amount due from her to the city; or, in other words, that it should not be estimated upon the sum of \$13,618.10, but should be estimated upon the difference between that sum and the amount of the award in her favor in the condemnation proceeding. But the answer to this is that

whatever be thought to be plaintiff's equity in this regard, the whole matter is under statutory control, and a reading of the statute discloses that it contemplates that the 5 per cent. delinquency shall be estimated upon the total of the assessment. A reading of sections 22 and 24 of the act discloses that the penalty attaches immediately upon the failure of the property owner to pay within the time limited, and that this penalty, since it thus attaches, is to be estimated upon the total amount of the assessment. The only provision for an offset is found in section 21, which provides that the property owner may demand of the street superintendent that there be offset against the assessment the amount to which he is entitled under any award for his property taken, and the section then proceeds: "Thereupon, if said amount is equal to or greater than such assessments, including any penalties and costs due thereon, the assessments shall be marked 'Paid by offset'; and if the said amount is less than the assessments, and any penalties and costs due thereon, the person demanding such offset shall at the same time pay the difference to the street superintendent in money and the assessment shall on such payment be marked paid, the entry showing what part thereof is paid by offset and what part in money." It is thus made doubly plain that the 5 per cent. penalty was to be imposed upon the total amount of the assessment.

For these reasons the judgment appealed from is affirmed.

We concur: LORIGAN, J.; MELVIN, J.

164 Cal. 712

ANDERSON v. MUTUAL LIFE INS. CO.  
OF NEW YORK. (S. F. 6,093.)

(Supreme Court of California. Feb. 19, 1913.)

1. INSURANCE (§ 175\*) — CONSTRUCTION — COMMENCEMENT OF RISK — "DATE OF THIS POLICY" — "ISSUANCE OF THIS POLICY" — "ISSUANCE."

Insured on May 21, 1908, applied to defendant for insurance, and on June 24, 1908, signed an amended application. A medical examiner's report, dated May 22, 1908, was attached to the first application, and on July 6, 1908, defendant "caused to be executed and issued" the policy sued upon, dated May 22, 1908, and to which a copy of the first application was annexed. Each application provided that "for one year following the date of issue" insured was not to engage in certain occupations without permission, or die by his own act during the year following "said date of issue," and the policy was conditioned to be free from restriction as to occupation "after one year from its date as set forth in the provisions of the application \* \* \* attached hereto," and that the insurer should not be liable in case of suicide within "one year after the issuance of this policy." On May 21, 1909, insured paid the second premium, and on June 12, 1909, committed suicide. *Held*, that the expressions "date of this policy" and "issuance of this policy" were not in ordinary acceptance synonymous, that the word "issuance" standing alone would probably mean ei-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ther the signing (without delivery) of the contract by the insurer's officers or the delivery of a fully written and signed policy, and that from the entire policy, read in the light of the circumstances, the risk commenced May 22, 1908, so that, as insured did not commit suicide within a year, the insurer was liable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 362-371; Dec. Dig. § 175.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1830-1831; vol. 4, pp. 3778-3782; vol. 8, p. 7693.]

**2. INSURANCE (§ 175\*)—COMMENCEMENT OF RISK—ANTEDATED POLICY.**

It is competent for the parties to an insurance policy to agree that it shall be antedated, and thereupon it takes effect by relation from the dating agreed upon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 362-371; Dec. Dig. § 175.\*]

**3. INSURANCE (§ 175\*)—ACTION ON POLICY—PRESUMPTION—COMMENCEMENT OF RISK.**

In the absence of evidence to the contrary, a policy will be presumed to take effect from its date.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 362-371; Dec. Dig. § 175.\*]

**4. INSURANCE (§ 146\*)—CONSTRUCTION—CONSTRUCTION AGAINST INSURER.**

Policies of insurance are to be construed against the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.\*]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Laura A. Anderson against the Mutual Life Insurance Company of New York. Judgment for defendant, and plaintiff appeals. Reversed, with directions to enter judgment for plaintiff.

Bert Schlesinger, of San Francisco, and Guy R. Kennedy, of Chico, for appellant. Chickering & Gregory, of San Francisco, for respondent.

**SLOSS, J.** This is an action based upon a policy of life insurance, insuring the life of Philip M. Anderson, in favor of the plaintiff, his wife, in the sum of \$2,000. Judgment went in favor of the defendant, and the plaintiff appeals therefrom and from an order denying her motion for a new trial.

The material facts are undisputed. The issuance of the policy, the payment of premiums, the death of the insured, the due presentation of proofs, and nonpayment are all conceded. The defense was that the insured died by his own hand, and that thereby the policy was avoided. On May 21, 1908, Philip M. Anderson made a written application to defendant for insurance. The application, as the court finds, was returned by the company to the applicant for amendment, and on the 24th day of June, 1908, Anderson signed a second application. A medical examiner's report, dated May 22, 1908, was attached to the first application. No such report was attached to the second. On July 6, 1908, the defendant "caused to be executed and issued" the policy sued upon. It bore date the 22d day of May, 1908,

and referred to the first application, a copy of which was annexed. The policy recited that it was issued in consideration of a premium of \$44.50, receipt whereof was acknowledged, and the payment of a like sum upon the 22d day of May in succeeding years. Each of the applications contained the following statements: "During the period of one year following the date of issue of the policy of insurance for which application is hereby made, I will not engage in any of the following extra-hazardous occupations or employments: retailing intoxicating liquors, handling electric wires and dynamos, \* \* \* unless written permission is expressly granted by the company. I also state that I will not die by my own act, whether sane or insane, during the period of one year next following said date of issue." Among the conditions of the policy itself were these: "Occupation. This policy is free from any restriction as to military or naval service, and, as to other occupations of the insured, it is free from any restriction after one year from its date as set forth in the provisions of the application endorsed hereon or attached hereto. Suicide. The company shall not be liable hereunder in the event of the insured's death by his own act, whether sane or insane, during the period of one year after the issuance of this policy, as set forth in the provisions of the application endorsed hereon or attached hereto." On or about May 21, 1909, Anderson paid the defendant the second premium upon said policy. On June 12, 1909, he committed suicide. His death consequently occurred less than one year after the day when the policy was in fact signed by the officers of the company, but more than one year after the day designated in the policy as its date.

[1-3] On these facts the single question is whether the insured violated the condition of the policy regarding suicide. More specifically, the issue is defined, with sufficient accuracy, in the following language, taken from respondent's brief: "If the date of the policy determines its issuance, the insured did not commit suicide within one year following the issuance of the policy, and the defendant is liable. If the issuance is a physical fact of execution, independent of the date of the policy, the insured committed suicide within one year after the issuance of the policy, and the defendant is not liable." The court below adopted the latter view.

The contention of the appellant is that the 22d day of May, 1908, was "adopted by both parties" as the day of issuance of the policy, and that the year within which Anderson's death by his own act would avoid the policy commenced to run on that day. We think this position is correct. It must, of course, be admitted, in accordance with the respondent's claims, that the expressions "date of this policy," and "issuance of this policy,"



are not, according to the ordinary acceptance of the terms, synonymous. The word "issuance," as applied to a contract like a policy of insurance, would, if standing alone, probably be taken to mean either the signing (without delivery) of the contract by the authorized officers of the insuring company (Kan. Mut. L. Ins. Co. v. Coalson, 22 Tex. Civ. App. 64, 54 S. W. 388; Stringham v. Mut. Life Ins. Co., 44 Or. 417, 75 Pac. 822), or, perhaps, the act of delivery of a fully written and signed policy (Logsdon v. Supreme Lodge, 34 Wash. 666, 76 Pac. 292; Homestead F. Ins. Co. v. Ison, 110 Va. 18, 65 S. E. 463; Sisk v. Cit. Ins. Co., 16 Ind. App. 565, 45 N. E. 804). But in construing any writing the usual definition of a single word is not a conclusive test of the meaning to be attributed to it in the connection in which it is found. We must endeavor to ascertain, from an examination of the entire instrument, read in the light of the circumstances surrounding its execution, the sense which the parties employed the particular phrase in question.

Here we find that the policy incorporates, as a part of the contract, the application of May 22d. Unquestionably the words "issuance of this policy" in the policy itself were intended to mean the same thing as "date of issue" in the application. The insurer, acting, so far as the record shows, with full knowledge of all the facts, elected to base its policy upon the first application, to date its policy May 22, 1908, the day upon which the medical examination of Anderson had taken place, to make the premiums payable on the 22d day of May of successive years, to make the principal sum payable in the event of death within 20 years from the apparent date of the policy, and to make dividends payable on the 22d day of May of each year. In all these particulars the company expressed its intention to fix the rights of the parties with reference to the 22d day of May in just the same way that these rights would have been fixed if a policy had been actually signed and delivered on that day. It is perfectly competent for the parties to agree that a policy shall be antedated, and, when this is done, the policy takes effect by relation from the date agreed upon. 1 Cooley, Brief on Ins. 831, 844; City of Davenport v. Peoria M. & F. I. Co., 17 Iowa, 276; Lightbody v. N. A. Ins. Co., 23 Wend. (N. Y.) 18; Phil. Life Ins. Co. v. Am. L. & H. Ins. Co., 23 Pa. 65. In the absence of evidence to the contrary, a policy will be presumed to take effect upon its date. 1 Cooley, Ins. 844; Union Ins. Co. v. Am. F. Ins. Co., 107 Cal. 328, 40 Pac. 431, 28 L. R. A. 692, 48 Am. St. Rep. 140. "And, after it has been issued and delivered, it takes effect from the date stated by its terms, and not from the date of delivery." Id.; Gordon v. U. S. Casualty Co. (Tenn. Ch. App.) 54 S. W. 98.

The policy here sued upon, therefore, must

be construed as effecting an insurance upon the life of Anderson for a period beginning May 22, 1908. The day upon which, by the agreement of the parties, the risk attached, may reasonably be taken to be the day which was meant to be designated, in the clause under consideration, as that of the "issuance" of the policy. The company inserted in the policy the various provisions above referred to, securing to itself various benefits which would naturally pertain to an insurance issued on the 22d day of May, rather than one issued at a later time. It thus became entitled to an earlier payment of premiums. It also received payment for insuring the life of Anderson during a period which had already elapsed when the policy was actually signed and delivered. The policy, then, having been written so as to take effect for its main purpose and its principal incidents, as of the 22d day of May, a clause which speaks of the time of "issuance" of the policy is fairly to be taken to refer to that date. The clause in question has been given the construction just indicated in the case of Harrington v. Mut. L. Ins. Co., 21 N. D. 447, 131 N. W. 246, 34 L. R. A. (N. S.) 373, decided by the Supreme Court of North Dakota since the rendition of the judgment here under review. In holding that the period during which suicide would avoid the policy began at the date of the policy, the court used this language: "The company took premiums for that period, fixed the date of the payment of the premiums as of that date, and made no provision in the contract limiting the dating back solely to the payment of the premiums. It is well settled that, where there is any uncertainty in the terms of an insurance policy, the policy will be construed most favorably for the insured, as the language used in the policy is the language of the insuring company." But, beyond these considerations, there is a further ground upon which the plaintiff's right to recover should be sustained.

The clause in the application relative to suicide speaks of a period of one year "next following said date of issue." The expression, "said date of issue," must obviously be referred back to some prior clause in which the term "date of issue" is employed. Such prior clause is the one limiting the right of the insured to engage in certain extrahazardous occupations. In it the application states that "during the period of one year following the date of issuance of the policy \* \* \* I will not engage in any of the following \* \* \* occupations." Clearly the date marking the beginning of the period must be the same in each case. Coming to the policy itself, we find corresponding provisions covering the two subjects of occupation and suicide. The clause of the policy entitled "occupation" states that as to occupations other than military or naval service, the policy is free from any restriction "after one year

from its date as set forth in the provisions of the application endorsed hereon or attached hereto." Here the period during which the insured's choice of occupations is to be limited is plainly declared to commence at the date of the policy, and the concluding words ("as set forth in the provisions of the application") afford a clear indication that the period so designated was understood by the framer of the policy (i. e., the defendant) to mean the same period as that described in the application. The clause covering suicide varies the language to "one year after the issuance of this policy," and continues with the same reference "as set forth in the provisions of the application. \* \* \*" Apparently, then, there was no intent in either case to make a provision which should differ from that indicated by the terms of the application. With reference to occupations, the company, in its policy, gave its own interpretation to the phrase "one year following the date of issue," appearing in both clauses of the application, and we see no good reason for believing that any other interpretation was intended to apply to the suicide provision, regarding which the application followed, in terms, the language used in restricting occupations. Reading the various clauses of the policy with those of the application as parts of one contract, it seems clear that the three expressions "date of issue," "date of this policy" and "issuance of this policy," were used interchangeably to express a single point of time.

[4] If this be so, no further argument is needed to establish the conclusion that, under the settled rule that policies of insurance are to be construed against the insurer, the point of time beginning the restricted period of one year must be taken to be the date appearing upon the face of the policy. It follows that, the defendant having failed to establish the only defense relied upon, the plaintiff was, upon the facts found, entitled to recover.

The judgment and the order appealed from are reversed, with directions to the court below to alter its conclusions of law in accordance with the views here expressed, and thereupon to enter judgment in favor of the plaintiff for the amount of the policy, with interest at the legal rate from the time when the loss was payable, together with costs.

We concur: SHAW, J.; ANGELLOTTI, J.

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21 Cal. App. 55

**COUNTY OF SAN LUIS OBISPO v. SMITH et al.** (Civ. 801.)

(District Court of Appeal, Second District, California. Jan. 28, 1913.)

**STATUTES (§ 101\*)—SPECIAL LEGISLATION—SURETY BONDS.**

Act March 25, 1903 (St. 1903, p. 476), to provide for payment by the state, counties, or municipalities of the premium on official bonds when given by surety companies, is not unconstitutional as special legislation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 113; Dec. Dig. § 101.\*]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by the County of San Luis Obispo against Frank H. Smith and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Albert Nelson, of San Luis Obispo, for appellant. Paul M. Gregg, C. P. Kaetzel, and A. E. Campbell, all of San Luis Obispo, for respondents.

**PER CURIAM.** No briefs have been filed herein. It appears, however, by a stipulation filed in this court on July 28, 1910, that the point involved, to wit, the constitutionality of an act of the Legislature of the state of California entitled "An act to provide for the payment by the state, or counties, or cities, or cities and counties, of the premium or charge on official bonds when given by surety companies," approved March 25, 1903 (St. 1903, p. 476), is identical with the question presented in L. A. No. 2,726, entitled County of San Luis Obispo v. P. H. Murphy, 162 Cal. 586, 123 Pac. 808, wherein by an opinion of the Supreme Court filed April 11, 1912, the said act was declared constitutional and valid.

Upon the authority of that case and pursuant to the stipulation of the parties, the judgment herein appealed from is affirmed.

21 Cal. App. 54

**PEOPLE v. SITZ.** (Cr. 267.)

(District Court of Appeal, Second District, California. Jan. 28, 1913.)

**CRIMINAL LAW (§ 1131\*)—APPEAL—DISMISSAL—ESCAPE OF DEFENDANT.**

Defendant pending his appeal from a conviction having escaped from custody, and being at large, appeal will be dismissed, unless he surrenders.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2971-2979, 2985; Dec. Dig. § 1131.\*]

Appeal from Superior Court, Kern County; Paul W. Bennet, Judge.

Bernard C. Sitz was convicted, and appeals. Dismissed conditionally.

Joseph H. Tam, of Bakersfield, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

**PER CURIAM.** Defendant was convicted of the crime of obtaining money under false pretenses; the judgment of the court being that he be imprisoned in the state prison for the term of five years. He appealed from the judgment and an order of court denying his motion for a new trial; and upon the issuance of a writ of probable cause he was remanded to the custody of the sheriff pending the hearing of his appeal. Thereafter, and during the pendency of his appeal, as shown by the affidavit of the sheriff, he escaped from custody, and thence to the hearing of his appeal has remained at large. Upon the authority of *People v. Redinger*, 55 Cal. 290, 36 Am. Rep. 32, and *People v. Elkins*, 122 Cal. 654, 55 Pac. 599, the Attorney General has moved to dismiss the appeal. That defendant escaped from the lawful custody of the sheriff, and is now at large, conclusively appears from the affidavit filed in support of the motion.

The case is identical with those above cited, and upon the authority thereof it is ordered that, unless defendant shall within 30 days from the date of the filing hereof surrender to the custody of the sheriff of Kern county, his appeal herein shall without further order stand dismissed.

20 Cal. App. 782

**ALBION LUMBER CO. v. LOWELL.**  
(Civ. 990.)

(District Court of Appeal, Third District, California. Dec. 31, 1912. Rehearing Denied by Supreme Court March 1, 1913.)

**1. SALES (§ 181\*)—DELAY IN PERFORMANCE BY PURCHASER—EVIDENCE.**

In an action by a purchaser for breach of a contract to furnish ties, evidence held to warrant a finding that a delay of about three months in sending for the ties was beyond plaintiff's control and not unreasonable.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473-491; Dec. Dig. § 181.\*]

**2. FRAUDS, STATUTE OF (§ 118\*)—SIGNATURES BY PARTY CHARGED—SEPARATE MEMORANDUMS.**

A letter written and signed by defendant, asking whether plaintiff had "made any further arrangement in regard to shipping the ties" he had sold him, where there was no other transaction between them, was a sufficient reference to a full memorandum agreement of the sale written and signed by the plaintiff and delivered to defendant; and hence there was a sufficient memorandum, signed by the defendant, to satisfy the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 199, 262-265; Dec. Dig. § 118.\*]

**3. SALES (§ 384\*)—BREACH—"PROXIMATE DAMAGES"—REMOVENESS.**

Where there was a contract of sale of ties, and the seller, by reason of the purchaser's breach, had to make several trips and pay for

an extension of an option on the timber land, expenses for such trips and the payment for the extension could not be recovered as damages, not being "proximate damages" contemplated by Civ. Code, § 3300, stating the measure of damages for a breach of contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098-1107; Dec. Dig. § 384.\*

For other definitions, see Words and Phrases, vol. 6, p. 5769.]

**4. FRAUDS, STATUTE OF (§ 113\*)—STATUTE OF FRAUDS—MEMORANDUM—TIME OF DELIVERY.**

A memorandum of a sale which does not specify the time of delivery satisfies the statute of frauds; a reasonable time being implied.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 239-241; Dec. Dig. § 113.\*]

**5. FRAUDS, STATUTE OF (§ 118\*)—MEMORANDUMS—PAROL EVIDENCE.**

Parol evidence was admissible to show that there was but one transaction between plaintiff and defendant, for the purpose of showing that a letter written by defendant referred to a certain memorandum.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 199, 262-265; Dec. Dig. § 118.\*]

**6. SALES (§ 416\*)—BREACH OF CONTRACT—OPEN MARKET—MARKET PRICE—EVIDENCE.**

In an action by a purchaser of ties for damages for a breach of a contract to sell ties, evidence that the plaintiff had to go into the open market to purchase ties, and as to the market price at the time, was admissible.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1171, 1172; Dec. Dig. § 416.\*]

**7. SALES (§ 181\*)—BREACH OF CONTRACT—EVIDENCE.**

In an action for damages for breach of a contract of sale of ties, where conditions beyond plaintiff's control caused a delay in removing the ties, evidence showing that defendant sold the ties to protect himself upon an option he had on the timber land was immaterial; and the sustaining of objections to its admission was proper.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473-491; Dec. Dig. § 181.\*]

**8. EVIDENCE (§ 448\*)—FRAUDS, STATUTE OF (§ 118\*)—MEMORANDUMS—LETTERS—PAROL EVIDENCE.**

Parol evidence is admissible, under the statute of frauds, to show that ties referred to in a letter written by defendant were those concerned in a sale of which there was a memorandum, but which defendant had not signed; parol evidence which does tend to vary the contract or introduce any new condition being admissible to show the meaning of a writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. § 448.\* Frauds, Statute of, Cent. Dig. §§ 199, 262-265; Dec. Dig. § 118.\*]

**9. APPEAL AND ERROR (§ 1048\*)—HARMLESS ERROR—EVIDENCE—MEANINGLESS ANSWERS.**

A meaningless answer of a witness was not prejudicial, although the question was improper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.\*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by the Albion Lumber Company against A. J. Lowell. Judgment for plaintiff, and defendant appeals. Affirmed.

Rehearing denied in Supreme Court, 130 Pac. 864.

Robt. Duncan and J. C. Ruddock, both of Ukiah, for appellant. Mannon & Mannon, of Ukiah, for respondent.

CHIPMAN, P. J. Plaintiff brings the action to recover for the breach of an alleged contract entered into between plaintiff and defendant November 5, 1908, for the sale and purchase of redwood ties. It is alleged that about March 1, 1909, plaintiff notified defendant of its readiness to receive the ties, but defendant repudiated and refused to carry out said contract. Defendant denies that he entered into any contract with the plaintiff as alleged, or at all. As further answer, That the agreement sued upon is for goods and chattels of value exceeding \$200, and is in violation of the statute of frauds, not having been in writing subscribed by defendant. As a third answer, defendant alleges: That defendant "entered into certain negotiations with one Donald McDonald in reference to said redwood ties, \* \* \* and said McDonald thereupon wrote, in his own handwriting," the following instrument: "Nov. 5, 08. Bot. of A. J. Lowell for the Albion Lumber Co. 35 M to 40 M 6 x 8 x 8 split redwood ties at 34 c. each f. o. b. vessel Westport subject to our inspection when loaded on vessel. Payments to be made in cash to George D. Gray 110 Mkt. St., San Francisco, as fast as these ties are moved. Donald McDonald." That this is the alleged agreement sued upon. That no part of said ties was received or accepted by said McDonald or said plaintiff, nor has any part of the purchase price been paid therefor. That as part of said agreement on the part of the buyer, and as part of the consideration, it was agreed that the buyer "should begin moving and accepting said ties within 10 days or two weeks from said November 5, 1908, at the latest," and so continue until all were accepted and moved by the buyer, and were to be paid for as fast as accepted and moved. That said time of acceptance was "expressly made part of said consideration of purchase, and was a material part of said consideration," and "was expressly made the essence of the contract of purchase." That, through the fault of plaintiff, "said ties were not taken nor accepted nor paid for within said time, nor within a reasonable time thereafter." That thereupon defendant promptly notified plaintiff "that the said defendant refused to sell or deliver the said ties or any part thereof. That any contract, verbal or otherwise, claimed or alleged by said McDonald or plaintiff to have been entered into with reference thereto by the defendant was rescinded by said defendant." For a fourth separate answer, among other things, it is alleged that, "at the time of the agreement on the part of the buyer, said defendant informed said McDonald that it was necessary that said ties should be ac-



cepted and defendant have the money for said ties in the immediate future, in order that said defendant might pay one George D. Gray for certain timber lands," for the purchase of which defendant had a contract from Gray, "and said McDonald then and there agreed that said ties would be taken and paid for in the immediate future," payments to be made to Gray, to which he consented; that plaintiff did not offer to take said ties or pay for them until about March 1, 1909, and said delay was unreasonable, "and defendant thereupon refused to deliver said ties;" that, prior to said offer to take said ties said Gray had notified defendant that "he would no longer deal with plaintiff, and would cancel said option or contract of sale to this defendant, unless said defendant should make some other arrangement for the sale of said ties and payment to said George D. Gray," and that, "by reason thereof and said unreasonable delay on the part of plaintiff and said McDonald, \* \* \* defendant refused to sell or deliver said ties," and so notified plaintiff. Defendant pleaded a set-off or counterclaim, alleging that, by reason of plaintiff's failure to accept and pay for the ties, he "was compelled to and did make two trips from his place of business at Westport to the city of San Francisco," and expended for his necessary expenses on said trips \$100 and "lost 24 days from his other business," and was thereby damaged in the sum of \$240; and that by reason of plaintiff's said failure, "defendant was compelled to and did pay to said George D. Gray the sum of \$500 for an extension of the said option \* \* \* until this defendant could secure the necessary money to pay the said George D. Gray therefor." A general demurrer to this defense was sustained "and motion to strike out matter from said counterclaim granted." Plaintiff's answer to defendant's separate defenses is a denial of the averments.

The court made the following findings: That plaintiff and defendant entered into a contract, on November 5, 1908, by which "defendant agreed to sell to the plaintiff and the plaintiff agreed to buy from defendant 35,000 split redwood ties" upon the terms stated in the agreement set out in defendant's answer, and on said date McDonald, "who was the general manager and duly authorized agent of the plaintiff corporation, having authority so to do, wrote, signed, and delivered to defendant an instrument in writing" (the same as set out in the answer); that "thereafter the defendant duly ratified, acknowledged, and accepted the terms of said contract by several instruments in writing subscribed by him in his own name;" that "the said written instrument contains all the terms of the contract between the plaintiff and defendant." It is further found, that after said memorandum was signed by McDonald and delivered to and accepted by de-

fendant, "further conversation was had between the defendant and the agent of plaintiff as to when plaintiff would receive said ties, but plaintiff did not agree that it would begin moving said ties within ten days or two weeks from said Nov. 5, 1908, or at any specified date; that no time of acceptance was made part of the consideration of said contract, nor was the time of acceptance and payment particularly or expressly, or at all, made the essence of the contract of purchase and sale;" that about March 1, 1909, plaintiff notified defendant of its readiness to receive said ties, but defendant thereupon notified plaintiff that "he would not carry out said contract, and would not deliver said railroad ties, or any part thereof, and then repudiated said contract; that plaintiff was then ready to receive and pay for all said ties in accordance with the terms of the contract hereinbefore set out; that plaintiff offered, within a reasonable time, to accept and pay for said railroad ties, and the consideration for said contract moving to defendant herein did not fail in any respect whatever, and that said contract was never rescinded; that plaintiff never offered to take or pay for said ties until about the 1st day of March, 1909, but that said delay was not unreasonable." It was further found that the price of ties "advanced in value to 40 cents each on board vessel at Westport" after said contract was entered into, and were of that value on March 1, 1909, and for 30 days prior thereto; that, relying on said instrument, plaintiff contracted to sell the ties therein mentioned to a third party, "and by reason of defendant's refusal to deliver said ties plaintiff was compelled to purchase, and did purchase, 35,000 ties of the same quality in the open market, and was compelled to pay therefor at the rate of 40 cents each," and was thereby damaged in the sum of \$2,100. Judgment for that amount was entered in favor of plaintiff. The appeal is from this judgment, and from the order denying defendant's motion for a new trial.

The pleadings and findings of fact present a fairly clear exposition of the various contentions of the parties.

Aside from some alleged errors of law assigned by defendant in the course of the trial, the principal, if not the only point presented by defendant is: That there was no contract or memorandum in writing signed by defendant; and therefore the agreement was invalid.

There was evidence that on November 5, 1908, Lowell met McDonald, whose agency and authority to act for plaintiff in the matter is admitted, for the purpose of selling the ties in question then on the landing at Westport, Mendocino county; that the meeting resulted in McDonald's agreeing to purchase and Lowell agreeing to sell on the terms set forth in the written memorandum signed by McDonald on behalf of plaintiff, as set forth

in defendant's answer; that McDonald gave the original to Lowell, retaining a copy. Present at this meeting was W. P. McFaul, who had a day or two before informed McDonald that Lowell had some ties, and who arranged with McDonald to meet Lowell. McFaul's interest in the sale arose out of the fact that he had an option to purchase certain timber land from George D. Gray, mentioned in said memorandum. Lowell had advanced money to McFaul in carrying on his tie-cutting and lumber operations. The Gray option had expired, and McFaul desired Lowell to take up the matter with Gray for a renewal of the option. Lowell testified: "It was understood between me and Mr. McFaul to sell these ties and apply it on the option and take it over myself. I had advanced some money to McFaul, and had money tied up in this land." McFaul testified: "I am interested in this transaction. My interest is this: Our option [his firm was McFaul & Hess] had expired on the land. Mr. Gray had notified us that we would have to vacate; so our interest was to have Mr. Lowell take up this option, extend the option to us, and give us a chance to get our equity out of the property, which he had agreed to do if he could make arrangements to pay off Mr. Gray. At that time our company was indebted to Mr. Lowell something in the neighborhood of \$7,000." McDonald testified, in speaking of what occurred, that he "did not know at that time whether Mr. McFaul was interested in the ties, or what the situation was. There was nothing said as to what Mr. McFaul's interest in the transaction was. He appeared anxious to have the ties sold; that was all." McDonald testified further that after the terms of the sale had been agreed upon, and the memorandum was signed and given to Lowell, they had a further conversation as to how soon McDonald could send for the ties. He testified: "My recollection is, after we had agreed on the terms of purchase and all that concerned that in their inspection and one thing and another, Mr. Lowell asked me, 'How soon can you have a vessel up there to move them?' 'Well,' I said, 'the Pasadena [the vessel which, it was understood, was to bring out the ties] has got a cargo or two at Albion [a nearby port], and she has got two cargoes from Newport [another neighboring port], and, of course, the weather conditions get bad, and I can't state definitely; but I will do it as soon as I can possibly get a boat up there. Just as soon as I could get the Pasadena up there—that is, my reports I got from her—I could get them moved. As it is, I had other business ahead of that I had to attend to. There was very little conversation between Lowell and myself on the subject. I assured him I would do it as soon as I could, which was my intention to do all the time. No definite time was mentioned by either of us. I could not give a definite time at that time of

year, or any other time of year. I could only do it as I got to it. Q. Was anything said at that time about moving them within ten days or two weeks? A. I would not agree to handle any as soon as that. Q. Was anything said about that? A. I know nothing was said to me about it; if there had been, I would simply have said, 'I can't do it in ten days or two weeks.' The only statement on my part was that I would do it as soon as I possibly could. We expected to shortly begin work with them, move them away." He testified that this was the only transaction for cross-ties he or his company had with Lowell. Later in the day the same parties met with Mr. Gray. Lowell's object in bringing about the meeting was to satisfy Mr. Gray, in order that the McFaul option might be extended. Plaintiff had no interest in this matter, as Lowell had the ties and had the right to sell them, and had already sold them. Gray testified that Lowell made the appointment for the meeting and brought him there; that the object was to satisfy him that he would "receive the cash due for the sale of the ties immediately on delivery of the ties that were receipted by the inspection certificate; and, furthermore, that a vessel would proceed immediately to bring those ties into the market, as I had insisted upon cash from Mr. Lowell." Gray also testified that McDonald said "he could not send a vessel immediately, of course, as the vessel was at the time on the Mendocino coast;" that she had some trips to make; that "as to the moving of the ties he assured me the vessel would go for them within ten days or two weeks." He further testified: "I don't remember that the transaction between Lowell and McDonald was discussed at that time. I saw no paper pass between them." There was much testimony tending to show that the condition of the weather was such, after the Pasadena was at liberty to go for these ties, as to make landing at Westport uncertain and at times dangerous, if not impracticable, during the months of December, January, and February; there was also evidence that in one of her trips she became disabled, and was sent to dry dock for repairs, which consumed about two weeks; that plaintiff had made unsuccessful efforts to reach Westport landing; and that McDonald, acting for plaintiff, had resold the ties, and was anxious to get them out and make delivery. Upon these various phases of the transaction, including the delay on plaintiff's part and its cause, there is a conflict in the evidence; but we think there was sufficient to justify the trial court in making its findings upon them.

[1, 2] Time was not made of the essence of the contract by its terms, and McDonald testified that he made no promise to move the ties at any specified time. Hence plaintiff was allowed a reasonable time to perform. The court found, on sufficient evidence, that the delay resulted from causes beyond plain-



tiff's control, and was not unreasonable. *Salinas Lumber Co. v. Magne-Silica Co.*, 159 Cal. 182, 112 Pac. 1089. Nevertheless, it is urgently contended that defendant is not liable, because, as is claimed, he never, in writing, agreed to the sale. And this brings us to an examination of what further followed the signing of the memorandum by McDonald.

There is a conflict in the evidence as to what he did with the memorandum after signing it. He testified that he gave it to Lowell, retaining a copy. Lowell testified that McDonald handed it to McFaul, who afterwards (he did not remember when) gave it to him. This was the memorandum produced at the trial by defendant. It is, perhaps, not important which received it; for McFaul was there in Lowell's interest, and in a sense acting for him, or at least jointly with him, in bringing about the sale, though not a party to the sale. However, the court accepted McDonald's version, and so must we. The parties separated with the understanding that the memorandum expressed the terms of the sale. On the 20th day of November, 1908, 15 days after the memorandum was in Lowell's hands, he wrote McDonald a letter, in which, among other things, he said: "Have you made any further arrangement in regard to shipping the ties I sold you? My object is that I had ordered some freight from San Francisco and referred shippers to the Bishop Lumber Co. for a vessel to Westport; their answer being that they had no vessel for Westport. This being the case I thought perhaps you had instructed them as to when you would take the ties out." It may be observed that this was after the limit of time for delivery had been reached, according to Lowell's testimony, and yet he makes no mention of it, nor complains of the delay. Upon the point under consideration we are satisfied that Lowell, in his letter of November 20th, referred to the memorandum signed by McDonald, and could have referred to none other, for the reason that this was the only sale of ties made by Lowell to plaintiff or to McDonald. He so testified on his cross-examination. On November 30, 1908, McDonald replied: "\* \* \* I am in receipt of yours of the 20th. In regard to your ties, I have a couple of cargoes to move from Newport, after which I will have the Pasadena move those that I bought from you at Westport, but as those ties are all going to San Pedro, the Pasadena will not call at San Francisco. She will come up from San Pedro direct to Westport. How much freight will you have? If the amount is sufficient to warrant it I could have the boat call into San Francisco. It costs \$125.00 per day to run one of these boats, and you will understand that the loss of time is quite a serious thing." Lowell made no reply to this letter. It was now the end of November, and no complaint had been made of any delay on plaintiff's part.

About the 1st of February McDonald met Gray, and explained to him the causes of the delay in not moving the ties. He testified: "He [Gray] said, 'Of course, those things you cannot help, the only things we have to guard against in transporting lumber and ties on the Mendocino coast,' or words to that effect; he realized those things. After this conversation, I think about the middle of February, I ordered the captain to Albion [near Westport] for orders, with a view of sending him to Westport, if there was a chance to get the boat in there. He came to Albion. It was very rough. I told him to go up the coast now; we had to move those ties. \* \* \* He laid out three or four days and came back to San Francisco without a cargo. It was then I called up Mr. Lowell [by telephone] and told him I expected to get the Pasadena up there. My recollection is I talked to him twice, once about the middle of February; and when I advised him I would be up there for a cargo he told me then he didn't think the deal would go through; that he had heard something from Mr. Gray, and would have to see Mr. Gray first before he could say whether he would deliver me the ties or not. \* \* \* My recollection I called a few days after that, about February 25th; he was at home. He said he had been to San Francisco and had seen Mr. Gray; the whole thing was off; could not have the ties under any conditions. I have no recollection of Mr. Lowell calling me by telephone or writing any letter, or making any other demand to take those ties than what is shown by the letters introduced in evidence." In one of these telephone conversations between McDonald and Lowell, the former offered to advance the latter 75 per cent. on the ties at the landing; but Lowell said that would not hold him, as Gray wanted all his money. It appears from Lowell's testimony that he went to San Francisco in February. He did not see or communicate with McDonald, but did see Gray, who told him he would have nothing more to do with McDonald; whereupon Lowell sold the ties to the Santa Fé Railroad Company for what would have yielded him 40 cents per tie, if he had not been obliged to pay Gray a commission on the sale. On March 3, 1909, McDonald wrote Lowell, notifying him that plaintiff would expect him to make delivery of the ties which he had sold to the Albion Lumber Company on November 5, 1908. Lowell answered March 8, 1909: "Replying to your letter under date of March 3, 1909, relating to the 35,000 to 40,000 split redwood ties your Mr. McDonald agreed to purchase from me on November 5th '08." He then proceeds to state that "this sale was made to cover a certain option which I held from Mr. Gray on timber lands," and to restate what he claimed was the agreement about delivery, and that he had been damaged by the company's failure

to keep its agreement, concluding that he would hold it responsible to him for the damage.

Some point is made by counsel for defendant, in connection with these two letters, that McDonald introduced a new condition to his readiness to pay for the ties, to wit, "less a proper amount for chuteage and inspection," as to which there was no meeting of minds. We attach no particular importance to either of these letters. They were written after Lowell had repudiated the contract originally entered into. Both were claiming damages, and both dealing with a situation which arose after the contract had been repudiated by defendant and his liability, whatever it became, was fixed. The question to be decided is: Did Lowell's letter of November 20, 1908, under the circumstances, amount, in legal contemplation, to a memorandum in writing sufficient to charge him? We entertain no doubt that it had such effect, and that plaintiff had the right to so regard it.

Defendant contends that, under the statute of frauds Lowell could not be charged, except upon a memorandum signed by him containing "every material part of the contract of sale"; and "it must show the names of the parties, the subject-matter of the sale, and the terms and conditions of sale, and must be certain as to all these"—citing *Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. 179; *Brown on Statute of Frauds* (5th Ed.) § 384, and other authorities. It is further claimed that, "if it is sought to establish a memorandum or contract by different papers, the papers must be attached together, or one must clearly refer to another, and they cannot be connected by parol testimony"—citing *Tiedeman on Sales*, § 75.

Turning to the memorandum signed by McDonald, it will be found to lack nothing to charge plaintiff. The mere delivery of the memorandum to Lowell would not bind Lowell; but it is not the law that, before he would be bound, he must himself write and sign a memorandum equally specific. Any communication in writing by Lowell to plaintiff, sufficiently definite to show his acceptance of or acquiescence in the memorandum of purchase signed by plaintiff, or showing that he treated it as an existing obligation of plaintiff and binding on himself, would satisfy the statute. There is nothing in the statute of frauds requiring the signed memorandum of a contract to be contained in a single paper. Two or more papers properly connected may constitute a sufficient memorandum. 20 Cyc. 278; *Brewer v. Horst & Lachmund Co.*, 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240. The evidence very clearly shows that the contract was treated as valid and binding by both parties until the later part of February, 1909, four months after its execution, and it was then disavowed by defendant, not because it was never entered into, but because of plain-

tiff's alleged failure to promptly move the ties.

It remains to notice certain alleged errors of law.

[3] The rule stated by the Code is that for a breach of contract the measure of damages is "the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Civ. Code, § 3300. To be proximate the damages must be such as "next immediately follow and are produced by the act complained of," or, if not proximate, "such as, in the ordinary course of things, would be likely to result therefrom." *Friend & Terry L. Co. v. Miller*, 67 Cal. 464, 8 Pac. 40. The damages claimed (by defendant) could not well have been contemplated by the parties when they entered into the contract. They were not proximate, as proximate damages are above defined; and we do not think they were such as would be likely to result in the ordinary course of things. They were too remote. See *Martin v. Deetz*, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151; *Wallace v. Ah Sam*, 71 Cal. 197, 12 Pac. 46, 60 Am. Rep. 534.

[4] We think the McDonald memorandum of November 5, 1908, was properly admitted in evidence. The objection that it specified no time of delivery is not tenable, for a reasonable time would be implied. Civ. Code, § 1657.

[5] It was not error to show witness McDonald that plaintiff made no other contract for ties with Lowell. The purpose of the evidence doubtless was to show that Lowell's letter of November 20th had reference to the memorandum of November 5th by showing that the parties had no other transaction. We think it would have been in aid of fraud, rather than for its discouragement, to allow defendant to claim that he referred to some other transaction by having the evidence excluded.

The letters dated, respectively, November 20th and 30th were admissible. McDonald's letter of March 3 and defendant's of March 8, 1909, perhaps added nothing material to the case; but they were not prejudicial to defendant.

[6] The plaintiff's testimony that, upon defendant's refusal to deliver the ties, it was compelled to go into the open market to supply them, and the testimony of witnesses to the market price of ties at the times mentioned, was admissible.

[7] We do not think it was material, and hence not error, to sustain objections to questions put, on cross-examination, to McDonald, for the purpose of showing that Lowell was selling the ties to protect himself upon the Gray option. Lowell's relations with Gray did not concern plaintiff, and defendant's motive in selling the ties was not material. Conversations at the time of



making the contract would not be admissible to vary its terms.

Some questions put and answers given, and some rulings occurring in proving market value, may be open to objection; but in the main the questions were proper, and no prejudicial error is discoverable. The motion for nonsuit was rightly denied.

[8] In his cross-examination Lowell was asked what ties he referred to in his letter of November 5th, and, over objection, answered, "I referred to the ties he agreed, to buy from me." The objection is that parol evidence is inadmissible to prove the terms of a contract, under the statute of frauds. The question did not tend to vary the contract or introduce any new condition. In fact, we think the letter was sufficiently definite on its face. If there was doubt as to his meaning the enforcement of the rule against parol evidence would aid rather than discourage fraud. *Beckwith v. Talbot*, 95 U. S. 289, 24 L. Ed. 496.

[9] It is contended that the evidence is insufficient to justify the finding that defendant "fully ratified, acknowledged, and accepted the terms of said contract [the memorandum] by several instruments in writing subscribed by said defendant." The finding is supported if there was one such instrument, and we think defendant's letter of November 5th was sufficient. We very much doubt the right of plaintiff to have made proof of custom or usage in the matter of shipping ties and lumber from along the Mendocino coast as excusing delays in delivery in the manner it was attempted to be done. One witness, in his answer, simply gives his own experience as a shipper on one occasion, which did not tend to establish usage. The only other witness answered: "Well, the custom is a man undertakes to transfer lumber on the Mendocino coast is for his ability to do so, weather conditions, accidents, and other things particularly controlling; that is the custom among all freighters on the coast." The answer is meaningless, and could not have been prejudicial.

We have thus endeavored to notice the questions presented by defendant's brief, and, discovering no prejudicial error in the transcript, the judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

20 Cal. App. 782

ALBION LUMBER CO. v. LOWELL.  
(S. F. 5,906.)

(Supreme Court of California. March 1, 1913.  
Dissenting Opinion, March 4, 1913.)

1. SALES (§ 181\*)—BREACH OF CONTRACT—EVIDENCE—ADMISSIBILITY.

In an action for damages for breach of a contract for the sale of ties, where conditions beyond plaintiff's control caused a delay in his removing the ties, evidence showing that defendant sold the ties at a sacrifice for cash to

get money to save a valuable option he had on the timber land was material, and should have been admitted.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473-491; Dec. Dig. § 181.\*]

2. APPEAL AND ERROR (§ 1048\*)—CURED ERROR—EVIDENCE.

Where the court erroneously sustains objections to questions asked on cross-examination, the error is cured by the witness testifying fully on such points on recross-examination.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.\*]

Beatty, C. J., dissenting in part.

In Bank. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by the Albion Lumber Company against A. J. Lowell. There was a judgment of the District Court of Appeals (130 Pac. 858) affirming a judgment for plaintiff, and defendant applies for a rehearing. Rehearing denied.

Robt. Duncan and J. C. Ruddock, both of Ukiah, for appellant. Mannon & Mannon, of Ukiah, for respondent.

PER CURIAM. [1, 2] In denying a hearing in this court after decision by the District Court of Appeal of the Third District, we deem it proper to say that the following paragraph, viz.:

"We do not think it was material, and hence not error, to sustain objections to questions put, on cross-examination, to McDonald, for the purpose of showing that Lowell was selling the ties to protect himself upon the Gray option. Lowell's relations with Gray did not concern plaintiff, and defendant's motive in selling the ties was not material. Conversations at the time of making the contract would not be admissible to vary its terms,"

—does not contain a correct answer to the claims of error referred to therein. This matter is not urged in the petition for a hearing in this court. We think the lower court erred in its rulings in this matter; but it appears from the record that on recross-examination McDonald testified fully upon the matters which were sought to be elicited by the questions, on cross-examination, referred to.

BEATTY, C. J. (dissenting). I cannot concur in the view of the court that the testimony of McDonald on recross-examination cured the error of the trial judge in sustaining the objection to the questions previously asked, for the purpose of showing that in the course of the negotiation for the sale of the ties he was informed by Lowell that the sale was being made at a sacrifice, for the sole purpose of raising funds essential to the securing of a valuable option. This ruling was sustained by the appellate court, on the ground that "Lowell's relations with Gray did not concern plaintiff, and that defendant's motive in selling the ties was not ma-

terial." It is here conceded that McDonald's knowledge that Lowell was selling the ties at 34 cents cash on delivery, in order to secure funds to meet a pressing obligation to Gray, was competent and material evidence on the question of reasonable time for removing the ties—the controlling question in the case. If so, McDonald's admission, subsequently made, that he did know that Lowell was making the sale in order to pay Gray a debt of some sort, only denying knowledge that it was to *secure an option*, can hardly be supposed to have caused the trial judge, by whom the findings were made, to change his opinion that such testimony could not be considered as having any relevancy to the question of reasonable time.

I think the long delay in sending for the ties, while the defendant was kept waiting for his money, was altogether unreasonable.

**POUCHAN v. GODEAU (Civ. 1,148.)**

(District Court of Appeal, First District, California. Feb. 27, 1913.)

Action by Germain Pouchan against Julius S. Godeau. From a decision in favor of plaintiff, defendant appeals. Order submitting cause for decision set aside, and copies of opinions forwarded to the Supreme Court.

LENNON, P. J. The Justices of this court having given their respective opinions in this cause, and being unable to agree in a judgment therein, the order heretofore made submitting said cause for decision is set aside. It is ordered that the said opinions be filed with the clerk, and that copies thereof be forwarded by him to the Supreme Court.

165 Cal. 24

**McKENDRICK et al. v. WESTERN ZINC MINING CO. et al.**

**In re BARTHELET.**  
(Sac. 1,904.)

(Supreme Court of California. Feb. 27, 1913.  
Rehearing Denied March 24, 1913.)

**1. JUDGMENT (§ 382\*)—VACATION—PERSONS ENTITLED TO MOVE.**

In an action to impose a lien on real property, the executrix of a person purchasing the property pendente lite may appear and move to vacate the judgment against her testator's grantor.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 684, 722, 723; Dec. Dig. § 382.\*]

**2. CORPORATIONS (§ 507\*)—PROCESS—SERVICE—"PERSON."**

Under Code Civ. Proc. § 411, providing that summons must be served on a domestic corporation by delivering a copy to the president or other head of the corporation, secretary, cashier, or managing agent, and section 412, providing that where the person on whom service is to be made resides out of the state, has departed therefrom, cannot be found within the state after due diligence, conceals himself to avoid the service of summons, or is a foreign corporation having no managing or business agent, cashier, or secretary within the state, the court or judge may order service to be made by publication, service may be made by publication on a domestic corporation, all of whose agents and officers upon whom service can be made have departed from the state; a corporation being a "person" and being regarded in such a case as having itself departed from the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1971-2000; Dec. Dig. § 507.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5322-5335; vol. 8, p. 7752.]

**3. PROCESS (§ 96\*)—SUBSTITUTED SERVICE—AFFIDAVITS—SUFFICIENCY.**

Under Code Civ. Proc. § 412, authorizing service by publication on a defendant who resides out of the state, has departed from the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



state, cannot after due diligence be found therein, or conceals himself to avoid service, an affidavit for service by publication, showing that the defendant has departed from the state, need not show that due diligence has been used to find such defendant except for the purpose of showing that his actual residence is unknown, since such service is authorized when either one of the separate and distinct conditions mentioned in that section exists.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 108-120; Dec. Dig. § 96.\*]

#### 4. CORPORATIONS (§ 507\*)—SUBSTITUTED SERVICE—AFFIDAVITS—SUFFICIENCY.

An affidavit for service by publication on a domestic corporation, which alleged that there was no president, secretary, etc., within the state, but that they had departed therefrom, was sufficient without stating the evidence showing such departure; the statement that they had departed being one of fact.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1971-2000; Dec. Dig. § 507.\*]

#### 5. CORPORATIONS (§ 52\*)—DOMICILE.

A domestic corporation is deemed to have a legal residence in this state, although it may do no business, and although its officers, agents, and stockholders reside outside the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 140-150; Dec. Dig. § 52.\*]

#### 6. PROCESS (§ 8\*)—STATUTORY PROVISIONS.

The authority conferred on courts by Code Civ. Proc. § 187, to adopt any suitable process or mode of proceeding most conformable to the spirit of that Code when jurisdiction is conferred and the course of proceeding not specifically pointed out by statute should not be exercised where the existing statute may reasonably be construed to provide for process.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 7; Dec. Dig. § 8.\*]

#### 7. PROCESS (§ 85\*)—STATUTORY PROVISIONS.

Statutory provisions, prescribing the process and mode of service upon persons who cannot be personally reached, should receive a most liberal construction to prevent inability to reach persons subject to the court's jurisdiction.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 99; Dec. Dig. § 85.\*]

Department 2. Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

Action by William McKendrick and another against the Western Zinc Mining Company and others. From an order denying a motion by L. R. Barthelet, executrix, of W. Henry Jones, deceased, to vacate a judgment against, and open the default of, the defendant Tehama Mining Company, the executrix appeals. Affirmed on rehearing.

P. H. Coffman, of Red Bluff, for appellant. Bush & Hall, of Redding, for respondent.

SHAW, J. At the time of the hearing of this cause in bank a motion of the respondents to amend the record on appeal by inserting therein a copy of the verification of the complaint, showing that it was duly verified, was granted; but the clerk failed to enter the order in the minutes. The verification must now be deemed a part of the record. This makes it necessary to deter-

mine questions which were not considered by the court in department in its decision upon which a rehearing was granted.

[1] The appeal is from an order of the trial court denying the motion to vacate the judgment against and open the default of the Tehama Mining Company upon the ground that it had never been served with summons in the action. The moving party is L. R. Barthelet, who by affidavit shows that the Tehama Mining Company sold and transferred the Donkey Mine, the real estate in controversy, upon which it is sought to impose a lien, to W. Henry Jones after the commencement of the action; that W. Henry Jones died; and that, after proceedings duly had and an order duly made, the affiant Barthelet was appointed executrix of the last will of said Jones and ever since has been such executrix. These allegations of interest are not controverted or disputed, and they sufficiently connect Mrs. Barthelet with the action to authorize her to appear and prosecute the motion. Code Civ. Proc. § 385.

The Tehama Mining Company is a domestic corporation, and constructive service of the summons by publication was made under an affidavit to the effect that there is no president or other head of the corporation, no secretary, no cashier, and no managing agent of the corporation within the state of California; that these officers had departed from the state and cannot after due diligence be found within the state of California.

[2] The first question presented by the appeal is the claim that the law does not authorize the publication of summons in the case of a domestic corporation; that section 412 of the Code of Civil Procedure applies exclusively to foreign corporations, so far as it applies to corporations at all; that section 411, Code of Civil Procedure, contains the sole provision for the service of process upon a domestic corporation; and that there is an omission in the law regarding the service upon a domestic corporation when the enumerated officers upon whom alone such service can be made cannot be found within the state or have departed therefrom.

We think this question is settled by the decision in *Douglass v. Pacific M. S. Co.*, 4 Cal. 304. In that case the defendant was a foreign corporation. Service was made upon it by publication as prescribed by section 30 of the Practice Act of 1851, which was the statute then in force. Stats. 1851, p. 55, G. & S. Comp. 524. Section 30 then provided that service by publication could be made "when the person on whom service is to be made resides out of the state; or has departed from the state; or cannot, after due diligence, be found within the state; or conceals himself to avoid the service of summons, and the fact appears by affidavit," etc. Section 29 of the Practice Act, so far as here applicable, then provided as follows:

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"The summons shall be served by delivering a copy thereof attached to a certified copy of the complaint, as follows: (1) If the suit be against a corporation, to the president or other head of the corporation, secretary, cashier or managing agent thereof." Section 412 is in effect a re-enactment of said section 30 with the addition of the words "or is a foreign corporation having no managing or business agent, cashier or secretary within the state," as an additional class upon which service by publication can be made. Section 29 was re-enacted in section 411 aforesaid with the addition of the words "formed under the laws of this state" inserted after the word "corporation" in the first clause. No such qualifying phrase occurs in section 29, and it therefore applied both to domestic and foreign corporations at the time of the decision in the *Douglass Case*. It will be observed that section 30 of the Practice Act did not specifically authorize constructive service upon corporations, and it could be held to do so only upon the theory that corporations were included in the word "persons," as there used. The court in that case held that corporations were so included and that the service was good, saying: "The court erred in restricting the operation of the thirtieth section of the 'act defining the manner of commencing civil actions' to natural persons. The word 'persons,' in its legal significance, is a generic term, and was intended to include artificial as well as natural persons."

This case is conclusive as to the meaning of the word "persons" in section 412, unless the insertion therein of the additional clause, above mentioned, authorizing such service upon foreign corporations, shows an intention to limit its meaning to natural persons and foreign corporations, and to exclude domestic corporations from its operation. The clause with the above addition first became law upon the adoption of the Codes in 1872. In view of the *Douglass* decision, the addition of this clause would appear to serve no purpose except possibly that of simplifying the proceeding for publication in such cases. A corporation is often a necessary or proper party to a civil action in which constructive service is proper. If it was a foreign corporation doing business in the state, then, under the act of 1870 (Stats. 1869-70, p. 881), it would be required to have a designated agent in the state authorized to receive service of process and personal service could be made upon him. If no such agent had been designated, then, under the original section 411 of the Code, service could be made upon any managing or business agent, cashier, or secretary of such corporation within the state. If there were none, then, under the decision in the *Douglass Case*, it would be a nonresident person upon whom the service by publication could be made as

upon natural persons. But there would still remain many cases for which the Code would contain no provision if the meaning of the word "person" is limited as above suggested. The agent of a foreign corporation might conceal himself in the state to avoid service, or it might be that after due diligence he could not be found within the state, although the plaintiff would not be able to say that he was out of the state. So also in the case of a domestic corporation, which in legal contemplation is a resident of the state, its officers and agents might depart from the state, or conceal themselves therein to avoid service, or be so concealed or obscure that they could not be found. If the word "persons" does not include corporations, there could be, in these cases, no service of process upon such corporations, although they might be necessary parties without whom the action could not proceed. Under these circumstances, we think it is clear that the maxim, "expressio unius," etc., should not be applied, and that the word "person" in section 412 should be given its generic meaning, as in the *Douglass Case*, at least with respect to all corporations concerning which the Code makes no express provision for service by publication. The service, therefore, is not invalidated by the fact that the defendant is a domestic corporation.

[3] There is a suggestion in the appellant's brief that the service is void because the affidavit for the order of publication does not state facts showing that due diligence was used to find the officers and agents of the Tehama Mining Company upon whom service could lawfully be made. If the only cause for publication shown by the affidavit was that such officers could not be found within the state, after due diligence, this question would be necessarily involved. But, as will be seen, the affidavit states another sufficient cause. Therefore it is unnecessary to consider the question of diligence.

[4] Section 412 authorizes service by publication where either one of five separate and distinct conditions exist, the second of which is stated to be where the person has "departed from the state." An affidavit showing the existence of this condition is sufficient, although no other condition is alleged. *Ligare v. Cal., etc., Co.*, 76 Cal. 614, 18 Pac. 777; *Parsons v. Weis*, 144 Cal. 415, 77 Pac. 1007; *Spencer v. Houghton*, 68 Cal. 87, 8 Pac. 679. The affidavit in question states that "said defendant corporations are formed under the laws of the state of California; but there is no president or other head of either of said corporations, no secretary, no cashier, and no managing agent of either of said corporations within the state of California, but have departed from the state of California." We take this to be, in effect, a statement that the officers and agents mentioned have departed from the



state. It is fairly susceptible of that construction, and we must presume that the court below so interpreted it when it was considering its effect and the condition necessary to authorize the publication. The statement is one of fact, and it is sufficient without giving the evidence upon which it is founded. The addition of a statement of facts tending to show the diligent efforts made to find these parties does not vitiate the proceedings. These averments were immaterial except for the purpose of showing that the actual residence of these persons were unknown. *Ligare v. Cal., etc., Co.*, supra. They sufficiently showed that such residence was not known, although they were perhaps insufficient as a showing of diligence under the third cause for publication.

[5] It is true, as stated, that a domestic corporation is deemed to have a legal residence in this state, although it may do no business at all and all its officers, agents, and stockholders may reside out of the state. Being a legal resident for many purposes, it seems anomalous to say that it may depart from the state; but we think under the provisions of the Code, properly construed, it may be so held.

[6, 7] Our courts have jurisdiction of civil actions, and this includes power to bring before them, or in some reasonable way to give proper notice to, the parties whose rights and interests are to be determined. A wronged person must have a remedy which he can enforce. Doubtless if there were no enabling statutes prescribing a process to be used, the courts, being vested by the Constitution with jurisdiction of civil actions, could frame suitable writs and direct a reasonable mode of service. Section 187, Code of Civil Procedure, expressly declares that this may be done where necessary. The power, of course, should not be resorted to in any case where the existing statute may reasonably be construed to provide for process. For these reasons the provisions prescribing the process and mode of service upon persons who cannot be personally reached should receive a most liberal construction to avoid the conclusion that there is no statutory provision made for any process at all upon any given class of persons who are otherwise subject to the jurisdiction of the court. A natural person retains his legal residence although bodily absent. In the case of a domestic corporation, all of whose agents and officers upon whom service can be made, its actual body, in point of fact, for this purpose, have departed from the state, we think it is not too great a stretch of construction to hold that the corporation itself, although still a legal resident of the state and constructively present therein, has departed from the state, within the purview of section 412 of the Code of Civil Procedure. The affidavit was therefore sufficient to support the

order made by the court for publication of summons and the service was valid.

The order appealed from is affirmed.

We concur: ANGELLOTTI, J.; MELVIN, J.; LORIGAN, J.

164 Cal. 765

### In re GLASS' ESTATE.

MILLER et al. v. GLASS et al. (L. A. 3,202.)  
(Supreme Court of California. Feb. 25, 1913.)

#### WILLS (§ 10\*)—CONSTRUCTION—"ESTATE."

A devise or bequest to the estate of a person is void and cannot be strained to mean that the property was meant to descend to such person or to his heirs if he predeceased the testator; an estate not being a person or entity which can take under a will under Civ. Code, §§ 1276, 1313, relating to wills, and the word "estate," when used in reference to a living man, may refer either to his whole property or to only a part of it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 18-25; Dec. Dig. § 10.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2475-2488; vol. 8, pp. 7653, 7654.]

Department 2. Appeal from Superior Court, Riverside County; M. T. Dooling, Judge.

In the matter of the estate of Nellie Glass, deceased. From an adverse construction of the will, Howard L. Glass and others appeal, and Charles F. Miller and others respond. Decree affirmed.

Lafayette Gill, of Riverside, and H. K. Stahl, of Ontario, for appellants. George R. Freeman, of Corona, and C. Schuebel, of Oregon City, Or., for respondents.

HENSHAW, J. The testatrix, Nellie Glass, died in 1907, leaving the following will, which was duly admitted to probate: "Oct. 10, 1901. At my death if my dear husband Mack Glass is living I want him to have all my property. Then at his death I want my brother Dr. J. K. Miller to have \$500.00 five hundred dollars. Also my two sisters Sarah Mawhinney and Dell Nesbit to have \$500.00 five hundred dollars each. Then what is left I want to go to Thos. Glass my husband's father. If my dear husband Mack Glass is not living then I want my brother Dr. J. K. Miller to have \$500.00 five hundred dollars. Also my two sisters Sarah Mawhinney and Dell Nesbit to have \$500.00 five hundred dollars each. The balance to go to father Glass' estate. The old family dishes to be divided between my two sisters Sarah Mawhinney and Dell Nesbit. The dear old clock to go to my brother Dr. J. K. Miller. My old watch I give to Rosa Nesbit and father Miller's watch to Bernell Miller my nephew. Nellie Glass. Corona, Cal., Oct. 10, 1901."

The construction of the will coming before the court under a petition for distribution, an appeal is taken from the decree by certain

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

disaffected heirs of Thomas Glass. The controversy is over the sentence, "The balance to go to father Glass' estate." The only facts pertinent to the consideration, besides those appearing upon the face of the will, are that, at the date of the execution of the will, Thomas Glass was living, but died before the death of the testatrix. It is intimated, but not found, that the word "estate" was written by testatrix in the will after the death of Thomas Glass. It would seem to be not improbable that such is the case; but nevertheless, the formalities attending the execution of a codicil were not observed, and the legal result is that the will must be construed as a single instrument executed at the date it bears. In *re* Pearsons, 99 Cal. 34, 33 Pac. 751. The language of the testatrix thus being referred to the date of her will and not to the date of her death, by the plain terms of the will Nellie Glass attempted to leave the residue of her estate, not to Thomas Glass, but to Thomas Glass' estate. Thomas Glass' estate is not a person or entity which can take under the will. Civ. Code, §§ 1275, 1313. When used with reference to a living man, "estate" may either mean all of his property and property interests, as, colloquially, "upon his death he will leave a large estate," or it may refer specifically to a particular property in land, as his "estate in Sonoma county." But, however used as to a living man no property can pass to it by descent, devise, or bequest. The case of appellants is not bettered if the word "estate" were eliminated from the will, though, of course, this would not be permissible, for the result would be a devise or bequest to one who predeceased the testatrix; and, no intent appearing to substitute another in his place, the disposition would fail. Civ. Code, § 1343. The construction contended for by appellants, namely, that the will is to be read as though it declared that the balance should go to Thomas Glass, if alive, and, if not, then to his estate, by "his estate" meaning his legal heirs, or his devisees or legatees, as the case may be, is too strained to be permissible.

The decree appealed from is therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(165 Cal. 12)

SEARS v. WILLARD et al. (L. A. 2,990.)

(Supreme Court of California. Feb. 26, 1913.)

#### 1. TAXATION (§ 796\*)—RIGHT OF ACTION—TITLE.

An action to quiet title can only be maintained by a plaintiff who has a complete title, and not by one who has a mere inchoate right of redemption from a tax sale, especially where

the defendant is admittedly in possession under claim of title.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1578-1581; Dec. Dig. § 796.\*]

#### 2. QUIETING TITLE (§ 10\*)—RIGHT OF ACTION—TITLE.

A plaintiff in a suit to quiet title cannot recover unless he shows title in himself, even though the defendant is also without title.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 36-42; Dec. Dig. § 10.\*]

Department 2. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by Ed. A. Sears against Elizabeth H. Willard and another. From an order granting a motion for a new trial, defendants appeal. Reversed.

Haines & Haines, of San Diego, for appellants. C. H. Rippey and Charles S. Conner, both of San Diego, for respondent.

MELVIN, J. Plaintiff sued to quiet title to two lots in Morse's addition in the city of San Diego. Defendants answered denying plaintiff's title, setting up their own title by conveyance as well as by open and exclusive possession of the property and payment of the taxes thereon, and pleading the bar of the statute of limitations. The court found that plaintiff was not the owner of nor entitled to the possession of the land in question; that for more than five years after their entry thereon under a certain tax title pursuant to certificates of sale of said premises, for nonpayment of city taxes for the year 1900, defendants had held exclusive possession of, and had paid all taxes upon, said property; and that plaintiff had not repaid nor offered to repay any of the amounts so expended. The conclusions of law drawn from said findings were: First, that it was not necessary to determine the question presented to the court by the plea of the statute of limitations; and, second, that plaintiff was not entitled to take anything by the action, but that the defendants should have their title to the two lots quieted. A motion for a new trial was made, and this appeal is from the order granting said motion.

Appellants contend that the title is not in the plaintiff; that this fact appears without conflict from evidence introduced by him; and that therefore plaintiff's case absolutely fails because he may only recover, if at all, upon the strength of his own title (referring to *Schroder v. Aden Gold Mining Co.*, 144 Cal. 630, 78 Pac. 20, and the cases therein cited).

[1] Plaintiff claims title derived from one Morse, and the validity of Morse's title is conceded; but by plaintiff's own proof it appears that before the commencement of this action the property was sold to the state for taxes and deeded to the state. Plaintiff concedes that the evidence offered by him does show the title to have been transferred



to the state, but insists that the title of the state is always coupled with the right of redemption by the former owner, which may be exercised at any time before the sale of the property by the state. This right of redemption, he affirms, gives him standing to prosecute this action, and in his brief it is asserted that the testimony shows a redemption by plaintiff of the property from the state just before the commencement of this suit. We have vainly searched the record for any evidence of such redemption. The bill of exceptions before us shows without contradiction that plaintiff introduced in evidence certificates of sale made in 1901 by the tax collector of the county of San Diego for the property involved in this action for taxes levied for the fiscal year 1900 and 1901, and also two certain deeds of the same lots from the said tax collector to the state of California. Upon this showing we cannot see how the mere "inchoate right of redemption," as it is called in respondent's brief, gives him a right to maintain this action. An action to quiet title must have a more substantial basis than an "inchoate right," especially when, as in this instance, it is prosecuted against persons admittedly in possession of the real property under claim of title. It is true that one whose real property has been sold to the state for nonpayment of taxes is not disturbed in his possession before sale of the land by the state; but the claim to have title quieted must be based upon a complete, not an inchoate, title.

[2] A plaintiff in an action like this must fail unless he shows title in himself, and he is not in a position to complain if some one else, even when that person is also without title, asserts an interest in the property. *Williams v. City of San Pedro et al.*, 153 Cal. 49, 94 Pac. 234. One seeking to establish his equitable title under an agreement of purchase must show compliance with the said agreement by the tender of the amount therein specified as the price to be paid. *Pennie v. Hildreth*, 81 Cal. 133, 22 Pac. 398. And it may be said with equal force that one who seeks to establish a legal title in himself may not prevail by showing that the title is not in him, even if he have an unexercised privilege of redemption. We conclude therefore that the motion was improperly granted so far as the finding that plaintiff was not the owner of the premises described in the complaint, and the conclusion of law and the judgment based thereon, are concerned. It is unnecessary to consider the motion with reference to the second finding and that part of the judgment based upon it, because it is no concern of the respondent whether error appears therein or not. Having no title himself, he is not in a position to complain. *Williams v. San Pedro*, supra.

The order granting a new trial is reversed.

We concur: HENSHAW, J.; LORIGAN, J.

164 Cal. 768

STORY v. GREEN. (L. A. 3,013.)

(Supreme Court of California. Feb. 25, 1913.)

1. APPEAL AND ERROR (§ 605\*)—RECORD—TRANSCRIPT—ARRANGEMENT.

Consideration of the transcript will not be refused because of failure to chronologically arrange therein the pleadings, proceedings, and statement, as required by Supreme Court rule 8 (119 Pac. xi), this causing no court no inconvenience; the contested points being few and simple.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2660-2663; Dec. Dig. § 605.\*]

2. APPEAL AND ERROR (§ 607\*)—TRANSCRIPT—APPROVAL—TIME.

A judge may postpone the presentation of the transcript to the trial judge for his approval beyond the time prescribed by Code Civ. Proc. § 953a, to a day when such judge, who is not a resident of, nor within, the county, will be present, and take up the matter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2665-2672; Dec. Dig. § 607.\*]

3. DAMAGES (§ 181\*)—PERSONAL INJURY—EVIDENCE—WEALTH OF DEFENDANT.

The cause of action for personal injury being simple negligence, plaintiff may not show the wealth of defendant.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 473, 474, 499; Dec. Dig. § 181.\*]

4. APPEAL AND ERROR (§ 1053\*)—HARMLESS ERROR—INSTRUCTIONS—CURING ERROR IN ADMISSION OF EVIDENCE.

Error in admitting in an action for injury from simple negligence evidence of defendant's wealth is not cured by a general instruction, enumerating the proper elements of damage; an instruction that in determining the amount of damages to be awarded defendant's pecuniary condition, as disclosed by the evidence, may be considered, being also given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.\*]

5. TRIAL (§ 412\*)—WAIVER OF ERROR—ADMISSION OF EVIDENCE—CROSS-EXAMINATION.

Error in allowing plaintiff, in a personal injury case, calling defendant as a witness, to examine him as to his wealth, is not waived by defendant's examination in his own behalf, amounting to nothing more than additional cross-examination to explain some of the matters brought out in his examination by plaintiff, and being directed not to the amount of his property, but to the character of his interest thereon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 182, 974-977; Dec. Dig. § 412.\*]

6. APPEAL AND ERROR (§ 864\*)—REVIEW—APPEAL FROM JUDGMENT.

Error in admission of evidence is not waived by failure to perfect the appeal from the order denying a motion for new trial; but is properly reviewable on appeal from the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1765-1767, 3456-3461; Dec. Dig. § 864.\*]

7. TRIAL (§ 133\*)—REMARKS OF COUNSEL—STATEMENT OF COURT.

In an action for running an automobile into plaintiff's motorcycle, in which violation of a municipal ordinance was charged, defendant, being cross-examined as to his being a lawyer,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

naving said, "You do not hold that, because he is a lawyer, he is held to be more accountable than anybody else," and on plaintiff's counsel replying that he claimed it was a natural presumption that a lawyer is presumed to know more of the law than an ordinary layman, having further said, "He is not on trial for his knowledge of the law," such statements must have apprised the jury of the true rule that defendant's occupation was not a material inquiry.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. § 133.\*]

Department 2. Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by C. V. Story against Howard Green. Judgment for plaintiff, and defendant appeals. Reversed.

L. E. Clawson and M. M. Meyers, both of Los Angeles (Howard Green and E. B. Drake, both of Los Angeles, of counsel), for appellant. Swaffield & Munholland, of Los Angeles, for respondent.

MELVIN, J. Action for damages for personal injuries received by plaintiff, who, while riding a motorcycle, was struck by an automobile driven by defendant. From a judgment against him for the sum of \$3,000, defendant appeals.

[1, 2] Respondent moves the dismissal of the appeal upon the ground that the reporter's transcript does not conform to Rules 7 and 8 (119 Pac. xi) of this court, and that the clerk's transcript was not approved within the time prescribed by law. Although respondent's motion to dismiss the appeal has been heretofore heard and denied, it is proper to say here that his objection is founded principally upon rule 7 as it was before amendment. The transcript was upon paper within the maximum size allowed by that rule. It is objected that the pleadings, proceedings, and statement are not chronologically arranged in the transcript as required by rule 8. As the contested points on this appeal are few and simple, this fact causes us no inconvenience, and we do not feel that the ends of justice would be subserved by our refusal to consider the transcript. The appeal was taken under the "alternative method" as provided in section 953a et seq., Code of Civil Procedure. Respondent denies the right of a judge to postpone the presentation of a bill of exceptions beyond the time prescribed by section 953a, Code of Civil Procedure, but we think the contention is without merit. It was shown at the hearing below by the affidavit of a deputy county clerk (which document by direction of the judge was made a part of the transcript) that Hon. K. S. Mahon, who had presided at the trial and who is not a resident of Los Angeles county, was not within said county when the notice required by law was given to the attorneys, informing them that the transcript was ready for pres-

entation to the judge who had tried the case. The affiant communicated with Judge Mahon, who appointed a day upon which he would be in Los Angeles and would take up the matter. The hearing was regularly continued by orders of the presiding judge of the superior court of Los Angeles county until the day thus indicated. This was the lawful and proper method of procedure.

[3, 4] The plaintiff called the defendant as a witness, and over objection examined him with reference to his wealth. This was a case where only actual damages resulting from negligence were alleged. There was neither averment nor testimony tending to establish fraud, oppression, or malice, and appellant insists that in such a case as this plaintiff may recover, if at all, only such an amount as will fairly and reasonably compensate him for the injuries received and the detriment caused to him as a result of the defendant's negligence. It has long been established that the plaintiff may not in such a case introduce proof of his poverty, because the damages are not in any manner dependent upon his financial condition. *Shea v. Potrero & Bay View R. R. Co.*, 44 Cal. 429; *Malone v. Hawley*, 46 Cal. 414; *Mahoney v. San Francisco & San Mateo Ry. Co.*, 110 Cal. 471, 42 Pac. 968, 43 Pac. 518; *Johnston v. Beadle*, 6 Cal. App. 253, 91 Pac. 1011. The rule, it seems to us, is equally applicable to the defendant. A man's responsibility for his negligence does not depend, in the slightest degree, upon his wealth, and the introduction of evidence upon that subject could only have the effect of prejudicing the rights of the defendant. In *Fox v. Oakland Consolidated St. Ry. Co.*, 118 Cal. 66, 50 Pac. 28, 62 Am. St. Rep. 216, this court, quoting from *Mayhew v. Burns*, 103 Ind. 340, 2 N. E. 793, said: "We can discover no principle upon which it can be determined whether negligence can be attributed to one in a given case by an inquiry into the state of his fortune." It is true that, in the case under review, the matter in issue was not the wealth or property of the defendant, but the court was considering the subject of the plaintiff's alleged contributing negligence. But the principle announced is thoroughly applicable to this case. The very rule for which appellant contends was announced in the instructive case of *Barbour County v. Horn*, 48 Ala. 578, an action against a county by one who had been injured by a fall from a defective bridge. After enumerating the elements of damage which may be considered in a case in which no malice, fraud, oppression, nor gross negligence are pleaded, the court said: "But the wealth of the defendant or poverty of the plaintiff has nothing to do with their ascertainment. It was therefore improper to admit evidence of the wealth of the defendant in the court below to go to the jury, or to refuse to instruct the jury, when properly requested, that the de-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



fendant's wealth could not be taken into consideration in making up their verdict." In 2 Greenleaf on Evidence (16th Ed.) § 269, the rule is phrased as follows: "Nor are damages to be assessed merely according to the defendant's ability to pay; for whether the payment of the amount due to the plaintiff, as compensation for the injury, will or will not be convenient to the defendant, does not at all affect the question as to the extent of the injury done, which is the only question to be determined. The jury are to inquire, not what the defendant can pay, but what the plaintiff ought to receive." The same rule is announced in *Roach v. Caldbeck*, 64 Vt. 596, 24 Atl. 989. But respondent says that the instructions cured any possible error in the admission of evidence regarding the defendant's wealth, calling our attention to a general instruction by which the proper elements of damage in a case like this were enumerated. This general instruction could not have served to cure the error because the court instructed the jury as follows: "You are instructed that in determining the amount of damage, if any, to be awarded to the plaintiff, you have a right to take into consideration the pecuniary condition of the defendant as disclosed by a preponderance of the evidence in this case." That this instruction was erroneous, and that in its tendency it was injurious to defendant, can scarcely be doubted.

[5] When defendant opened his case, he took the stand and gave testimony in his own behalf regarding his property, and this, according to respondent, was a waiver of the errors discussed above. In support of his position he cites a number of cases, including two Californian authorities—*People v. Anderson*, 26 Cal. 132, and *McLeod v. Barnum*, 131 Cal. 608, 63 Pac. 924—neither of which is in point. One was a case in which a defendant waived the error committed by the court in placing his wife on the stand without his consent as a witness against him by calling her in his own behalf. In the other case, after one witness had testified without objection to the contents of a letter, another gave testimony upon the same subject without preliminary proof of the loss of the written instrument. The court held that the evidence was immaterial, but, if it has been, the admission of the testimony without any objection was a waiver of the error. In this case the examination of the defendant in his own behalf amounted to nothing more than additional cross-examination for the purpose of explaining some of the matters brought out in his examination in chief while he was testifying as plaintiff's witness. The testimony quoted in respondent's brief, which was given by defendant in his own behalf, was directed, not to the amount of his property, but to the character of his interest therein. This was practically but a continuation of his cross-examination.

[6] There is no merit in the contention that the errors discussed above were waived by the failure of appellant to perfect his appeal from the order denying his motion for a new trial. They are properly reviewable in an appeal from the judgment.

[7] During the cross-examination of the defendant he was asked by a juror if he were a practicing lawyer, and, having stated his occupation to be that of an attorney at law, he was asked further questions about his practice. The court, interrupting the cross-examination, said: "You do not hold that because he is a lawyer he is held to be more accountable than anybody else." To this remark counsel replied: "Yes; I claim it is a natural presumption that a lawyer is presumed to know more of the law than an ordinary layman." Inasmuch as one of the counts of the complaint charged that at the time of the accident the defendant was violating a municipal ordinance, this remark might have been prejudicial to him, because naturally a lawyer is no more charged with knowledge of the ordinances of a great city like Los Angeles applicable to automobiles than is any other person who acts as a driver of such a vehicle. But the remark of the court immediately following counsel's statement was probably sufficient to overcome any injury which might have resulted from an erroneous and uncontradicted declaration of the law. The court said: "He is not on trial for his knowledge of the law." The two statements of the court quoted above must have apprised the jurors of the true rule that the occupation of the defendant was not a material subject of inquiry. As the case must be reversed for other reasons, it is not necessary to discuss this matter further. As counsel for respondent admits that his statement (which we have quoted) was "one which would have been much better unsaid," there will doubtless be no repetition of it at another trial.

The judgment is reversed.

We concur: HENSHAW, J.; LORIGAN, J.

164 Cal. 756

In re GLEASON'S ESTATE.

CORBIN v. GLEASON. (L. A. 3,285.)

(Supreme Court of California. Feb. 24, 1913.  
Rehearing Denied March 24, 1913.)

1. WILLS (§ 165\*)—EXECUTION—UNDUE INFLUENCE—EVIDENCE—SUBSEQUENT STATEMENTS OF TESTATOR.

Statements of testator a few minutes after executing his will are inadmissible, unless part of the *res gestæ*, to show undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 415-420; Dec. Dig. § 165.\*]

2. EVIDENCE (§ 121\*)—"RES GESTÆ."

*Res gestæ* are those circumstances which are the undesigned incidents of a particular litigated act—that is, stand in immediate causal relation to the act—and so include declara-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tions which are the immediate accompaniments of the act; immediateness being tested by closeness of causal relation (citing 7 Words & Phrases, 6130).

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 303, 307-338, 1117, 1119; Dec. Dig. § 121.\*]

For other definitions, see Words and Phrases, vol. 8, p. 7787.]

### 3. WILLS (§ 165\*)—EVIDENCE—RES GESTÆ—DECLARATIONS.

Statements of testator, though made only a few minutes after executing his will, that he "had to do it right," and, if he had not, it would be extremely uncomfortable at home, being the mere expression of his opinion regarding a past occurrence, are not part of the res gestæ.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 415-420; Dec. Dig. § 165.\*]

### 4. WILLS (§ 166\*)—EXECUTION—"UNDUE INFLUENCE"—EVIDENCE.

Evidence on a contest of a will held insufficient to show undue influence—that is, a pressure which overpowered the mind—and bore down the volition of testator at the very time the will was made.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7166-7172.]

Department 2. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

In the matter of the Estate of Henry B. Gleason, deceased. Lida E. Corbin contested the will, which was in favor of Eva Mildred Gleason, and from an adverse judgment and an order denying her motion for new trial, contestant appeals. Affirmed.

J. H. Peters, G. P. Adams, and Newman Jones, all of Los Angeles, for appellant. E. B. Drake, of Los Angeles, for respondent.

MELVIN, J. The will of Henry B. Gleason, deceased, was admitted to probate July 13, 1911. By it he left \$10 to his sister, Lida E. Corbin, appellant herein, and the rest of his property, amounting in value to about \$40,000, to his wife, Eva Mildred Gleason. Early in July, 1911, the sister of the deceased, Gleason, filed a contest to said will, praying revocation of the probate thereof on the grounds, among others, that "the said deceased was induced to execute the said will by reason of the undue influence of the said Eva Mildred Gleason, exercised and exerted by her over and upon him, and that the said will was extorted from him by the said Eva Mildred Gleason by threats of personal violence, and was executed by him under fear of the same, and that at the time of the making of the said will, and for a long time prior thereto, he was not of sound mind and memory, and was not competent to make a will." The questions of fact involved were tried before a jury, and, a determination in favor of the validity of the instrument having been made, judgment was entered accordingly adverse to the prayer of the sister's pe-

tition. From said judgment and from an order denying her motion for a new trial the contestant appeals. The will was drawn by W. S. Lang, a notary public, who had known Mr. Gleason for some years. Testator went alone to the office of Mr. Lang; told the notary that he wanted to make a will; stated his wishes in relation thereto; and the will was prepared by the notary. Mr. Gleason requested that, in addition to the signatures of the two witnesses, he desired Mr. Lang to acknowledge the instrument as a notary. This was accordingly done, and that the will was executed with proper formality is not questioned. Of the manner and apparent testamentary competency of Mr. Gleason at the time of the execution of the will, the notary testified: "At the time he signed the will his condition was apparently normal, or otherwise I would not have taken his acknowledgment. I saw nothing at that time to indicate to my mind at all that he was not perfectly normal and sane. He told me how to make the will and who to will the property to. Q. Who did he tell you to will the property to? A. I remember the wife and sister. He gave his sister \$10, if I remember right. After the will was written I think he read it. I am quite sure he did. Q. Was there anything to indicate that he was acting under any undue influence that you noticed at that time? A. No; not that I noticed. Q. You would never have taken his acknowledgment as a notary public if there had been, would you? A. Unquestionably I would not."

Further describing the conduct of the testator, the notary was permitted to testify, over objection, that Mr. Gleason returned to his office within 10 or 15 minutes after the execution of the will; that testator seemed to be in a state of nervous collapse; that he "fell into a rocking chair"; and that a conversation ensued between him and the notary. This may be best described in the language of the record. Witness Lang, being questioned by Mr. Adams, testified as follows: "He sat down in a chair and made the remark: 'Oh, hell.' I did not pay any attention to it at that time and continued to read, and again he remarked: 'Oh, hell, that paper,' and so I looked up, and he was looking at me, and I said, 'What paper do you mean?' 'That will.' So I thought I would ask him questions— Q. (By Mr. Adams): You mean he said 'that will'? That was his answer, 'That will.' I said: 'I suppose you knew, Mr. Gleason, it was not necessary to acknowledge that at all. That was rather an unusual proceeding.' 'I know,' he said, 'but I had to do it. I had to do it right or hell would pop at home; I could not stay there.' And that is about all that was said on that particular point. He frequently says, 'Oh, hell,' or 'Damn it.' Q. Repeat any further conversation you had with him at that



time. A. I asked him—I said: 'Why, Mr. Gleason, who did you marry?' He said, 'I will be damned if I know.' He said, 'I got drunk, and they said I was married; that is all I know about it.' That was about all that was said at that time." Another witness named Clemens corroborated Mr. Lang in his account of the testator's nervous condition. In the charge to the jury the court gave the following instruction: "You are instructed that while there was testimony admitted in this case from the witnesses, William S. Lang and Nicholas Clemens, that shortly after the making of the will in controversy, but after it was signed, witnessed, and delivered, that the decedent appeared to be nervous and in more or less of a physical collapse, and which evidence contained a purported conversation or statement at that time and place by decedent, yet you are now cautioned that such testimony was admitted alone upon the theory, and was competent only for the purpose, of being considered by you upon the question of the soundness or unsoundness of the mind of the testator, the said Henry B. Gleason, and was not competent to prove, nor was it admitted for the purpose of, nor can you consider the same, in any wise as establishing undue influence on the part of Eva Mildred Gleason, and was not competent for that purpose, and you should not consider it for that purpose."

[1] The limitation in the above instruction of the scope of the testimony of the two witnesses is the appellant's sole assignment of error, and her entire reliance for a reversal of the judgment rests upon the contention that the conduct and utterance of the testator were a part of the *res gestæ*. Undoubtedly the rule regarding the matters which are admissible as parts of the *res gestæ* has been somewhat liberally construed by courts in later years. It is also, true that declarations, when admissible as parts of the *res gestæ* need not necessarily be absolutely contemporaneous with the main event. Appellant contends that the test is not the time of the declarations with reference to the main event, but the opportunity for reflection and intention which may have been given to the testator, or as Prof. Wigmore expresses it: "The utterance must have been before there has been time to contrive and misrepresent; i. e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance. This limitation is in practice the subject of most of the rulings." Wigmore on Ev. par. 1750. Conceding this to be the general rule, we cannot say that the lapse of from 10 to 15 minutes was not, under the circumstances here given, sufficient to exclude the evidence as part of the *res gestæ* and as applicable to the issue of undue influence. In the first place such declarations are not looked upon with favor by the courts. Many statements of the rule

might be cited, but a typical and oft quoted one is that of Colt, J., in *Shailer v. Bumstead*, 99 Mass. 119: "That the instrument which contains the testamentary disposition of a competent person, executed freely and with all requisite legal formalities, must stand as the only evidence of such disposal, is generally conceded. Such a will is not to be controlled in its plain meaning by evidence of verbal statements inconsistent with it, nor impaired in its validity and effect by afterthoughts or changes in the wishes or purposes of the maker, however distinctly asserted. It is to be revoked only by some formal written instrument, some intentional act of destruction or cancellation, or such change of circumstances as amounts in law to a revocation. Any invasion of this rule opens the way to fraud and perjury; promotes controversy; destroys to a greater or less degree that security which should be afforded to the exercise of the power to control the succession to one's property after death."

The rule with reference to declarations in cases like this in this and many other jurisdictions has long been that so well expressed in *Kirkpatrick v. Jenkins*, 96 Tenn. 89, 33 S. W. 820: "We think the great weight of authority and of reason is to the effect that subsequent declarations of an alleged testator may be considered by a jury upon an issue of mental capacity, but that they cannot be considered upon an issue of undue influence, unless there be independent proof indicating the presence of undue influence, and then only to show a condition of mind susceptible to such influence, and the effect thereof upon the testamentary act." This court has formulated the rule even more forcibly. In *re Calkins*, 112 Cal. 301, 44 Pac. 578, contains this language in the opinion: "In order to establish that a will has been executed under undue influence, it is necessary to show, not only that such undue influence has been exercised, but also that it has produced an effect upon the mind of the testator, by which the will which he executes is not the expression of his own desires. The external facts constituting the exercise of undue influence must be established by other evidence than the declarations of the testator. His declarations are incompetent to show either that the influence was exercised, or that it affected his actions, and are inadmissible, except as they may illustrate his mental state, and give a picture of the condition of his mind contemporaneous with the declarations themselves. Whenever the condition of the mind is a fact which it is desirable to prove, it may be established by such evidence as is competent for that purpose. The mental condition of an individual is made manifest to others by his statements, declarations, conversations, as well as by his conduct, and, when the state of a testator's mind at the

time of executing the will is the fact to be shown, his contemporaneous declarations or statements furnish the most satisfactory evidence of that fact. His statement of the effect that an act or suggestion of another produced upon him at some previous time is, however, only hearsay, while the statement of his feeling or disposition at the time of making the statement is but the expression in words of his condition at that time, and, so far as it produces a picture thereof, is admissible." See, also, *Estate of Ricks*, 160 Cal. 485, 117 Pac. 539; *Estate of Kilborn*, 162 Cal. 11, 120 Pac. 762; *Estate of Gregory*, 133 Cal. 131, 65 Pac. 315. Unless, therefore, we are compelled to regard the utterances and demeanor of the testator as parts of the *res gestæ*, evidence relating to them should be declared inadmissible according to a rule most firmly established in this state.

[2, 3] Definitions of *res gestæ* are as numerous as prescriptions for the cure of rheumatism and generally about as useful. One accurate definition is quoted with approval in *7 Words & Phrases*, 6130, as follows: "The *res gestæ* is defined by Wharton in his work on Evidence, 258, 267, 'as those circumstances which are the undesigned incidents of particular litigated acts, and are admissible where illustrative of such acts. These incidents may be separated from the act by lapse of time more or less appreciable. Their sole distinguishing feature is that they should be necessary incidents of the litigated act—necessary in this sense: that they are part of the immediate preparations for, or emanations from, such acts, and are not produced by the calculated policy of the actors. In other words, they must stand in immediate causal relation to the act—a relation not broken by individual wariness seeking to manufacture evidence for itself. Therefore declarations which are the immediate accompaniments of an act are admissible as part of the *res gestæ*; remembering that immediateness is tested by closeness, not of time, but by causal relation, as just explained.'" Tested by this rule, we cannot say that the conduct and conversation of the testator here reviewed must be considered a part of the *res gestæ*. The mere fact that but a trifling period of time elapsed between the testamentary act and the circumstances related by witnesses Lang and Clemens does not make the evidence admissible for all purposes. It appears from the record that Henry B. Gleason was subject to sick spells, relief from which was obtained only by the use of morphine hypodermically injected. It may well have been that his agitation and his remarks on the occasion of his second visit to the notary's office were caused by illness, or morphine, or a combination of the two. His agitation may have resulted from any one of a dozen causes, and his remarks, when analyzed, do not amount even to a statement that his wife had coerced him in the matter

of the disposition of his property by will. He described no act or command or threat of his wife; but said he "had to do it right" and expressed the conclusion that matters would have been extremely uncomfortable at home if the instrument had not been properly executed. His statements were not even declarations of past occurrences. That which he said was merely the expression of his opinion regarding a past occurrence, and was no more a part of the *res gestæ* because it was uttered a few minutes after the execution of his will than it would have been if spoken a month later. *Lissak v. Crocker Estate Co.*, 119 Cal. 444, 51 Pac. 688; *Durkee v. Central Pacific R. R. Co.*, 69 Cal. 534, 11 Pac. 130, 58 Am. Rep. 562; *Luman v. Golden A. C. M. Co.*, 140 Cal. 709, 74 Pac. 307; *Boone v. Oakland Transit Co.*, 139 Cal. 492, 73 Pac. 243; *Waldeck & Co. v. Pacific Coast S. S. Co.*, 2 Cal. App. 169, 83 Pac. 158.

[4] But, even if the court had erred in refusing to rule that the conduct and statements of the testator subsequent to the preparation and execution of the will constituted parts of the *res gestæ*, we would not look upon the error as material, because the evidence in the case fell far short of establishing contestant's allegation that the will was the result of undue influence exerted upon the testator by Eva Mildred Gleason in such manner as improperly to influence him in the making of his will. The contestant's only material evidence at the trial beyond that which we have discussed was the following, which we quote from the transcript: "Other evidence was given on behalf of the plaintiff to the effect that the decedent at the time of his marriage to the defendant was 60 years of age; that she at the time was 22 years of age; that the decedent's first wife, to whom he was devotedly attached, died less than a year prior to his marriage to the defendant, after a happy married life of more than 30 years with him; that the defendant first married November 23, 1903; her husband was killed April 19, 1904; that she married again September 1, 1904; was divorced from the second husband December 5, 1906; married the decedent June 5, 1907, having known him but six months; that he had numerous sick spells and his only relief at such times was by use of morphine hypodermically injected; that the will in controversy was taken by the defendant a few hours after its execution to Mr. Pennington, one of the witnesses to the said instrument, and she showed it to him and asked him if he had signed it as a witness, and thereafter on the same day she placed it in a safe deposit box at the bank; that the defendant married again a few months after the death of the decedent Gleason, and this latest marriage was thereafter annulled at her instance; that the decedent, Gleason, died June 22, 1910, seven weeks after the execution of the alleged will,



and that the estate left by him was and is appraised at about \$40,000, all of which, with the exception of ten dollars bequeathed to his sister, the said Lida E. Corbin, is by the terms of the will in question devised and bequeathed to the said defendant Eva Mildred Gleason."

The court seems to have been very liberal towards contestant in the admission of testimony. This, of course, was proper, in view of the several issues involved, but we fail to see what relevancy the numerous marriages of Eva Mildred Gleason could possibly have to the questions involved in the contest, and this is most emphatically true with reference to the marital ventures of the lady after she become the Widow Gleason. Surely her influence over her former spouse, whatever it may have been, had then ceased. While Gleason's marriage to a young woman who had been once widowed and once divorced might possibly have indicated that he was reckless, it would not necessarily suggest either lack of testamentary capacity or subjection to the will of his new wife. Her early custody of the will and her prompt inquiry regarding its execution might have been important, if there were other evidence that she had sought by threats or subtler means improperly to influence her husband, but there is no such showing beyond the conduct and statements of the testator which we have discussed above, and which were totally inadequate to establish undue influence. The unbroken rule in this state is that the courts must refuse to set aside the solemnly executed will of a deceased person upon the ground of undue influence unless there be proof of "a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made." Estate of Carithers, 156 Cal. 428, 105 Pac. 130; Estate of Lavinburg, 161 Cal. 543, 119 Pac. 915; Estate of Kilborn, supra.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(165 Cal. 36)

VESPER v. CRANE CO. et al.

(L. A. 2,908.)

(Supreme Court of California. Feb. 28, 1913.)

1. MALICIOUS PROSECUTION (§ 16\*)—ATTACHMENT (§ 356\*)—INJUNCTION (§ 257\*)—ELEMENTS.

Generally, under the common law, suit for maliciously prosecuting an action against plaintiff does not lie on the fact per se that such action was unsuccessful or abated; it being necessary that it have been prosecuted maliciously and without probable cause, whether the damages be sought for bringing an action alone or procuring issuance of an attachment, injunction, or other ancillary process.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 19-22, 59; Dec. Dig. § 16;\* Attachment, Cent. Dig. §§ 1319-1321; Dec. Dig. § 356;\* Injunction, Cent. Dig. § 606; Dec. Dig. § 257.\*]

2. ATTACHMENT (§ 331\*)—MALICIOUS PROSECUTION (§ 13\*)—WRONGFUL ATTACHMENT—REMEDIES.

On failure of an attachment, defendant may either sue on the attachment undertaking or for malicious attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1180-1185; Dec. Dig. § 331;\* Malicious Prosecution, Cent. Dig. §§ 13-15; Dec. Dig. § 13.\*]

3. ATTACHMENT (§ 331\*)—WRONGFUL ATTACHMENT—SUIT ON UNDERTAKING—PROOF REQUIRED.

Suit on an attachment undertaking is sustained by allegation and proof that the writ was wrongfully procured, that there was no debt due from the attachment defendant when it was issued and levied; a showing of malice and want of probable cause being unnecessary.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1180-1185; Dec. Dig. § 331.\*]

4. MALICIOUS PROSECUTION (§ 16\*)—WRONGFUL ATTACHMENT—PROOF REQUIRED.

In an action for wrongful attachment, wherein plaintiff, the attachment defendant, disregards his remedy on the attachment undertaking, he must allege and prove malice and want of probable cause in procuring issuance of the attachment the same as in a common-law action for malicious prosecution.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 19-22, 59; Dec. Dig. § 16.\*]

5. ATTACHMENT (§ 374\*)—WRONGFUL ATTACHMENT—EVIDENCE—JUDGMENT ROLL.

Even if, in an action for wrongful attachment brought independently of the attachment undertaking, the judgment roll in the attachment action, showing judgment for the attachment defendant, is admissible as prima facie evidence of want of probable cause, it is no evidence of malice in procuring issuance of the attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1363-1372; Dec. Dig. § 374.\*]

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by A. E. Vesper against the Crane Company and another. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

Grant Jackson and Lewis Cruickshank, both of Los Angeles, for appellant. S. J. Parsons, of Los Angeles, for respondents.

PER CURIAM. This appeal was originally heard and determined in Department 2, an opinion written by Mr. Justice Lorigan having been filed on September 13, 1912; the court affirming the judgment and order appealed from. A rehearing in bank was ordered. Upon further consideration we adhere to the views expressed in the department opinion, and adopt the same as the opinion of the court in bank.

The following is a copy of the department opinion:

"This appeal is taken from a judgment in favor of defendants and an order denying the motion of plaintiff for a new trial.

"The action was brought to recover damages for the alleged wrongful issuance and levy of a writ of attachment.

"The complaint was in two counts, and the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

allegations common to both are that in April, 1907, the defendant Crane Company, asserting that plaintiff was indebted to it in the sum of \$463.57 for goods, wares, and merchandise sold by it to him, assigned its claim therefor to the other defendant, Hunt, one of its employés, for the purpose of collecting the amount by suit, and such an action was brought therefor at its request by Hunt on May 10, 1907; that an affidavit and undertaking on attachment was filed and given, and a writ of attachment issued in the suit, under which an automobile belonging to plaintiff was levied on and taken possession of by the sheriff on the same day the action was commenced, and held in the possession of the latter until January 19, 1909, some 20 months; that plaintiff answered in said action, and, after trial, judgment was entered in his favor in September, 1908, for his costs of suit, the court finding that he was never indebted to the Crane Company or Hunt, as assignee, in any sum whatever; that Hunt appealed from said judgment and executed a bond to continue the attachment in force pending the appeal, and also moved for a new trial; that while the appeal and said motion for a new trial were pending, it was on January 19, 1909, stipulated between the parties that both the appeal and motion should be abandoned, the automobile released from attachment and restored to plaintiff, and the costs in the judgment awarded to plaintiff paid by said Hunt, all of which was done.

"It was then further alleged in the first count that plaintiff was never indebted to the defendant Crane Company or to said Hunt, and that said action was commenced and said attachment issued and levied by defendants 'maliciously and without probable or any cause therefor, and for the purpose of harassing and annoying plaintiff and putting him to trouble and expense'; that the reasonable value, use, and occupation of said automobile during its detention for said 20 months by the sheriff under the writ was \$15 a day, amounting in the aggregate, with other alleged damages, to \$9,315, for which judgment was asked.

"As to the second count, the only material difference between its allegations and those of the first count are that the damages claimed as the result of the detention of the automobile are more specifically set forth, the claim being that they aggregated \$9,766.42, and the omission of any allegation that the action was brought and the attachment levied maliciously; it being alleged in that respect 'that the said action was commenced and the said writ of attachment issued and levied without probable or any cause therefor.' It was further alleged in both counts that the said action by Hunt against plaintiff was brought and prosecuted, and the attachment issued and levied, by Hunt at the request and direction of the Crane Company, and as its agent and for its benefit.

"The answer of defendants admitted that defendant Hunt, in the prosecution of the said suit against plaintiff, was acting in behalf of the defendant Crane Company and all the allegations respecting such actions. The levy of the attachment and detention by the sheriff of the automobile of plaintiff thereunder were likewise admitted; but defendants denied that said action was brought maliciously or without probable cause on the part of either of said defendants, or that plaintiff suffered damage by reason of the bringing of said action or the issuance and levy of said attachment. As a further defense, the defendants set forth at length facts and circumstances in connection with the claim of indebtedness asserted by Hunt as assignee of defendant Crane Company in said suit against plaintiff, the bringing of the action thereon, and the levy of the attachment, under all of which it was asserted and claimed that both Hunt and the Crane Company, in bringing said suit, had probable cause for doing so, and believed that plaintiff was legally liable on the account upon which suit was brought, and were so advised by their attorney, to whom they had freely and fairly stated all the facts regarding the matter of which they had then knowledge, and that said action was brought in good faith, with probable cause, and without any malice on the part of either of said defendants against plaintiff.

"On the trial of the action, as to the allegation in the first count of the complaint that the suit complained of was instituted by the defendants maliciously, it was expressly admitted by the attorney for plaintiff that said action was begun and the attachment issued and levied by the defendants without any malice on the part of the defendants against the plaintiff.

"Having so abandoned the allegation of malice, and on the assumption that it was only necessary to prove want of probable cause as alleged in both counts, plaintiff introduced in evidence, in support of such allegation, the judgment roll in the action of Hunt against the plaintiff.

"The admission by plaintiff of the absence of malice and the introduction of this judgment roll on the issue of want of probable cause was all that was presented to the court on these matters. The rest of the evidence was addressed solely to the question of damages.

"The court, in concurrence with the admission of counsel for plaintiff, found that, in bringing the action and levying the attachment, the defendants did so without malice, and further found against the claim of plaintiff that said action and levy were without probable or any cause therefor. In addition the court found that, by reason of the issuance of the attachment and detention of the automobile for the period claimed, the damages to plaintiff did not exceed \$711. The court concluded, as matter of law, that



as the action against plaintiff was brought and the attachment levied without malice, and it not being shown that the same was brought with malice and without probable cause, the defendants were entitled to a judgment in their favor dismissing the complaint of plaintiff, which was accordingly done. The theory upon which the superior court rendered judgment for the defendants was that no action could be maintained directly against an attaching creditor unless upon allegation and proof that the issuance and levy of the writ was procured maliciously and without probable cause; that otherwise the sole remedy of the attachment defendant was against the sureties upon the undertaking on the attachment given to procure the issuance of the writ.

"As we understand the contention made by appellant here, it is that the present action was not brought to recover punitive damages for malicious attachment, but simply to recover actual damages caused by the issuance and levy of the writ; that, when the action is of that character alone, it is not necessary to aver malice or even want of probable cause, but only to aver, as appellant did, that the respondents never had any cause of action against appellant when they brought the suit against him, and that proof thereof entitled them to a recovery of actual damages for which the suit was alone brought; or that, in any event, an averment of want of probable cause and proof thereof was all that was essential to warrant a recovery for actual damages.

[1] "The general rule is well settled in this state, following the common-law doctrine, that no action for damages can be prosecuted against a plaintiff in an action from the fact per se that the action was unsuccessful or abated. The action must have been prosecuted maliciously and without probable cause, or the plaintiff cannot be made liable for bringing it. And the rule is the same whether the damages sought proceed from the bringing of an action alone or whether it is accompanied with an attachment, injunction, or other ancillary process. In either event, the plaintiff in such an action must allege and prove malice and want of probable cause in bringing the original action or in procuring the issuance of the ancillary proceeding therein, or he is not entitled to recover.

[2] "When an attachment is sued out and levied upon the property of a defendant in the action, and the plaintiff therein has failed to maintain his action, two remedies may be open to the attachment defendant: He may sue upon the undertaking on attachment or maintain an action for malicious attachment.

[3] "The remedy on the attachment undertaking is sustained by allegation and proof that the writ was wrongfully procured—that there was no debt due from the attachment defendant when it was issued and levied. It

is not there necessary to aver malice and want of probable cause for the issuance of the attachment, but simply that the attachment was wrongfully procured and levied.

[4] "When, however, the attachment defendant undertakes to proceed against the attachment plaintiff alone and independent of any right of action upon the bond, he must allege and show malice and want of probable cause on the part of the attachment plaintiff, as required by the principles of the common law in actions for malicious prosecution. The averment of malice and want of probable cause go to the very gist of the action by the attachment defendant; and no recovery can be had unless these essential elements of liability are alleged and established by the evidence. The action to recover damages from the attachment plaintiff for the mere wrongful issuance and levy of an attachment is analogous to the ordinary action for malicious prosecution of a criminal proceeding, or of a civil action where no attachment or other ancillary proceeding has been had, and is governed by the same rules as to pleading and proof as far as applicable. *Eastin v. Bank of Stockton*, 66 Cal. 123, 4 Pac. 1106, 56 Am. Rep. 77; *Robinson v. Kellum*, 6 Cal. 399; *Grant v. Moore*, 29 Cal. 644; *King v. Montgomery*, 50 Cal. 115; *Gonzales v. Cobliner*, 68 Cal. 151, 8 Pac. 697; *Asevado v. Orr*, 100 Cal. 293, 34 Pac. 777.

"While two of the cases above quoted (*Robinson v. Kellum* and *Asevado v. Orr*) involved actions on injunction bonds, the same principle as to the maintenance thereof is applicable whether the ancillary process or proceeding accompanying the suit consists of an injunction, or attachment, or other writ, which it is asserted has been improperly procured in the action. In the last case immediately cited, quoting from the first, it is said, at page 297 of 100 Cal., at page 778 of 34 Pac.: "An action on the case will not lie for improperly suing out an injunction, unless it is charged in the declaration as an abuse of the process of the court through malice and without probable cause. If the act complained of is destitute of these ingredients, then the only remedy of the injured party is an action upon the injunction bond, which is specially provided by the statute as a protection against injury, even without malice"—and reversed the judgment because the complaint failed to aver those facts."

"The cases of *King v. Montgomery* and *Gonzales v. Cobliner*, supra, were actions for damages by the attachment defendant against the attachment plaintiff, in which this court declares it to be the settled law that no action lies against the plaintiff in behalf of one whose property has been attached and the suit or attachment terminated in his favor, unless such suit or attachment was prosecuted or sued out and levied malicious-

ly and without probable cause. In the last case just referred to, this court cites several cases from other jurisdictions in support of this rule, among others *Stewart v. Sonneborn*, 98 U. S. 192, 25 L. Ed. 116, where it is said (and extending the quotation somewhat further): "The jury were positively instructed to return a verdict for the plaintiff independently of any consideration of malice in the institution of the bankruptcy proceedings, or want of probable cause therefor. If the charge was correct, then every man who brings a suit against another, with the most firm and reasonable belief that he has a just claim, and a lawful right to resort to the courts, is responsible in damages for the consequences of his action, if he happens to fail in his suit. His intentions may have been most honest, his purpose only to secure his own, in the only way in which the law permits it to be secured; he may have had no ill feeling against his supposed debtor, and may have done nothing which the law forbids. Such is not the law. It is abundantly settled that no suit can be maintained against an unsuccessful plaintiff or prosecutor, unless it is shown affirmatively that he was actuated in his conduct by malice or some improper or sinister motive. Malice is essential to the maintenance of any such action, and not merely (as the circuit court thought) to the recovery of exemplary damages. Notwithstanding what has been said in some decisions of a distinction between actions for criminal prosecutions and civil suits, both classes at the present day require substantially the same essentials. Certainly an action for instituting a civil suit requires not less for its maintenance than an action for a malicious prosecution of a criminal proceeding."

"It will be observed in this quotation from the Supreme Court of the United States that the distinction which the appellant seeks to make between actions for actual damages and those for exemplary damages, as affecting the necessity of allegations of malice and want of probable cause in procuring an attachment or other process, is expressly repudiated; that such allegations are essential to the maintenance of any such action, whatever the character of the damages sought, whether compensatory or punitive.

"We content ourselves with reference to our own cases and the authorities referred to therein sustaining the rule that allegation and proof of both malice and want of probable cause are essential to a suit against an attachment plaintiff, without additional citation from other jurisdictions, which abundantly sustain this rule.

[5] "Considerable discussion is directed on both sides to the effect of the judgment roll in the suit of Hunt against the plaintiff, in which suit the attachment was issued, and

which was introduced in evidence by plaintiff in this action in support of his allegation of want of probable cause. Appellant contends that it sufficiently established such issue; respondent denies that it had that effect. But we perceive no reason for considering this point. If it be assumed, without so deciding, that it was at least prima facie evidence of want of probable cause, this cannot benefit plaintiff, because to maintain the action both malice and want of probable cause must be shown on his part. As pointed out, proof of want of probable cause and malice must be made to warrant recovery; it cannot be had on proof of want of probable cause alone. While malice may be inferred from want of probable cause, there can be no room for such inference where, as here, it was expressly admitted on the trial that neither of the respondents was actuated by malice in bringing the action or procuring the issuance and levy of the attachment.

"Nor is it necessary to discuss the point made as to the proper rule for the assessment of damages in cases of this character. This could only be important if, as contended by appellant, proof alone of want of probable cause in procuring the levy of the attachment was sufficient to sustain an action of this character, which, as pointed out, is not the rule in this state. While the trial court took evidence on the subject of damages and made a finding thereon, still on its further findings, supported by the admissions of appellant on the trial that respondents did not act maliciously in procuring the attachment, the matter of damages became a false quantity in the action. It was not necessary for the court, in view of the other findings, to make any finding on the subject of damages, and properly ignored it in entering the judgment dismissing the action which, under the other findings discussed, it was right to do."

The judgment and order appealed from are affirmed.

BEATTY, C. J., does not participate in the foregoing.

165 Cal. 19

TOGNAZZINI et al. v. JORDAN, Secretary of State. (S. F. 6,335.)

(Supreme Court of California. Feb. 27, 1913.)

CORPORATIONS (§ 40\*)—AMENDMENT OF ARTICLES—DISSOLUTION OF CORPORATION.

Civ. Code, § 362, after prescribing the manner in which a corporation may amend its articles, provides that the section shall not be construed to authorize any corporation to increase or diminish its capital stock, change its name, extend its corporate existence, or change the number of its directors without complying with the special provisions of the Code. Code Civ. Proc. § 1227 et seq., provides a method for terminating the existence of a corporation



by applying to the court for dissolution. *Held*, that a corporation may shorten its term of existence by filing an amendment in accordance with section 362, although the corporation by reason of such shortened term goes out of existence on filing the amendment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 124; Dec. Dig. § 40.\*]

In Bank. Application for writ of mandamus by T. G. Tognazzini and others against Frank C. Jordan as Secretary of State. Writ granted and made peremptory.

Gavin McNab, B. M. Aikins, and Lillenthal, McKinstry & Raymond, all of San Francisco, for petitioners. U. S. Webb, Atty. Gen., for respondent.

MELVIN, J. Petitioners prayed for a writ of mandamus requiring the Secretary of State to file, nunc pro tunc as of the 9th day of August, 1912, a certified copy of a certificate of amendment of the articles of incorporation of the Swiss-American Bank. An alternative writ was issued, and the matter is now before us for final consideration of the points of law involved; there being no controversy with reference to the facts. The Swiss-American Bank was incorporated for the term of 50 years on the 10th day of August, 1909. Subsequently, by a contract made and executed in accordance with the "Bank Act," so called, and approved by the superintendent of banks, the corporation transferred all of its deposits to the Anglo-Californian Trust Company. There are no corporate debts. Prior to August 9, 1912, the Swiss-American Bank, following the procedure prescribed by section 362 of the Civil Code, amended its articles of incorporation by abbreviating its term of corporate existence to three years. A certificate of amendment was filed in the office of the county clerk of the city and county of San Francisco on August 8, 1912, and a certified copy thereof, accompanied by the proper fee, was tendered to the Secretary of State for filing on August 9, 1912—the day before that upon which, if the amendment to the articles of incorporation was valid, the existence of the Swiss-American Bank would terminate. The Secretary of State declined to file the proposed document upon the ground that a corporation may not shorten the term of its corporate existence, at least not in such manner as practically to end its being almost immediately. He insists that a corporation wishing to terminate its existence must apply to a court for dissolution as prescribed by sections 1227 et seq. of the Code of Civil Procedure. The only question before us, therefore, is whether or not section 362 of the Civil Code permits the shortening of the corporate life of the Swiss-American Bank.

Section 362 of the Civil Code, after prescribing the manner in which a corporation may amend its articles of incorporation and providing for the filing with the Secretary of

State a certified copy of its amended articles, contains the following proviso: "Nothing in this section shall be construed to authorize any corporation to increase or diminish its capital stock, change its name, extend its corporate existence, or increase or diminish the number of its directors, without complying with the special provisions of this Code applicable thereto." In his brief the learned Attorney General states that the proviso quoted above was first inserted in section 362 of the Civil Code in 1905, save that part prohibiting the diminishing of capital stock by amendment of the articles of incorporation. He says: "The exceptions running to the change of name, extension of corporate existence, increase or decrease of number of directors, as well as to the increase or decrease of capital stock, were inserted for the first time in the amendment of 1905." He then calls attention to the repeal of section 399 of the Civil Code in 1905 (Stats. 1905, p. 563). That section simply stated that "dissolution of corporations is provided for" in certain specified parts of the Civil Code. In the brief of the Attorney General we are also cited to the language of the note of the code commissioner on said section 399 of the Civil Code to the effect that: "This section, which purports merely to designate the place in the Code of Civil Procedure where the dissolution of corporations is provided for, does not state any rule of law and constitutes but an imperfect index to the provisions referred to." The brief then proceeds as follows: "Prior to the amendment of section 362, in 1905, the Code contained other provisions practically the same as at present, relating to the increase of the capital stock, change of name, extension of corporate existence, and increase or decrease in the number of directors. Yet it has never been contended that, prior to such amendment, section 362 authorized a corporation to accomplish any of these purposes by mere amendment of its articles of incorporation." It occurs to us that the reason for a failure to contend that section 362 of the Civil Code authorized a corporation to accomplish a shortening of its term of existence amounting almost to an immediate dissolution may perhaps be found in the existence of section 399 of the Civil Code and the belief which the profession may have entertained that said section pointed the only way to a practical termination of corporate entity. But whatever may have been the reason, it is certain that ever since its passage in 1885 section 362 has contained a proviso against the *extension* of its corporate existence. This fact seems to have been overlooked, but in the act as originally passed (Stats. 1885, p. 92) we find this language: "Provided, that the time of the existence of such corporation shall not be by such amendment extended beyond the time fixed in the original articles or certificate of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

incorporation." In the amendments to the section in 1893 and 1903 this proviso is substantially repeated (Stats. 1893, p. 131; Stats. 1903, p. 411). The proviso contained in the section as amended in 1905 has been previously quoted above.

Petitioners contend that the power to dissolve by application to a court cannot deprive a corporation of the right to shorten its term of existence even if the practical result of such abbreviation would amount to a speedy termination of the corporate life: First, because there is nothing inconsistent in the two methods of procedure; and, second, because section 362, which (it is asserted) gives the right to curtail the corporate term, was passed subsequently to those sections of the Code of Civil Procedure relative to dissolution of corporations by proceedings in the superior court. These contentions must be upheld. The power to amend articles of incorporation has reference to the changes in those matters essential to the original articles. California Telephone & Light Co. v. Jordan (App.) 126 Pac. 598. Section 290 of the Civil Code prescribes the necessary contents of articles of incorporation, among which is the term for which the corporation is to exist, not exceeding 50 years. Section 362 of the Civil Code gives the general right to amend articles of incorporation, limiting the power, however, to certain particulars; one of them being the *extension* of the corporate term. This very limitation indicates an intention to permit an amendment shortening the period of the corporation's life. It is the rule that the exception of a particular thing from the purview of the general expressions of a statute indicates that in the opinion of the lawmaking body the thing excepted would have been included within the general clause if the exception had not been made. Commonwealth v. Summerville, 204 Pa. 304, 54 Atl. 27; Gibbons v. Ogden, 22 U. S. (9 Wheat.) 191, 6 L. Ed. 23; Brown v. Maryland, 25 U. S. (12 Wheat.) 438, 6 L. Ed. 678; Tinkham v. Tapscott, 17 N. Y. 152; 2 Lewis' Sutherland, Statutory Construction (2d Ed.) § 351. The limitation upon this rule is that it must not be carried too far—that an exception from the general language of a statute is sometimes made out of an abundance of caution and not to indicate that without the exception its subject-matter would come within the scope of the act. We do not think that section 362 of the Civil Code comes within the limitation upon the general rule.

It is asserted that the other methods of dissolution of corporations would, in general, provide greater protection to minority stockholders from fraud, although it is conceded that in the present proceeding no injury could result from permitting the method selected by petitioners to be used in ending the career of the Swiss-American Bank. The mere fact that other and better methods may

exist cannot prevent us from declaring what seems to us to be the plain meaning of the statute under discussion. If the shortening of the term of corporate existence had been for one year instead of 47 years, there could have been no claim that such action amounted to disincorporation without notice to all persons interested and in possible fraud of their interests. If the statute permits abbreviation of the corporation's legal lease of life, we cannot say, where the law does not, just when the process of diminution becomes dissolution.

Let judgment be entered in accordance with the prayer of petitioners, and let the writ be made peremptory.

We concur: HENSHAW, J.; LORIGAN, J.; SHAW, J.; SLOSS, J.; ANGELLOTTI, J.

165 Cal. 1

NATIONAL HARDWOOD CO. et al. v.  
SHERWOOD et al. (L. A. 2,832.)

(Supreme Court of California. Feb. 25, 1913.)

1. BILLS AND NOTES (§ 167)—NEGOTIABILITY  
—NOTE SECURED BY MORTGAGE.

Where a note is secured by a mortgage on land, both being executed at the same time and as parts of the same transaction, the note, though negotiable in form, is not negotiable in law, and a purchaser, taking it with knowledge of the existence of the mortgage, takes subject to equities.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 418, 419; Dec. Dig. § 167.\*]

2. BILLS AND NOTES (§ 453\*)—RECITALS—  
VALUE RECEIVED—ESTOPPEL.

Neither the presumption of consideration arising from the fact that a contract is in writing as provided by Civ. Code, § 1614, Code Civ. Proc. § 1963, subd. 39, nor a recital in a non-negotiable note secured by a mortgage on land that it was given for value received, is sufficient to create an estoppel against the maker and his successors in interest to assert want of consideration as a defense to the note in the hands of an indorsee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1344-1351; Dec. Dig. § 453.\*]

3. BILLS AND NOTES (§ 318\*)—ESTOPPEL (§  
22\*)—BY DEED—CONSIDERATION—DENIAL—  
CAVEAT EMPTOR.

Code Civ. Proc. § 1962, subds. 2, 3, provided that the recital of a fact in a written instrument, except the recital of a consideration, is conclusive between the parties or their successors in interest by a subsequent title, and that when a party by his own declaration, act, or omission has intentionally and deliberately led another to believe a particular thing true, and to act on such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it. F., having accepted a deed of trust for part of the purchase price of a lot sold to S. in order to enable S. to borrow money with which to construct a building, inserted in a trust deed a recital that it was subsequent to the lien of a mortgage for \$3,000 in favor of J., to whom S. executed a note for \$3,000 secured by a mortgage on the property. The consideration of this note was to be advanced as the building progressed, and only \$1,940.67 was paid. J.



sold the note and mortgage to P. for \$3,000, at the time showing to her a statement signed by S. and wife that the note and mortgage to J. had been given for value received, and that there were no offsets against the same, together with the recital in the deed of trust which was subsequently foreclosed and the property bid in by F. Held that, as against P., F. was estopped by the recital in his deed of trust to deny that the consideration of the note and mortgage to J. had not been fully paid; nor was such estoppel obviated by the rule of caveat emptor applicable to a purchaser of a nonnegotiable obligation.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 754; Dec. Dig. § 318; \*Estoppel, Cent. Dig. §§ 27-51; Dec. Dig. § 22.\*]

#### 4. ESTOPPEL (§ 22\*)—RECITALS IN MORTGAGE.

Where a person accepts a mortgage which recites that it is subject to another mortgage on the same property, he is estopped thereby, and may not defeat or impair such other mortgage by denying its priority or validity, at the time he took it, to the amount of it as recited in his own mortgage.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 27-51; Dec. Dig. § 22.\*]

#### 5. ESTOPPEL (§ 72\*)—INNOCENT PERSONS—NEGLIGENCE OF ONE.

Where a deed of trust, securing the balance of the purchase price of certain vacant property, recited that it was subject to a mortgage to J. for \$3,000, and contained no statement that the amount of such prior mortgage was to be thereafter advanced, and though only a portion thereof was ever advanced, J. sold the mortgage to a purchaser for \$3,000, who took on the faith of the recital in the deed of trust, the beneficiary under such deed, who purchased the property on foreclosure thereof, was bound by the recital as to the extent of the lien to which the deed was subject under Civ. Code, § 3543, providing that, where one of two innocent persons must suffer by the act of the third, he by whose negligence it happened must be the sufferer.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 188; Dec. Dig. § 72.\*]

In Bank. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by the National Hardwood Company and others against Damon Sherwood and others. Judgment for plaintiffs, and defendant A. R. Phelps appeals. Reversed.

Lloyd W. Moultrie, of Los Angeles, for appellant. Borden & Carhart, Job Harriman, H. T. Morrow, G. H. Moore, and Cole & Cole, all of Los Angeles, for respondents.

SHAW, J. The defendant Phelps appeals from the judgment.

The plaintiffs began the action to foreclose certain alleged liens upon the lot in controversy for materials furnished in the erection of a building thereon. No objection is made to the judgment with respect to these liens. The sole controversy is between the appellant, Phelps, and the defendant Emil Firth; and the question presented is whether the principal sum of the mortgage lien held by Mrs. Phelps upon the lot is \$3,000 or only \$1,940.67. The note described in the

mortgage was for \$3,000, but it was given for future advances, and the mortgagors received only \$1,940.67 therefor. The facts are somewhat complicated, and it is necessary to state them at length.

The defendant Firth owned the lot prior to any of the transactions involved in the case. He executed a deed of the lot to the defendant Damon Sherwood; the purchase price being \$1,800. The deed was dated September 3, 1908. Under the same date, Sherwood and wife executed a deed of trust upon the lot to the Title Insurance & Trust Company, as trustee, to secure the payment of the said purchase price in four installments, for which Sherwood executed four notes to Firth. Sherwood desired to build a house on the lot, and for that purpose to borrow money by a first mortgage thereon. He arranged to borrow this money from one L. E. Jones. To accomplish the purpose, it was necessary that the deed of trust in some manner recognize the proposed mortgage as a paramount lien. To accomplish this, the following recital was inserted therein: "This trust deed is given to secure the purchase price of said property, but is second and subsequent to the lien of a mortgage for the sum of \$3,000 in favor of L. N. Jones." On October 8, 1908, Sherwood and wife executed to Jones the mortgage on the lot purporting to secure a note of the same date from Sherwood to Jones for \$3,000, payable three years after date. The mortgage also provided that, in case of foreclosure, the mortgagors would pay the attorneys' fees of the plaintiff in the suit, and that, upon default in payment of the interest or of any installment of the principal, the holder of the note should have the option to declare the whole sum due immediately. The deed of trust, although dated September 3, 1908, was not fully executed by delivery until October 13, 1908, on which day both the mortgage and the deed of trust were placed on record. It was agreed between Sherwood and Jones that the money borrowed on the mortgage should not be immediately paid to Sherwood, but should be paid over from time to time in smaller sums as needed for the proposed building. Firth was cognizant of this agreement. Sherwood thereupon proceeded to erect a building on the lot, and Jones advanced him therefor sums amounting to \$1,940.67, and no more. The building was completed on January 19, 1909. On November 4, 1908, Jones sold, assigned, and indorsed the said note and mortgage to the appellant, A. R. Phelps, for \$3,000, which she then paid to him.

At the time Sherwood and wife made the note and mortgage to Jones, they also signed and delivered to Jones a written statement declaring that said mortgage "has been given for value received, and that there are no offsets to the same." This document, and also the aforesaid recital in the deed of trust,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

were shown to Mrs. Phelps by Jones at and prior to her purchase of the note and mortgage from Jones. She took the assignment and paid the \$3,000 to Jones without any notice or knowledge of the agreement between Jones and Sherwood, or of the fact that Sherwood had not received the full amount named in the note; and she relied on said recital of the deed of trust and said statement of the Sherwoods. She made no inquiry, personally, of the Sherwoods, or of Firth, or of the trustee, in regard to the matter.

Default was made in the payment of the purchase price due to Firth, secured by the deed of trust, and thereupon the trustee, in pursuance of the power of sale contained therein, duly sold said lot to enforce payment. Firth was the purchaser at the sale, and on May 22, 1909, the trustee, in pursuance thereof, executed a deed conveying the lot to him.

[1] It appears to be settled by the decisions of this court that where a note is secured by a mortgage on land, both being executed at the same time, or as parts of one transaction, the note, although negotiable in form, is not negotiable in law, where the purchaser takes it with knowledge of the existence of the mortgage. *Meyer v. Weber*, 133 Cal. 681, 65 Pac. 1110; *Briggs v. Crawford*, 162 Cal. 129, 121 Pac. 381; *Civ. Code*, § 1642. See, also, *Hibernia v. Thornton*, 127 Cal. 577, 60 Pac. 37; *Hays v. Plummer*, 126 Cal. 109, 58 Pac. 447, 77 Am. St. Rep. 153. In *McDonald v. Randall*, 139 Cal. 246, 72 Pac. 997, the court, in deciding that knowledge by the president of a corporation that a note, negotiable in form and secured by mortgage, was without consideration, where the note was payable to him, and was indorsed by him to the corporation, could not be imputed to the corporation under the circumstances shown, said in the course of the opinion, that the note was negotiable, and upon that statement assumed that the corporation would take it free from all existing defenses, unless it took with notice thereof. But the point that the mortgage accompanying the note made it nonnegotiable was not presented upon the argument nor discussed by the court. The case of *Meyer v. Weber*, supra, was not cited or mentioned either in the opinion or in the briefs. In view of these circumstances, the *McDonald* Case cannot be considered as a decision overruling *Meyer v. Weber* on that point. Three reasons for the doctrine were given in *Meyer v. Weber*. The first was that the mortgage there involved provided for the payment of attorneys' fees if suit to foreclose was instituted; a condition which destroyed the negotiability of the note, under the provisions of section 3088 of the Civil Code as it stood prior to the amendment of 1905. It would not have that effect under the section as it now is, and as it was when the note

here involved was executed. The second reason was that the mortgage provided that, upon default in the payment of the interest due before the maturity of the principal, the payee had the optional right to declare the principal due immediately, which also, under section 3088, would make a note nonnegotiable. The third reason was that in this state, under section 726 of the Code of Civil Procedure, a note secured by mortgage can be enforced only by foreclosure of the mortgage, and consequently the personal liability upon such note is contingent and dependent upon there being a deficiency in the proceeds of the mortgaged premises to pay the note upon a foreclosure sale. This also, it was held, introduced into the contract a condition not certain of fulfillment within the meaning of section 3088, and renders the contract as a whole nonnegotiable. The facts upon which the second and third reasons are founded are present in the case at bar; and the reasons are as potent as in the *Meyer* Case. It should be remarked, however, that in the present case, and also in *Meyer v. Weber* and *Briggs v. Crawford*, the note recited that it was secured by mortgage. The result was that no person could receive the note as indorsee without notice of the fact that it was accompanied by the mortgage. There is nothing in any of the decisions which would support the claim, should a case arise, that, in the absence of any such recital in the note, one who should purchase it for value before maturity, in good faith, and without knowledge or notice of the mortgage, could not hold it as a negotiable instrument and free from any defense which the maker might have as against the payee or any previous holder.

The note being nonnegotiable on its face, the result is that Mrs. Phelps, although she paid Jones the full face of the note as the price thereof, is not entitled to the protection which the law gives to an indorsee of a negotiable note, in good faith, for value and before maturity. *Civ. Code*, §§ 3122, 3123, 3124. Firth, as successor in interest of Sherwood, the mortgagor, may therefore avail himself of the defense of partial want of consideration arising out of the fact that Jones did not loan more than \$1,940.67 on the note, unless he is estopped to do so by the conduct of Sherwood, or by some other circumstance not depending upon the law of negotiable instruments.

[2] The note, as signed by Sherwood, recited that it was given for value received. It is not claimed that this representation would constitute an estoppel and prevent Sherwood, or Firth as his successor, from asserting want of consideration as a defense to the note in the hands of the indorsee. It would constitute prima facie evidence of a valuable consideration sufficient to support the promise to pay, although, since the contract is in writing, such consideration would



be presumed without the aid of the recital. Civ. Code, § 1614; Code Civ. Proc. § 1963, subd. 39. But neither the recital nor the statutory presumption is conclusive upon the maker, and the consideration may always be impeached, if the instrument is not negotiable, notwithstanding such presumption and recital.

[3] The court below held that the aforesaid statement given to Jones by the Sherwoods, and exhibited by Jones to Mrs. Phelps to induce her to purchase the note, created an estoppel in her favor against the Sherwoods alone, preventing them from denying that the note was good for the full amount thereof. It did not appear that Firth had any knowledge of the Sherwood statement, or of the exhibition thereof to Mrs. Phelps, or that she was induced to purchase thereby. Hence it was held to work no estoppel against him.

The principal thing relied on by the appellant to create an estoppel against Firth is the recital in the deed of trust that said deed was subject to "the lien of a mortgage in the sum of \$3,000" in favor of Jones. Firth had knowledge of this deed. It does not appear that he signed it, but he was the beneficiary named therein; and the recital was inserted with his consent for the purpose of making the mortgage to Jones paramount to the interest held by the trustee for his benefit. The evidence shows, however, that all the parties to this deed understood that no money was loaned on the mortgage at the time of its execution, and that it was to be advanced subsequently as needed for the proposed building. Hence we must conclude that it was not the actual intention of the immediate parties to the transaction, including Firth, that the mortgage should be a valid lien at any time for a sum larger than had been advanced thereon at such time by Jones.

The Code declares that the recital of a fact in a written instrument, except the recital of a consideration, is conclusive between the parties thereto, or their successors in interest by a subsequent title. Also that when a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it. Code Civ. Proc. § 1962, subds. 2 and 3. Firth unquestionably had an interest in or under the deed, whether he signed it or not. By the conveyance from the trustee he became the successor in interest of Sherwood by a subsequent title. That conveyance placed him in the same position, with respect to this recital, as he would have occupied if Sherwood had conveyed the lot to him after the mortgage to Jones was recorded. So far as the mortgage lien was concerned or affected by the recital, he is bound by it as

fully as if he was a party to the deed in which it was inserted.

The purpose of the recital, so far as Firth, Sherwood, and Jones were concerned, was to assure Jones that the deed of trust would be subject to the mortgage lien for whatever sums he should loan thereon. If he had continued to hold the mortgage, it may be assumed that he could not have enforced it for more than the sum actually loaned by him. But Mrs. Phelps had no knowledge of the agreement that the money was to be loaned subsequently in installments as required. That agreement was not referred to in the mortgage nor placed on record; and it cannot be invoked by Firth against her.

The respondent argues that the rule of caveat emptor applies to one who is about to purchase a nonnegotiable obligation for the payment of money, and that such buyer is bound at his peril to inquire into the defenses of the debtor, and can occupy no better position than does the original creditor. This doctrine is well established; but it does not obviate the estoppel here involved. Under the provisions of section 1962 of the Code of Civil Procedure, above recited, and under the facts we have stated, Firth occupies the position of the mortgagor, and is bound by the recital. He, therefore, comes within the third subdivision of that section—that of a person who has by his own declaration led another to believe a particular thing true, and to act upon that belief. Mrs. Phelps saw the recital and acted upon the belief it inspired; and he cannot be permitted to falsify it for his own benefit and to her detriment in the matter in which she acted. She was bound to inquire into the matter or abide the consequences. She did inquire, and she found this recital which she rightly presumed was made with the knowledge and consent of Firth. She was justified in accepting it as true and in purchasing the note and mortgage in reliance on the information it contained. Under the principle declared in the aforesaid provision of the Code, Firth is estopped to deny the truth of the thing of which it informed her. The authorities are in accordance with the Code upon this proposition.

[4] Where a person accepts a mortgage which recites that it is subject to another mortgage on the same property, the rule is that he is estopped thereby and is not allowed to defeat or impair the other mortgage by denying its priority or validity at the time he took it to the amount of it as recited in his own mortgage. *Old National Bank v. Heckman*, 148 Ind. 507, 47 N. E. 953; *Hardin v. Hyde*, 40 Barb. (N. Y.) 435; *Gow v. Lumber Co.*, 109 Mich. 52, 66 N. W. 676; *Bronson v. Railroad Co.*, 69 U. S. (2 Wall.) 310, 17 L. Ed. 725; *Central T. Co. v. Columbus, etc., Co.* (C. C.) 87 Fed. 828. There are also many cases holding that the purchaser, who takes the property by a deed which re-

cites that it is subject to a mortgage thereon, is estopped to assert the invalidity of the mortgage or any defense thereto which existed at the time between the mortgagor and the mortgagee. This is held in cases where it does not appear that the vendor of the land had deducted the mortgage debt, as recited, from the price of the property agreed on between him and the vendee; and it appears to be the rule applicable in any case where the land is taken subject to a mortgage recited in the deed. *Cornell v. Corbin*, 64 Cal. 200, 30 Pac. 629, which concedes, but does not decide, the point; *Freeman v. Auld*, 44 N. Y. 50; *Green v. Kemp*, 13 Mass. 515, 7 Am. Dec. 169; *Shufelt v. Shufelt*, 9 Paige (N. Y.) 145, 37 Am. Dec. 381.

Where the recital is of such a nature that it shows an intent to declare that the second mortgage is to be taken subject only to so much of the sum named in the first mortgage as may be justly owing thereon, the second mortgagee is not estopped from showing that the first mortgage is good only for a part of its face value. *Bennett v. Bates*, 94 N. Y. 354. Firth, as the beneficiary of the trustee, clearly stands in the same situation as a second mortgagee, with regard to the recital. The subsequent purchase under the power in the trust deed does not change his position in this respect. If the recital could be reasonably construed to imply by its terms that the lien of the mortgage to Jones was for an amount less than \$3,000, the principle just stated would be applicable. But we find nothing in its language, or in the note and mortgage to which it refers, which suggests the idea that the money was not loaned on the mortgage at the time of its execution, or that it was made to secure future advances, or that the loan was to be made in installments. In the usual course of business of giving a mortgage, the loan of the money and the execution of the mortgage are practically contemporaneous. The presumption, from the facts shown of record, is that the usual course of business was followed, and that the money was all loaned at the time. Code Civ. Proc. § 1963, subs. 13 and 20. Mrs. Phelps was therefore justified in relying upon the recital as a statement that \$3,000 had been loaned upon the security of the mortgage.

It appears that before buying the note she had seen the lot and the house in process of erection thereon. It is argued that this is sufficient to impute to her knowledge of the fact that the mortgage was made to secure money for use in the erection of the building, and of the fact that it would not be loaned until required for payment of the cost thereof. We see no force in this argument. There is not, so far as we are advised, any custom of making loans in that manner sufficiently established to make it the usual course of business, or to require a prudent person to

inquire, in such a case, as to facts concerning such loan, upon becoming aware that a house was being constructed on the lot.

[5] Another consideration leads us to the conclusion that Firth's interest should be deemed subject to the entire mortgage in the hands of Mrs. Phelps. "Where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer." Civ. Code, § 3543. Firth knew that the mortgage was taken for future advances, and that it was to be paramount to his claim under the deed of trust. But he consented to the insertion of a recital in that deed which did not disclose the fact that it was taken for money to be thereafter loaned, but which implied that the loan was completed. He thereby put it in the power of Jones to exhibit the recital to a purchaser of the note, and to induce the belief that the note was good for its face value, as well as prior to the deed of trust, and by that means to sell it for its face value before he loaned the whole of the money upon it. By simply causing the insertion in the recital of the words "to be hereafter advanced," Firth could have made it speak the truth, he would thereby have protected himself against any such purchaser, and in all probability the sale of the mortgage to Mrs. Phelps would not have been made. He was negligent in thus allowing Jones to possess the means of deceiving others. The deceit was accomplished by Jones, and it happened through this neglect of Firth. Hence he, rather than Mrs. Phelps, the deceived person, must suffer the injury.

The respondent contends that the facts involved in *Briggs v. Crawford*, supra, were substantially the same as in this case, and that it sustains the proposition that there is no estoppel. The party there entitled to assert the estoppel, if any existed, was Crawford, the defendant. It was necessary for him to plead it in order to obtain any benefit from it. The answer pleaded an estoppel by reason of the original conveyance of the Briggs Real Estate Company to the mortgagor, and by reason of the execution of the mortgage; and it did not plead the deed of trust, or any recital therein, as an estoppel in his favor or at all. The terms of the recital do not fully appear; Crawford did not see it or rely upon it when he purchased the mortgage; and the opinion does not discuss or mention such recital or state of facts upon which it could be based. Hence it does not constitute an authority upon the subject. The court below erred in holding that Firth was not estopped and that Mrs. Phelps could not assert a lien for the full face of the mortgage. No other questions are presented.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.



165 Cal. 15

NELSON v. STEELE et al. (L. A. 2,967.)  
(Supreme Court of California. Feb. 26, 1913.)

1. TRIAL (§ 404\*)—TRIAL BY COURT—FINDINGS.

A finding of facts by the court, from which a conclusion of the existence of the fact in issue follows, is equivalent to a finding of such fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957-962; Dec. Dig. § 404.\*]

2. PATENTS (§ 214\*) — LEASE OF RIGHTS — RIGHT TO RESCIND—"ON A PAYING BASIS."

A lease to a corporation of the right to manufacture, sell, and control a patented oiler, providing for payment to the lessor of one-half of "the net proceeds from said \* \* \* oiler and from said corporation," and authorizing cancellation of it at the option of either party if the corporation be not "on a paying basis" within a year, contemplates that there shall be net proceeds paid during the year; and such proceeds not being produced, but net gains being merely shown by treating as cash on hand promissory notes not yet due, received by the corporation for a sale of rights, the lessor may have a cancellation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 321-327; Dec. Dig. § 214.\*]

3. PATENTS (§ 214\*)—LEASE OF RIGHT—CANCELLATION—LOSS OF RIGHT.

A lessor of the right to manufacture, sell, and control a patented article does not lose his right, given by the lease, to have it canceled, if the lessee corporation be not on a paying basis within a year, by not exercising his option till a month after the end of the year; he not having been furnished with information as to the condition of the business.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 321-327; Dec. Dig. § 214.\*]

4. PATENTS (§ 214\*)—LEASE OF RIGHT—CANCELLATION—NOTICE.

A lease of a patent right giving right to have it canceled only if the lessee corporation be not on a paying basis within a year, notice by the lessor that he will not continue, extend, or renew it, as the lessee has not fulfilled its part of the agreement, is sufficient, without stating that it is because it is not on a paying basis.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 321-327; Dec. Dig. § 214.\*]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by R. C. Nelson against H. D. Steele and others. Judgment for plaintiff, new trial denied, and defendants appeal. Affirmed.

W. A. Alderson, of Los Angeles, for appellants. E. E. Hewlett, of San Francisco, and Stuart M. Salisbury, of Los Angeles, for respondent.

MELVIN, J. This is an appeal taken from a judgment in favor of plaintiff and from an order denying the motion of defendants for a new trial.

The action was one whereby plaintiff sought to have canceled a certain contract, by which he had leased to defendants Steele and Baxter, with the understanding that the said agreement should be assigned to a corporation to be formed by them, the right to manufacture, sell, and control a patented

device upon which plaintiff owned the patent rights and known as "the Nelson axle oiler." This agreement provided that Nelson should advance no money; that the defendants should manufacture, sell, and control the patented article; and that they should pay plaintiff 50 per cent. "of the net proceeds from said Nelson axle oiler and from said corporation." The contract contained a provision that a statement should be rendered to Nelson by the manufacturer on the 15th day of each month. In the agreement was this paragraph: "That should this corporation not be on a paying basis within one year from date, this contract may be canceled at the option of any of the parties hereto, or may be extended under a new agreement, and upon a new basis." The date of this instrument was May 14, 1909. On June 22, 1910, plaintiff sent to defendants the following notice, dated May 15, 1910: "Messrs. W. E. Baxter, H. D. Steele. Los Angeles, Calif.—Gentlemen: In accordance with our contract relative to the Nelson axle oiler, which expired May 14, 1910, and now becomes null and void, I wish to advise and serve this notice, that I will not continue, extend or renew any contract with you, as you have not fulfilled your part as per agreement. You must consider all obligations between us at a close. This as per our past agreement. Yours truly, [Signed] R. Nelson."

The court found that the contract was duly executed; that it was duly assigned to the defendant corporation; that monthly statements were rendered to plaintiff at times alleged in the answer, but that said statements showed neither the net earnings nor the financial condition of said corporation; that defendants sold the right to manufacture and control the Nelson axle oiler in the territory known as Northern California for the sum of \$2,500, for which promissory notes were accepted, only \$500 of which had been paid prior to May 15, 1910; "that, in order to show the 'net gain' of \$26.95 contained in defendants' exhibit No. 1, the defendants treated as cash on hand promissory notes amounting to \$2,000, which were not yet due, the said notes being the unpaid portion of the promissory notes for \$2,500 received for the sale of the right to manufacture, sell and control the said Nelson axle oiler in Northern California." The court also found that the notice of rescission, quoted above, was sent to defendants June 22, 1910, and as a conclusion of law announced that plaintiff was entitled to judgment canceling the contract in question, enjoining defendants and those claiming under them from using the Nelson axle oiler, or in any manner dealing with it, and for costs, but that said judgment should be entered without prejudice to an action by any of the parties for an accounting.

[1,2] Appellants' first point is that the

matter of the existence or nonexistence of net gain for the year was one squarely in issue, and that the court did not find thereon. There is no merit in this contention. The finding of the court, which we have quoted in *hæc verba*, was equivalent to a finding that the business was not on a paying basis at the end of the first year. This finding was based upon a stipulation that the very facts found with reference to the method of figuring the "net gain," so called, were true. The only important question, therefore, is whether or not these facts show that the concern was on a "paying basis" on May 14, 1910. Respondent insists that the expression means that there must have been "profits," or an excess of receipts over expenditures, in order that the concern might be said to be upon a paying basis, citing as instructive upon this point a number of cases, including *People v. S. F. Savings Union*, 72 Cal. 200, 13 Pac. 498. Appellants insist that the criterion of "profits" is too narrow, but that all "assets," including notes payable in the future, must be set off against all liabilities in determining whether or not a corporation is on a "paying basis."

Appellants cite *Lowther v. Miller-Sibley Oil Co.*, 53 W. Va. 507, 44 S. E. 436, 97 Am. St. Rep. 1027, where the phrase "paying quantities" in an oil lease is construed to mean "paying quantities to the lessee," and a like definition in *Young v. Oil Co.*, 194 Pa. 243, 45 Atl. 121, is approved. But that case does not meet the difficulty here presented. The matter there involved was the question when a right to an extension of the term of a certain oil lease vested; and it was properly determined that ordinarily the term "paying quantities" must refer to the amount that would properly compensate the exploring lessee for his outlay, rather than such sum as might be a reasonable return to the lessor upon his investment. We find no direct authority defining the expression "on a paying basis." None is needed, because the contract itself gives us a key to the meaning of the parties thereto. It provides for a payment of one-half of the "net proceeds from said Nelson axle oiler and from said corporation" to the plaintiff. It was clearly contemplated, therefore, that there should be net proceeds paid during the first year of the life of the contract; and it is equally clear that the option to rescind the agreement rested upon the failure to produce such net proceeds.

[3] Plaintiff was therefore in a position to rescind after May 14, 1910, and we do not think that he lost his right to a cancellation of the agreement because he did not exercise his option on or before that time. His position was not analogous to that of a lessee who may, under the provisions of a lease, terminate it at his option on or before a certain date, because in such a case the ex-

act amount when his right expires is fixed by the terms of the lease; but the plaintiff could have no option until after May 14, 1910, and he could not know until he had received the information, either from the books of the defendant corporation, or from its monthly report, whether the year had been productive of gain or not. As the court found that the statements "did not show the net earnings of the business," plaintiff was sufficiently excused for the brief delay in demanding a cancellation of the contract. We have discussed this matter upon the theory that sale of "territory" is part of the profits of the business. Respondent is of the opinion that such sale is a parting with that which is equivalent to the capital of the corporation. It is not necessary, however, to decide that question, because the same result is obtained, no matter what we call such sales.

[4] The notice of rescission was sufficient. Appellants suggest that it treats the contract as null and void, and does not purport to give them any clew to Nelson's right arising out of the failure of the corporation to be upon a paying basis. But the notice does refer to the plaintiff's refusal to continue, extend, or renew the contract—rights which could only arise under that part of the agreement defining the options which would exist if the enterprise should not be on a paying basis in its first year. This was sufficient to direct the attention of appellants to the exact basis of plaintiff's claim.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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165 Cal. 84

**COUNTY OF SACRAMENTO v. PFUND,**  
County Clerk. (Sac. 2,043.)

(Supreme Court of California. March 6, 1913.

Rehearing Denied April 4, 1913.)

**1. OFFICERS (§ 100\*)—CLERKS—COMPENSATION**  
—STATUTORY PROVISIONS.

St. 1909, p. 663, § 2, allows county clerks 10 per cent. of amounts received for hunting licenses as compensation for services under the act. Pol. Code, § 4235, fixes county clerks' salaries, and section 4290 makes the salaries and fees full compensation for all services rendered by them, both of which provisions antedate the 1909 act. Const. art. 11, § 9, prohibits the increase of an officer's salary, etc., during the term for which he was elected. *Held* that, as applied to terms commencing after the 1909 act was adopted, it constitutes a valid provision for compensation for additional services required under the act.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152-157; Dec. Dig. § 100.\*]

**2. STATUTES (§ 164\*)—AMENDMENT—EFFECT.**

Under Pol. Code, § 325, providing that a section partly amended is not to be deemed wholly re-enacted, the amendment of a statute in a given particular does not constitute such re-enactment of other provisions not changed by the amendment as to make it a later expression of the legislative intention on a given point than another statute enacted before the amendment, but after the amended section was originally adopted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 239; Dec. Dig. § 164.\*]

In Bank. Application by the County of Sacramento for writ of mandate against E. F. Pfund, County Clerk. Application denied.

Eugene S. Wachhorst, Dist. Atty., of Sacramento, for appellant. White, Miller & McLaughlin, of Sacramento, for respondent.

**HENSHAW, J.** This is a proceeding in mandate to compel the respondent, the county clerk of Sacramento county, to pay into the county treasury certain fees asserted to have been collected by him as such county clerk for services performed in the issuance of hunting licenses under the act to regulate and license the hunting of wild birds and animals. Stats. 1909, p. 663. Section 2 of that act provides as follows: "Licenses granting the privilege to hunt, pursue or kill wild birds or animals shall be issued and delivered upon application, by the county clerk of any of the counties of this state, or by the state board of fish commissioners." The licenses shall be prepared by the fish and game commission and furnished to the county clerk, and, for the licenses furnished to and disposed of by the county clerk, "the county clerk shall be responsible and shall account for the same to the controller of the state every three months, beginning with July 1st of each year. For each license sold, registered, and accounted for by any person, excepting a fish commissioner, he shall be allowed as compensation out of the game preservation fund 10 per cent. of the amount ac-

counted for." The facts, over which there is no serious controversy, are that respondent received for the issuance of these licenses the sum of \$4,721. The whole of this sum he paid into the state treasury at different times, in accordance with the law, and after such payments he received from the fish and game commission the 10 per centum contemplated by the statute, which moneys, aggregating \$472.10, he insists upon his right to retain as his personal property. The legal question, therefore, is whether, under the law, the county clerk is so entitled to retain it, and, subordinate to that inquiry—one not necessary here to determine—whether, if the county clerk is not entitled to retain it, the money belongs in the treasury of the county or of the state. Preliminarily it may be said that no question is here involved of an increase of salary during the term of office of an incumbent, for the term which respondent is now serving commenced nearly two years after the act of 1909 was passed.

[1] A reading of the license act of 1909 establishes certain facts beyond peradventure: First, that the state of California has imposed an additional duty upon the county clerks, for the act not only authorizes them to issue the licenses, but makes it their duty so to do upon application; second, that this duty is one to be performed, not for and on behalf of the county, but for and on behalf of the state, since it is a state license which the county clerks are authorized and directed to issue, and since by section 6 of the act all moneys collected from these licenses shall be paid into the state treasury; third, the authority to issue licenses is limited absolutely to the state board of fish commissioners and their deputies, and county clerks and their deputies; fourth, that the state Legislature set forth a succinct and clearly devised plan whereby, for the issuance of such licenses, "any person" other than a fish commissioner, who should so issue them, was allowed "as compensation" 10 per cent. of the amount of the license; fifth, since the authority to issue was by the act limited to officials only, namely, state fish commissioners and county clerks, the phrase "any person" seems to have been used designedly, for otherwise "any official" would have been the more appropriate language; sixth, that the use of the words "any person" in this connection seems clearly to indicate that the Legislature designed to differentiate in the matter of the issuance of these licenses between the county clerks in their official capacity and county clerks in their private capacity; seventh, that the clear purpose of this differentiation was to give expression to the legislative intent that the county clerks, as individuals, should be entitled to retain this 10 per centum "as compensation"; eighth, this is made the more manifest by reason of the fact that, if the county clerks



are not so allowed to retain this 10 per centum (since the fish commissioners are in express terms forbidden to retain it), it results in convicting the Legislature of a very manifest absurdity in declaring that a particular class of officers shall be allowed to retain a commission, which very class, under other laws of the Legislature's own creation, are forbidden to do this very thing.

These facts, we say, are irresistible from a reading of the statute itself, but nevertheless they are, of course, not conclusive upon the question. For it still may be that the Legislature has passed a law whose intent may be plainly seen, but which intent may not be given effect because of the prohibition of the Constitution or of other controlling statutes. Such, it is contended, is the case here. This inhibition upon the county clerk's right to retain these fees, it is said, is found in the language of sections 4235 and 4290 of the Political Code. The first of these sections fixes the salary of the county clerk of Sacramento county. The second declares that "the salaries and fees provided in this title shall be in full compensation for all services of every kind and description rendered by the officers named in this title, either as officers or ex officio officers, their deputies and assistants, unless in this title otherwise provided." But these two sections, in so far as they have any bearing upon the present consideration, are precisely the same now as they were when the game license act was adopted; and, as the only constitutional limitation upon the Legislature in fixing the compensation of officers is a prohibition against increasing their salary or emoluments during the term for which the officers are elected (Const. art. 11, § 9), it follows that it was permissible for the Legislature to make any such increase to apply to future terms. As has been said, such is the situation here presented. Thus, for the additional duties imposed upon county clerks, no one would question the right of the Legislature to say that their salaries should be increased in a fixed sum, and no objection attaches to the method of compensation by fees based upon a per centum of the amounts received for the issued licenses.

[2] Were this all of the question, there could be but one conclusion drawn, and that in favor of the respondent's right to the retention of the money. But it is said that sections 4235 and 4290, being amended in certain particulars, were entirely re-enacted by the Legislature of 1911 (St. 1911, pp. 134, 251), and that such re-enactment should be held to be the latest expression of the legislative view, and thus to forbid the retention of the moneys. But it is conceded that the amendments, touching the matter under consideration, made absolutely no change in the sections of the Code as they previously stood. In other words, the provisions of the law, so

far as section 4290 is concerned, are identical, and, so far as section 4235, they were not changed in any material respect by the amendment of 1911. But it is said that section 4235 was amended two days after the approval of the game license act by increasing the compensation and number of deputies of the county clerks in the class of counties to which Sacramento belonged, and that it must be concluded from this that this increase was designed to cover the added service required in the issuance of hunting licenses. We cannot, however, concur with this reasoning. Section 4235 merely fixes the compensation and leaves section 4290 to declare what additional compensation may be received and what is forbidden. Moreover, so to find an inhibition by implication, and so to construe a statute amended in certain particulars as having been wholly re-enacted as of the date of the amendment, is to do violence to the Code and all canons of construction. The Code itself (Pol. Code, § 325) declares: "Where a section or part of a statute is amended, the statute as a whole is not to be considered as having been repealed and re-enacted in the amended form; but the portions which are not altered are to be considered as having been the law from the time when they were enacted." For the interpretation of this section, as well as for the general rules of construction, it is sufficient to cite *C. P. R. v. Shackelford*, 63 Cal. 265; *Swamp Land, etc., v. Glide*, 112 Cal. 90, 44 Pac. 451; *People v. Sutter St. Ry.*, 117 Cal. 604, 49 Pac. 736.

The application for mandate is therefore denied.

We concur: MELVIN, J.; SHAW, J.; SLOSS, J.; ANGELLOTTI, J.

165 Cal. 55

#### PEOPLE v. O'BRYAN. (Cr. 1,725.)

(Supreme Court of California. March 5, 1913.)

#### 1. HOMICIDE (§ 166\*)—EVIDENCE — RELATIONSHIP OF PARTIES.

In a murder trial, the prosecution was properly permitted to show the existence of a strike by a labor organization of which accused was a member, and that decedent was a non-union workman, employed by a company against whom the strike was directed, though such testimony should be limited to a general showing of the relations of the parties.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 320-331; Dec. Dig. § 166.\*]

#### 2. CRIMINAL LAW (§ 371\*)—EVIDENCE OF RELATED OFFENSES—ADMISSIBILITY.

Generally evidence of offenses other than the one for which accused is on trial is not admissible; but, where two offenses are part of a single transaction, every element of accused's conduct in that transaction can be shown to illustrate his motive and intent in committing the particular act, and hence, in a prosecution of a union employé for killing a nonunion workman, the prosecution was properly permitted to show an assault at the same time upon a non-union companion of decedent, where the evi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dence sustained a theory that the killing and the assault were parts of one attack upon decedent and his companion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.\*]

**3. WITNESSES (§ 277\*) — CROSS-EXAMINATION OF ACCUSED—SCOPE.**

Under Pen. Code, § 1323, which permits cross-examination of accused as to all matters about which he was examined in chief, it was proper in a trial of a union employé for killing a nonunion workman, wherein accused testified that he did not intend to shoot decedent, to ask him, on cross-examination, as to his relation to a strike which involved the parties, as to his movements on the night of the homicide, etc.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-983; Dec. Dig. § 277.\*]

**4. WITNESSES (§ 380\*)—IMPEACHMENT—INCONSISTENT STATEMENTS BY ACCUSED.**

If one accused of murder gave such testimony on cross-examination as supported his direct testimony that he did not intend to shoot decedent, the prosecution was not bound by his answers on a cross-examination, but could impeach him by proof of contradictory statements made at other times.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1210-1219; Dec. Dig. § 380.\*]

**5. CRIMINAL LAW (§ 393\*)—EVIDENCE—COMPULSORY SELF-INCRIMINATION.**

Under Const. art. 1, § 13, which provides that no one shall be compelled in any criminal case to testify against himself, it was error to permit the people in a murder trial to show accused's testimony before the grand jury before which he was taken after being arrested on suspicion, without being informed of his constitutional right to decline to be a witness against himself or that his statements might be used against him, though the grand jury did not return an indictment, and the prosecution was upon information.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 871-874; Dec. Dig. § 393.\*]

**6. CRIMINAL LAW (§ 1186\*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

The admission of such evidence was not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. § 1186.\*]

In Bank. Appeal from Superior Court, San Luis Obispo County; E. B. Unangst, Judge.

W. J. O'Bryan was convicted of murder in the first degree, and he appeals. Affirmed

A. E. Campbell, of San Luis Obispo, and George Appell, of San Francisco, for appellant. U. S. Webb, of San Francisco, for the People.

**SLOSS, J.** The defendant, convicted of murder of the first degree and sentenced to life imprisonment, appeals from the judgment and from an order denying his motion for a new trial.

The appellant does not question the sufficiency of the evidence to support the verdict, nor does he attack the instructions given to the jury. The only errors assigned consist of certain rulings admitting evidence over the objection of the defendant. A brief statement of the case presented by the people will

suffice for the understanding of the points so raised.

Defendant was a member of a labor organization which had declared a strike against certain employers, including the Llewellyn Iron Works. John D. Avila, the deceased, and one Molina, were nonunion workmen, and were working for the Llewellyn Iron Works in the construction of oil tanks near the city of San Luis Obispo. Early in the morning of December 17, 1910, Avila and Molina, after spending the preceding evening in the city, started to walk back to their lodgings, which were at the place where the tanks were being erected. After they had gone some distance, they were overtaken by the defendant, who, with two companions, was following them. The defendant was armed with a revolver. Avila drew a pistol, but the defendant came up to him, and seized him by the wrist of his pistol hand. One of the men with O'Bryan then took Avila's pistol from him. A similar weapon was also taken from Molina. Avila broke away from O'Bryan, and started to run toward the city. O'Bryan ordered him to stop, and, on Avila disregarding the command, fired. Avila continued to run, and made his way to the city. It appears, however, that the bullet from defendant's revolver had passed through his body, and in consequence of the wound so received he died during the following night. O'Bryan did not pursue him, but turned to Molina, and, after asking him questions regarding his and Avila's employment, struck him. Molina then ran away and made his escape.

While it was not expressly admitted that the shot fired by O'Bryan had caused Avila's death, there was no real controversy over this point. The defendant's contention was that he had fired for the purpose merely of frightening Avila, and without any intention of hitting him. It is apparent, therefore, that the intent of the defendant became the paramount issue, and that any competent testimony tending to show a motive on his part for the killing or injuring of Avila, or to throw light on the purpose leading him to fire the fatal shot, was relevant and proper.

[1] It cannot be doubted that the prosecution was entirely within its rights in proving the existence of the strike, the connection of the defendant with the organization conducting the strike, and the employment of Avila as a nonunion workman by the Llewellyn Iron Works, one of the employers against whom the strike was directed. This was evidence tending very directly to show a motive on O'Bryan's part for attacking Avila. People v. Grow, 16 Cal. App. 147, 116 Pac. 369; People v. Donnelly, 143 Cal. 394, 77 Pac. 177; People v. Soeder, 150 Cal. 12, 87 Pac. 1016. It may be observed, however, that testimony of this character should be limited to a general showing of the relations of the



parties. *People v. Thomson*, 92 Cal. 506, 512, 28 Pac. 589; *People v. Colvin*, 118 Cal. 349, 50 Pac. 539. Perhaps the district attorney was permitted, in this case, to show with too great detail the activities of the defendant on behalf of the union. At the same time we cannot see that anything substantially prejudicial to the defendant was elicited in consequence of the widening of the range of inquiry.

[2] There was no error in permitting the people to prove the assault upon Molina, following the firing of the shot that killed Avila. The general rule is, of course, that evidence of offenses other than the one for which the defendant is on trial is not admissible. But, where the two offenses are part of a single transaction, "every element of defendant's conduct in that transaction could be shown to the jury for the purpose of illustrating his motive and intent in committing the act which was the basis of the charge against him." *People v. Manasse*, 153 Cal. 10, 94 Pac. 92; *People v. Walters*, 98 Cal. 141, 32 Pac. 864; *People v. Craig*, 111 Cal. 468, 44 Pac. 186; *People v. Teixeira*, 123 Cal. 298, 55 Pac. 988; *People v. Suesser*, 142 Cal. 363, 75 Pac. 1093. It was the theory of the prosecution—and the theory was entirely reasonable under the evidence—that the shooting of Avila and the assault on Molina were parts of one attack upon the two, perpetrated in pursuance of a single scheme to terrorize or injure them because they were working for the Llewellyn Iron Works. Whatever was done in the course of that attack was proper as throwing light on the motive and intent of O'Bryan and his companions.

The defendant took the stand as a witness in his own behalf. His testimony, on direct examination, was, in effect, that he saw Molina and Avila on the night of the shooting; that he had never seen them before; that he shot his gun; that he did not shoot at or aim at Avila, and did not intend to kill him. His purpose, he testified, was to scare Avila, and to make him stop.

[3, 4] The cross-examination of the defendant was extended, but, with an exception to which we shall recur, we cannot see that it exceeded the proper limits of cross-examination. By asserting that he had not intended to shoot Avila, the defendant opened the door to any questions so framed as to elicit answers which might tend to show that he had in fact entertained and acted upon the purpose of killing or injuring Avila. In seeking to obtain answers which would support the claim that the defendant was actuated by a motive of hostility to Avila, the prosecution did not go beyond the bounds defined in section 1323 of the Penal Code, which permits a defendant offering himself as a witness to be cross-examined "as to all matters about which he was examined in chief." In so far as the cross-examination touched upon O'Bryan's relation to the strike as an "organizer"

for the union, it is apparent, from what we have already said, that the questions had a proper bearing upon his motive and intent. It was entirely permissible, too, for the prosecution to go into the defendant's movements on the night of the homicide, and to draw out his statement of the occurrences leading up to the shooting. If, in any of his answers, he testified in such manner as to lend support to his declaration made on direct examination, that he had not intended to shoot the deceased, the prosecution was not bound by such answers, but had the right to impeach him by proof of contradictory statements made at other times. Evidence directed to this end did not violate the rule prohibiting impeachment on matters "collateral and irrelevant to the issue." Without discussing in detail the various questions asked of defendant in the course of a somewhat protracted cross-examination, we may say that the rulings of the court in this regard were, in the main, correct, and that any errors that may have been committed were of trivial import.

[5] On the day of the shooting, December 18th, the defendant was arrested on suspicion of being concerned in the killing of Avila, and was held in custody in the county jail. No formal charge had been made against him when on the 28th of December he was, by the sheriff, taken before the grand jury which was investigating the homicide, and was sworn and questioned concerning his actions before and at the time of the shooting. He was not informed of his constitutional right to decline to be a witness against himself, nor was he warned that his statements might be used against him. In response to the examination of the district attorney, he made to the grand jury a number of statements. These statements did not amount to a confession, but were admissible in evidence against the defendant as declarations against interest, unless proof of them was rendered incompetent by the manner in which they had been obtained.

Over the objection of the defendant, the people were allowed to show the questions thus asked of O'Bryan before the grand jury and his answers thereto. This testimony should not have been admitted. The course pursued was in violation of the constitutional right of every person not to "be compelled, in any criminal case, to be a witness against himself." Const. Cal. art. 1, § 13. The defendant could not, of course, have been called and required to testify against himself at the trial. The guaranty against being so compelled would be of little value if the same result could be attained by the indirect method of compelling him to testify at some antecedent step of the proceedings against him, and then offering in evidence his statements so extracted. We do not mean to suggest that under no circumstances can testimony given by a person before a

grand jury be given in evidence in a subsequent trial of a criminal charge against him. The Constitution protects a person from being compelled to be a witness against himself. If, at the time he appears, no accusation, formal or informal, has been made against him, he does not in testifying become a witness against himself. Or if, even though charged with crime, he voluntarily gives evidence against himself, his rights are not infringed by the use of such evidence thereafter. These distinctions are well illustrated by a series of New York cases (*Hendrickson v. People*, 10 N. Y. 13, 61 Am. Dec. 721; *People v. McMahon*, 15 N. Y. 384; *Teachout v. People*, 41 N. Y. 7; *People v. Singer*, 18 Abb. N. C. (N. Y.) 96; *People v. Mondon*, 103 N. Y. 211, 8 N. E. 496, 57 Am. Rep. 709; *People v. Chapleau*, 121 N. Y. 267, 24 N. E. 469), the result of which is summed up in *People v. Molineux*, 168 N. Y. 331, 61 N. E. 308, 62 L. R. A. 193, in these words: "When a person testified at an inquest as an accused or arrested party, his testimony cannot be used against him upon a subsequent trial of an indictment growing out of the inquest, unless his testimony has been voluntarily given after he has been fully advised of his rights and has been given an opportunity to avail himself of them." Here the defendant when brought before the grand jury was in custody under an accusation of guilt of the crime under investigation. Taken into the presence of that body by the sheriff, sworn and examined without the aid of counsel, and without any instruction as to his rights, it cannot be said that his submission to the interrogation was in any fair sense voluntary. The great preponderance of authority is that testimony so given by a defendant is not to be used against him. *U. S. v. Kimball* (C. C.) 117 Fed. 156, 163; *Boone v. People*, 148 Ill. 440, 36 N. E. 99; *State v. Clifford*, 86 Iowa, 550, 53 N. W. 299, 41 Am. St. Rep. 518; *State v. Froiseth*, 16 Minn. 296 (Gil. 260).

Of the cases cited to support the admission of this testimony, the only one which need be noticed is *People v. Sexton*, 132 Cal. 37, 64 Pac. 107, in which this court used the following language: "Defendant's statements, whether made in the grand jury room, at the trial, or extrajudicially, may be used against him, and we see no error in their admission here." The report of the decision does not disclose the conditions under which the defendant in the *Sexton* Case testified before the grand jury. It may well be assumed that no accusation had been made against *Sexton*, or that he gave his testimony voluntarily, with full knowledge of his right to remain silent. In either of these events his declarations were properly admitted in evidence at the trial. At any rate, we cannot regard the case as an authority requiring us to hold that the state may give in evidence against a defendant charged with a criminal offense testimony

which he, while accused of the same offense, was compelled to give before a grand jury investigating such offense.

We attach no importance whatever to the circumstance that the grand jury did not return an indictment, and that the defendant was in fact tried upon an information. Granting that the testimony given by him before the grand jury could not be used against him on the trial of an indictment found by that body, it would be manifestly unfair to hold that the constitutional right was lost because the district attorney elected to proceed by information rather than indictment. To so hold would give sanction to a device which might readily be used for the purpose of accomplishing by evasion what could not be done directly. For like reasons, it was improper to permit the district attorney, on cross-examination of the defendant, to question him concerning other statements similarly made by him before the grand jury.

[6] But, conceding that error was committed in the admission of this testimony, there still remains the question whether the character and effect of the error were such as to require a reversal. This question must be answered with due regard to the terms of section 4½ of article 6, added to the Constitution by amendment adopted in 1911. Section 4½ reads as follows: "No judgment shall be set aside, or new trial granted in any criminal case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error in any matter of pleading or procedure, unless, after an examination of the entire cause including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." The general purpose of the amendment is plain. Inasmuch as under the pre-existing provisions of the Constitution the jurisdiction of the Supreme Court and of the District Courts of Appeal was limited in criminal cases "to questions of law alone" (Const. art. 6, § 4), it was incumbent upon these courts to reverse any judgment of conviction based upon proceedings which were affected in any degree by substantial error of law. Where, however, the error complained of was trivial, or the record showed that no prejudice to a substantial right could have resulted therefrom to the defendant, it has always, even before the amendment, been the practice to disregard the error. Pen. Code, § 1258. But where neither of these conditions existed, and the error was one which might or might not have turned the scale against the defendant, the limitation of the appellate jurisdiction to questions of law precluded the reviewing courts from weighing the evidence for the purpose of forming an opinion whether the error had or had not in fact worked injury. Having no jurisdiction in matters of fact, the court in which the appeal was pending was bound to apply



the doctrine that prejudice was presumed to follow from substantial error.

In not a few instances this limitation upon the power of courts produced results which were unsatisfactory and which seemed to hamper the state in its efforts for a prompt and effective enforcement of the prohibitions and penalties of its penal laws. It sometimes became necessary for the Courts of Appeal and for this court to grant new trials to defendants on account of technical errors or omissions, even though a review of the evidence, if such review could legally have been undertaken, would have shown that the guilt of the accused had been established beyond question and by means of a procedure which was substantially fair and just. It was to avoid the necessity for such results that the amendment in question was proposed and adopted. By the new constitutional provision the appellate courts are empowered to examine "the entire case, including the evidence," and are required to affirm the judgment, notwithstanding error, if error has not resulted "in a miscarriage of justice." What, then, is a miscarriage of justice? The phrase is a general one, and has not as yet acquired a precise meaning. We find it in the English Criminal Appeal Act of 1907 (St. 7 Edw. VII, c. 23), section 4 of which contains this language: "Provided that the court may, notwithstanding they are of opinion that the point raised on the appeal might be decided in favor of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred." The Court of Criminal Appeal created by this act has had frequent occasion to consider whether a given error has resulted in a miscarriage of justice. In the case of *Peter Meyer*, 1 Criminal Appeal Cases, 10, 12, the Lord Chief Justice said that the provision "enables the court to go behind technical slips and do substantial justice." We have no doubt that in a general way this fairly states the purpose of our own constitutional provision. It does not, however, afford an all-embracing test or definition for determining just what will constitute a miscarriage of justice. In the case of *Cohen and Bateman*, 2 Crim. App. Cas. 197-207, *Channell, J.*, referring to section 4 of the Criminal Appeal Act, used this language: "This section has been considered in almost all the cases which have come before this court, but these precedents are of little use in subsequent cases because of the varying circumstances of each particular case." The same may be said of our constitutional provision. It is as difficult to frame a definition of "miscarriage of justice" which shall be "at once perspicuous, comprehensive and satisfactory" as it has been to thus define the term "due process of law" of which Mr. Justice Miller said, in *Davidson v. New Orleans*, 96 U. S. 97, 104 (24 L. Ed. 616): "There is wisdom in the ascertaining of the intent and

application of such an important phrase in the federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." This much, however, we think may be safely said. Section 4½ of article 6 of our Constitution must be given at least the effect of abrogating the old rule that prejudice is presumed from any error of law. Where error is shown, it is the duty of the court to examine the evidence and ascertain from such examination whether the error did or did not in fact work any injury. The mere fact of error does not make out a *prima facie* case for reversal which must be overcome by a clear showing that no injury could have resulted.

On the other hand, we do not understand that the amendment in question was designed to repeal or abrogate the guaranties accorded persons accused of crime by other parts of the same Constitution or to overthrow all statutory rules of procedure and evidence in criminal cases. When we speak of administering "justice" in criminal cases, under the English or American system of procedure, we mean something more than merely ascertaining whether an accused is or is not guilty. It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected. For example, if a court should undertake to deny to a defendant charged with a felony the right of trial by jury, and after a hearing of the evidence render a judgment of conviction, it cannot be doubted that such judgment should be set aside even though there had been the clearest proof of guilt. Or, if a defendant, after having been once acquitted, should be again brought to trial and thereupon convicted, in disregard of his plea that he had been once in jeopardy, it would hardly be suggested that, because he was in fact guilty, no "miscarriage of justice" had occurred.

But it does not follow that every invasion of even a constitutional right necessarily requires a reversal. It may well be that the court, after examining the "entire cause including the evidence," is of the opinion that the error complained of, whatever its character, has not resulted in a miscarriage of justice. The mere fact that the assignment of error is based upon a provision of the Constitution is not conclusive. The final test is the opinion of the appellate court upon the result of the error. No doubt this view requires the court, to some extent, to weigh the evidence, and form conclusions upon its weight—a function which, heretofore, has been reserved for the jury. But it cannot be doubted that the legislators, in proposing the amendment, and the electors, in adopting it, intended to put upon the courts the performance of just that function. We are not sub-

stituted for the jury. We are not to determine, as an original inquiry, the question of the defendant's guilt or innocence. But, where the jury has found him guilty, we must, upon a review of the entire record, decide whether, in our judgment, any error committed has led to the verdict which was reached. If it appears to our satisfaction that the result was just, and that it would have been reached if the error had not been committed, a new trial is not to be ordered.

The application of these views requires an affirmance of the judgment and order under review, notwithstanding our conclusion, as already stated, that the statements of the appellant to the grand jury should not have been allowed to go to the jury. These statements were to the effect that the defendant had joined the union at Coalinga in August; that he had quit work on account of the strike, and thereafter had drawn strike benefits of \$7 a week; that, after coming to San Luis Obispo, he had acted as captain of the organizers; that he went out to see that the organizers were doing their duty, which was to get the men working at the Tank Farm to join the union, if possible. These declarations were introduced as a part of the people's case in chief. Every material matter covered by them was shown to the jury by other evidence, which was concededly admissible, and the truth of which was not contradicted. Among other things, it was proven that substantially the same statements had been made by the defendant in interviews with the district attorney. In his testimony at the trial, in response to proper cross-examination, he again reiterated the substance of these declarations. In this state of the record we should certainly not be justified in forming or expressing the opinion that the admission of this testimony had resulted in a miscarriage of justice.

As we have already stated, O'Bryan was cross-examined regarding other statements made to the grand jury, and such statements were introduced in evidence on rebuttal. Nothing of any consequence was developed in this way, with the exception of testimony of the defendant's statement that he had, before going down the road on the night of the shooting, obtained a loaded pistol from the union headquarters. The only importance of this declaration was that it differed from his testimony at the trial, in which he stated that he did not know, when he got the pistol or when he came up to Avila and Molina, whether or not the pistol was loaded. In view of the testimony regarding defendant's conduct, including his own admissions before and at the trial, this statement was so improbable that we cannot, without reflecting upon the common sense of the jury, assume that credence could have been given to it. Any fair-minded man must have believed that O'Bryan knew that his pistol was

loaded, and the admission of his own declaration to that effect was not, therefore, an error for which, under the constitutional provision above quoted, a new trial should be granted.

The offense with which the appellant was charged was committed prior to the adoption of section 4½ of article 6. But the amendment, under the construction which we have given to it is not obnoxious to the provision of the federal Constitution against ex post facto laws. It does not affect the crime with which the defendant was charged, "the punishment prescribed therefor, or the quantity or degree of proof necessary to establish his guilt." *Mallett v. North Carolina*, 181 U. S. 589, 21 Sup. Ct. 730, 45 L. Ed. 1015. It merely alters the rules for the disposition of an appeal after trial. There can be no constitutional objection to an enactment which, while it preserves to a defendant all the substantial safeguards in force at the time of the commission of the act charged, merely provides that formal or technical errors, which have not brought about an unjust result, shall not be ground for a reversal. *Jacquins v. Commonwealth*, 9 Cush. (Mass.) 279. There is no vested right to have a judgment set aside for errors which have not affected the real merits of the cause. Such changes as the one under consideration are permissible on the ground that they go merely to matters of remedy or procedure. In the case last cited the court applied to past judgments a statute providing that, where a criminal judgment is reversed upon writ of error on account of error in the sentence, the court may render such judgment as should have been rendered, or may remand the case for that purpose. Shaw, C. J., delivering the opinion of the court, used the following language, which is very appropriate here: "It was competent for the Legislature to take away writs of error altogether in cases where the irregularities are formal and technical only, and to provide that no judgment should be reversed for such cause." Similarly, in *Mallett v. North Carolina*, supra, the Supreme Court of the United States upheld, as applied to past offenses, a statute which gave to the prosecution an appeal where none had before been allowed.

The judgment and the order denying a new trial are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

LORIGAN, J. (concurring). I concur in the judgment and order of affirmance in this case and in the views expressed by Mr. Justice SLOSS in the foregoing opinion, except as to the construction of section 4½ of article 6 of the Constitution and its application under the evidence. I am of the opinion that neither the construction nor application of this section is necessarily involved in the disposition of this appeal, and therefore the dis-



cussion upon it is obiter and the scope of this section may be better left until the question is squarely presented. It was, as pointed out in the opinion, error for the court to have admitted in evidence on behalf of the state the statements made by the defendant before the grand jury. This was in violation of the constitutional right of the defendant not to "be compelled in any criminal case to be a witness against himself." If the defendant had not subsequently become a witness on the trial in his own behalf but had stood squarely upon the error of the court in permitting evidence of those statements, I am not prepared just now to say that against this violation of a constitutional right the section of the Constitution could be interposed. But here the defendant did not stand upon the error. He became subsequent to its admission a witness in his own behalf, and gave testimony in chief upon such matters as warranted the district attorney upon cross-examination in covering all the matters concerning which he had made statements before the grand jury. This district attorney was justified in cross-examining him as to all these matters, and the testimony of the defendant respecting them was substantially a reiteration of the statements he had made before the grand jury. This being true, whatever error was committed by the court in the first instance was cured by this subsequently properly elicited testimony covering the same matters. The original prejudicial character as error was obviated by this subsequent confirmatory evidence of the defendant, and under the general rule which has always obtained here the error became harmless, and could not be successfully invoked by defendant to obtain a reversal. This being the general rule applied before the constitutional amendment referred to was made, it is as directly applicable now since the amendment, and the assignment of the ruling as error was without merit by virtue of the general rule, and in my opinion, therefore, it is unnecessary obiter to construe or apply the amendment in disposing of this alleged error. The general rule to which we have thus referred is one to which this court long since has given succinct utterance. Thus in *People v. Brotherton*, 47 Cal. 388, 404, where the question before this court was the ruling of the trial court upon a matter of evidence it is said: "That a technical error has intervened at the trial is therefore not of itself enough to warrant our interference. The prisoners must go further, and affirmatively show in some way that their substantial rights have been injuriously affected by the error complained of." That the principle here laid down has since been consistently adhered to and never once departed from will appear from the following cases in each one of which it was argued on behalf of the defendant that error prejudicial to

him arose under the court's rulings receiving or rejecting evidence and in each one of which this court refused to support the contention: *People v. Barnhart*, 59 Cal. 381; *People v. Chuck*, 78 Cal. 317, 20 Pac. 719; *People v. Nelson*, 85 Cal. 425, 24 Pac. 1006; *People v. Daniels*, 105 Cal. 262, 38 Pac. 720; *People v. Clark*, 106 Cal. 33, 39 Pac. 53; *People v. Maroney*, 109 Cal. 278, 41 Pac. 1097; *People v. Barthleman*, 120 Cal. 15, 52 Pac. 112; *People v. Wynn*, 133 Cal. 72, 65 Pac. 126; *People v. Glaze*, 139 Cal. 162, 72 Pac. 965.

We concur: MELVIN, J.; HENSHAW, J.

165 Cal. 31

COOPER v. MILLER. (L. A. 2,992.)

(Supreme Court of California. Feb. 27, 1913.  
Rehearing Denied March 29, 1913.)

1. DIVORCE (§ 249\*)—DISPOSITION OF PROPERTY.

In a decree of divorce in an action brought by the wife, it is competent for the court to set aside to the wife all of the real estate belonging to the community.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 701-705, 707, 709, 712; Dec. Dig. § 249.\*]

2. HOMESTEAD (§ 158\*)—DECREE OF DIVORCE—DESTRUCTION OF HOMESTEAD.

The decree in a divorce suit, which declares that plaintiff is entitled to have set apart to her the real property belonging to the community, and declaring that the homestead thereon "is hereby vacated and dissolved," and which sets the real property over to the plaintiff, vests the title in the plaintiff and destroys the homestead declared under the state homestead law.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 310; Dec. Dig. § 158.\*]

3. PUBLIC LANDS (§ 140\*)—HOMESTEAD EXEMPTION.

Rev. St. U. S. § 2296 (U. S. Comp. St. 1901, p. 1398), exempting the homestead from liability for debts incurred before the issuance of a patent, does not protect one who has parted with title to the land and subsequently acquired the title.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 377-382; Dec. Dig. § 140.\*]

4. PUBLIC LANDS (§ 140\*)—DECREE OF DIVORCE—HOMESTEAD EXEMPTION.

Where, in a divorce suit, the decree sets over the community real property to the plaintiff, and vacates her declaration of homestead thereon, she does not take that part of the community realty which she derived from the federal government under the homestead law under a new title, nor did she part with title so as to waive or destroy the federal homestead exemption.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 377-382; Dec. Dig. § 140.\*]

5. PUBLIC LANDS (§ 140\*)—HOMESTEAD EXEMPTION—DEBTS PRIOR TO ISSUANCE OF PATENT.

Where a patent is issued on March 26, 1892, and notes given by the person to whom the patent is issued were executed May 24, 1892, the land was not exempt from liability for this indebtedness by the exemption in the federal laws; Rev. St. U. S. § 2296 (U. S.

Comp. St. 1901, p. 1398), exempting the land from liability only for debts incurred prior to the issuance of the patent.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 377–382; Dec. Dig. § 140.\*]

**6. JUDGMENT (§ 736\*)—JUDGMENT ON MOTION—RES ADJUDICATA.**

Where the owner of land applies to the superior court to have an order enforcing a judgment by sale of land vacated, and the order is denied, this determination is not res adjudicata in a subsequent action brought by the owner against the purchaser at the sheriff's sale to quiet title, as such a judgment is res adjudicata only upon matters adjudicated under the motion, and the sole ground of motion was that the owner had not been served with summons in the original action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1264, 1265; Dec. Dig. § 736.\*]

**Department 2. Appeal from Superior Court, Ventura County; Robert M. Clarke, Judge.**

Action by Florence I. Cooper against H. G. Miller. Judgment for plaintiff, and defendant appeals. Judgment ordered modified.

Louis Luckel and Murphey & Poplin, both of Los Angeles, for appellant. Watkins & Blodget, of Los Angeles, for respondent.

**HENSHAW, J.** This action was brought to quiet plaintiff's title to 120 acres of land in Ventura county. The defendant, Miller, bases his title upon a sheriff's sale pursuant to an execution issued out of the superior court of Los Angeles county upon a judgment in his favor against the plaintiff, Florence I. Cooper, and J. F. Cooper, formerly her husband. The setting forth of plaintiff's title requires a longer narration of facts.

Plaintiff acquired title by patent from the United States under its homestead laws to the S. ½ of the S. W. ¼ of section 35. This was in 1901. The adjoining 40 acres to the west, being the S. E. ¼ of the S. E. ¼ of section 34, was patented to her husband, J. F. Cooper, in 1892. In 1897 the husband made his deed of grant to his wife, plaintiff herein, for this 40 acres. Thereafter, in June, 1901, the wife recorded her declaration of homestead covering the whole 120 acres. An action for divorce was instituted by plaintiff herein against her husband in 1904 and the interlocutory decree was duly entered on January 27, 1906. That decree provided as follows: "That the plaintiff is entitled to a divorce from the defendant; that, when one year shall have expired after the entry of this interlocutory judgment, a final judgment and decree shall be entered granting a divorce herein, wherein and whereby the bonds of matrimony heretofore existing between said plaintiff and said defendant shall be dissolved, and that the plaintiff is entitled to have awarded and set apart to her all of the real property described in the complaint, \* \* \* all of which is community property, and the declaration of homestead thereon

vacated and dissolved; and a final judgment and decree shall be entered when one year shall have expired from the date hereof, awarding all of the said real property to plaintiff and dissolving the said homestead." The final decree was entered upon January, 1907. It was silent concerning and made no final disposition of the property. Thereafter, upon April 21, 1907, upon motion of Mrs. Cooper, plaintiff in the divorce action and plaintiff here, the decree was amended; the court declaring that, through its oversight, inadvertence, and mistake, it had failed to embody in the final decree all the matters and things therein intended to be embodied. Wherefore on motion of Donald Barker, Esq., attorney of plaintiff, the final decree heretofore entered is hereby amended, and plaintiff is awarded relief as follows: "It is hereby declared that said plaintiff, Florence I. Cooper, is entitled to have set apart to her the real property hereinafter described, which said real property was, at the time of filing of the complaint, community property of the plaintiff and defendant, and the declaration of homestead thereon is hereby vacated and dissolved, and the said real property is hereby set apart and awarded to the plaintiff without any restriction whatever, and plaintiff is hereby declared to be the owner thereof, freed from any claim or demand whatsoever of the defendant or any person claiming by, through, or under him. Said real property is described as follows." Here follows a description of the two parcels of land in controversy.

The debt upon which judgment was secured against the Coopers was contracted in 1892. A homestead patent to Mrs. Cooper had issued in 1901. Appellant's contention upon these facts is that Mrs. Cooper, by virtue of her declaration of homestead, and by her own affirmative act in causing the dissolution of that homestead and the setting over to her of the 120 acres, acquired thereby a new title, which title was subject to all of her debts and liabilities. By respondent it is argued that it is beyond the power of the court to dissolve or vacate a homestead in the divorce proceedings when all of the community property is awarded to either spouse, as was done in this case, and properly done because of the adulterous conduct of the husband. And, further, respondent argues that if this position be not well taken, still, unquestionably, the 80 acres patented to Mrs. Cooper under the homestead laws of the United States is forever freed from the claim of any debt contracted prior to the issuing of her patent.

It is important to bear in mind the titles by which the respondent held the two parcels of property at the time she made her declaration of homestead thereon. Both parcels, under the decree of divorce, were declared to be community property; but title



to the 80 acres was acquired by patent from the United States under its homestead laws, while title to the second vested in her by virtue of the deed of grant from her husband.

[1] The decree of divorce not only set aside to her this property absolutely, as it was competent for the court to do, but, at the invitation of the respondent herself, the decree "vacated and dissolved the homestead."

[2] This decree was not beyond the power of the court to make, and its effect was to vest the title in the respondent and to destroy the homestead declared under the California homestead law. *Shoemaker v. Chalfant*, 47 Cal. 432; *Burkett v. Burkett*, 78 Cal. 310, 20 Pac. 715, 3 L. R. A. 781, 12 Am. St. Rep. 58; *Huellmantel v. Huellmantel*, 124 Cal. 583, 57 Pac. 582; *Bahn v. Starcke*, 89 Tex. 203, 34 S. W. 103, 59 Am. St. Rep. 40. But the homestead, and consequently the homestead exemption, having thus been dissolved and destroyed, appellant further contends that because respondent included in her homestead declaration the 80 acres of land acquired by her from the United States under its homestead laws, when the decree of divorce awarded her the property, it came back to her, divested of the exemption and protection of the federal statute. Revised Stats. U. S. § 2296 (U. S. Comp. St. 1901, p. 1398).

[3] It is, of course, well settled that this federal exemption does not protect one who has parted with title to the land and subsequently acquired that title. *De Lany v. Knapp*, 111 Cal. 165, 43 Pac. 598, 52 Am. St. Rep. 160. Appellant contends that *Taylor v. Hargous*, 4 Cal. 273, 60 Am. Dec. 606, announces the doctrine that, upon a declaration of homestead, a new title, in the nature of a joint tenancy, is created. But this construction was subsequently overruled by *Gee v. Moore*, 14 Cal. 472, and the operation and effect of a homestead declaration, as declared in *Gee v. Moore*, has been consistently adhered to since.

[4] Therefore it follows that, upon the restoration to respondent by the divorce court of this property, she took it in the present instance under no new title; nor had she parted with title so as to waive or destroy the federal homestead exemption.

[5] As to the 40 acres, however, the case presents a different aspect. The patent to the 40 acres was issued on March 26, 1892. The notes upon which appellant recovered judgment against respondent and her former husband were executed May 24, 1892, after the date of the patent. This 40 acres was, therefore, never at any time, by virtue of the federal laws, exempt from this debt. *Struby-Estabrook Mercantile Co. v. Davis*, 18 Colo. 93, 31 Pac. 495, 36 Am. St. Rep. 266; *Leonard v. Ross*, 23 Kan. 292; *Flanagan v.*

*Forsythe*, 6 Okl. 225, 50 Pac. 152. It follows herefrom that the 80 acres were exempt from execution, levy, and sale under the Miller judgment, and the 40 acres were not so exempt.

[6] After an order had been made by the superior court enforcing the Miller judgment, and before the sheriff's sale, the respondent applied to the superior court to have the order enforcing the judgment vacated. The hearing came on and was on December 17, 1910, denied. It is argued that this determination upon the order to show cause was *res adjudicata* and worked an estoppel by judgment against the present action brought by plaintiff. That a decision of a court upon an order such as this may, in proper cases, be pleaded as *res adjudicata* is unquestioned. *Lake v. Bonyng*, 161 Cal. 120, 118 Pac. 535. But it is *res adjudicata* only upon the matters adjudicated under the motion, and here it is established, upon the face of the record, that the sole ground was that respondent had not been served with summons in the Miller action; and it is at least doubtful whether the respondent in his motion could have sought an adjudication of the questions considered and determined in the present action. *Roth v. Insley*, 86 Cal. 134, 24 Pac. 853.

Wherefore the judgment is ordered modified, and the court directed to decree that the 40 acres of land were subject to the execution, sale, and levy and to the legal rights of appellant which may have arisen by virtue of such execution and sale. Appellant will recover his costs.

We concur: MELVIN, J.; LORIGAN, J.

165 Cal. 45

BARROWS v. HARTER. (L. A. 2,978.)

(Supreme Court of California. March 1, 1913.)

1. VENDOR AND PURCHASER (§ 98\*)—RESCISSION BY VENDOR—RESTORATION OF CONSIDERATION.

While under Civ. Code, § 1691, requiring a party rescinding a contract to restore everything of value received thereunder or to offer to restore it upon condition that the other party shall do likewise, and section 3408, providing that the court, on adjudging the rescission of a contract, may require the party to whom such relief is granted to make any compensation to the other which justice requires, a vendee upon a rescission by a vendor is ordinarily entitled to a restoration of the moneys paid by him, as well as to an allowance for permanent improvements, taxes paid, etc., he was not entitled to the return of his payments where the value of the use of the premises by him exceeded such payments.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 163-165; Dec. Dig. § 98.\*]

2. VENDOR AND PURCHASER (§ 101\*) — RESCISSIION BY VENDOR—NOTICE.

A vendee could not complain because a vendor gave notice of rescission on January 27th, and commenced action therefor on Feb-

January 4th, where he failed to show at the trial his ability to make the payments required under the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 170-174; Dec. Dig. § 101.\*]

**3. VENDOR AND PURCHASER (§ 93\*)—RESCISSI-  
SION BY VENDOR—DEFAULT BY VENDEE.**

Where a vendee had possession under the contract for six years, and for more than two years failed to make any payments of principal or interest as required by the contract, a rescission by the vendor could not be denied on the ground that he had not been injured by the vendee's default.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 153, 154; Dec. Dig. § 93.\*]

**4. VENDOR AND PURCHASER (§ 186\*)—PAY-  
MENT OF PURCHASE PRICE—EXCUSES.**

That a vendor did not have a merchantable title did not excuse the purchaser from making the payments required by the contract of sale.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 341, 673; Dec. Dig. § 186.\*]

Department 2. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by L. H. S. Barrows against Stephen A. Harter. Judgment for plaintiff, and defendant appeals. Affirmed.

M. B. Butler, of Pasadena, for appellant.  
J. H. Merriam, of Pasadena, for respondent.

**HENSHAW, J.** Under a contract of sale of a certain piece of property, entered into between plaintiff and defendant herein, the vendee entered into possession, and thereafter continuously remained in possession of the property contracted to be sold. Under this contract, and an extension thereof agreed to by the parties, defendant paid a small portion of the purchase price and certain sums by way of interest, altogether, as the court finds, aggregating \$570. He ceased paying interest in May, 1909, and continued in possession of the land thereafter without paying any part of the principal or interest as provided in the contract. On January 27, 1911, plaintiff gave notice to defendant of his rescission of the contract, offering to restore to defendant everything of value which he had received under the contract upon condition that defendant do likewise. Subsequently, on February 4, 1911, plaintiff commenced this action. Defendant by answer and by cross-complaint expressed his willingness and ability to comply with the terms of the contract and make the payments therein contemplated, and further demanded from plaintiff the return of the moneys which he had paid upon account of the purchase price. The court, in addition to the findings indicated by the above statement of facts, further found that plaintiff had rescinded in accordance with law; that defendant was not able to comply with the terms of his contract; found that the value of the use and occupation of the premises

which had been enjoyed by defendant since the date of the contract, for a period exceeding six years, was \$700, and decreed a rescission of the contract and the restoration to plaintiff of his land and premises.

[1] Upon this appeal the questions principally urged are that the court erred in not decreeing a repayment to the vendee of the amount which he had paid, principal and interest, upon account of the purchase price, and this, without diminution on account of the value of the rents, issues, profits, use, and occupation of the premises in possession of the vendee. In support of this, certain detached utterances are taken from cases, these utterances declaring very properly that in rescission the vendee is entitled to a restoration of the moneys paid by him. Ordinarily he is so entitled. He is entitled, as well, to an allowance for permanent improvements, taxes paid and the like. The cases to which we have adverted, however, are cases where there was no question of set-off against these amounts on account of the use and occupation of the premises. In cases of rescission, under general principles of equity as well as under our Code provision, each party, when it is practicable, must restore to the other whatever of value he has received. Such is the rule of section 1691 of the Civil Code, and it is still further emphasized by section 3408, which declares: "On adjudging the rescission of a contract, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require." The principle under which the court in the case at bar acted is that clearly enunciated in *Gates v. McLean*, 70 Cal. 42, 11 Pac. 489, and uniformly followed throughout all our later decisions. In that case, speaking of a vendee's right under rescission against a defaulting vendor, it is said that it is his duty to "offer to, and to restore the possession, in which case he may recover the purchase money advanced and the interest, together with the value of his improvements, deducting therefrom such sum as the use of the premises may reasonably have been worth." That the rule in this state is not peculiar to the state may be seen from 2 *Warvelle on Vendors*, § 869, and cases. Here the sum actually paid by defendant was \$570. The value of the use of the premises is found to be \$700. The court did not even give judgment against the defendant for the difference, \$130, but allowed him to retain it. He has no cause of complaint.

[2, 3] Appellant further urges that, notwithstanding his own default, the court should not have decreed a rescission, since notice of rescission was given on the 27th day of January, 1911, and the action was commenced on the 4th day of February, 1911. To this it is sufficient to answer that, while in his answer the defendant expressed his



willingness and ability to make the payments required of him by his contract, even so late as the time of the trial he failed absolutely to show his ability. If his expressed willingness had then been accompanied by a present ability to pay, the decree might have been different. Under the circumstances he has nothing to complain of. He urges further in this connection that plaintiff was not injured in any respect by his defaults and delays, but, in contemplation of the fact that plaintiff had been deprived for six years of the possession of his land, and for more than two years received no return by way of principal or interest upon the purchase price, it cannot be said that this position is well taken.

[4] Complaint is made of the refusal of the court to permit the entry in evidence of a certain judgment roll which confirmed the title to the property in the plaintiff. It is said that this judgment roll would have shown that up to the time that the judgment became final the plaintiff did not have a merchantable title. But this fact, if it be a fact, affords no justification for defendant's defaults. *Joyce v. Shafer*, 97 Cal. 336, 32 Pac. 320; *Backman v. Park*, 157 Cal. 607, 108 Pac. 686, 137 Am. St. Rep. 153.

The judgment appealed from is therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

166 Cal. 48

WURZBURGER et al. v. NELLIS et al.  
(L. A. 2,965.)

(Supreme Court of California. March 3, 1913.)

# 1. APPEAL AND ERROR (§ 854\*) — REVIEW — GROUNDS OF DECISION.

An order granting a new trial in general terms would be sustained if properly granted upon any of the grounds of the motion therefor, even though it appeared that the trial court granted it on another ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. § 854.\*]

# 2. NEW TRIAL (§ 70\*) — GROUNDS — VERDICT CONTRARY TO EVIDENCE.

Where, in an action against a road commissioner for injuries caused by falling into a gully or wash in the portion of a highway next to the property line at a point where there was no sidewalk, it appeared that the condition of the highway had existed for six months, but the commissioner testified that he had no knowledge thereof, and that that road district was very large, including about 75 miles of worked roads, the granting of a new trial after a verdict for plaintiff for insufficiency of the evidence to show notice would not have been an abuse of discretion, and hence an order granting a new trial in general terms would not be reversed.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.\*]

# 3. HIGHWAYS (§ 188\*)—DEFECTS—CARE REQUIRED.

A street commissioner or road overseer can be held to the exercise of only a reason-

able degree of care with respect to defects in highways.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 480; Dec. Dig. § 188.\*]

# 4. HIGHWAYS (§ 213\*)—NEW TRIAL (§ 157\*)—DEFECTS—QUESTIONS FOR JURY.

What constitutes a reasonable degree of care on the part of a street commissioner or road overseer is primarily a question for the jury, but is also one which the trial court may consider in passing upon a motion for a new trial.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 535; Dec. Dig. § 213; New Trial, Cent. Dig. §§ 314, 317, 318; Dec. Dig. § 157.\*]

# 5. HIGHWAYS (§ 188\*)—DEFECTS—CARE REQUIRED.

The degree of care required from a road commissioner in a rural district is quite different from that imposed upon a street superintendent in a city, and the requirement respecting notice is different from that governing a city street superintendent.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 480; Dec. Dig. § 188.\*]

# 6. HIGHWAYS (§ 198\*)—DEFECTS—PERSONS LIABLE.

While under Pol. Code, § 2641, requiring road commissioners to see that all orders of the board of supervisors pertaining to roads in his district are properly executed, section 2643 giving boards of supervisors general supervision over roads in the county, and section 2645 requiring the road commissioner, under the direction and supervision, and pursuant to the orders of the board of supervisors, to keep the highways in good repair, the functions of the road commissioner are to be performed under the direction of the board, it is his positive duty of his own motion to keep the roads clear from obstructions and in good repair, or at least to report to the board cases requiring attention, and hence he was not relieved of liability for injuries caused by a defect in a highway merely because the board had not ordered its repair.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 504-507; Dec. Dig. § 198.\*]

# 7. HIGHWAYS (§ 214\*)—ACTIONS FOR INJURIES—INSTRUCTIONS.

In an action for injuries sustained on a highway outside an incorporated city or town, it appeared that plaintiff came to the end of a sidewalk and proceeded three or four steps when she fell into a gully. The highway, with sidewalks constructed along a portion of it, had been accepted by the county. The court charged that plaintiff had a right to assume that the sidewalk was in a reasonably safe condition for her to pass over with ordinary care; that the highway included both the roadway and the sidewalks; that those in charge of highways outside of cities and towns were not bound to provide sidewalks, and had no power to do so, except under special circumstances not shown in that case; and that one walking along such a highway had no right to assume that there was a sidewalk at any particular point. *Held*, that the instructions were not inconsistent; their purport being that, where sidewalks existed, a traveler was entitled to depend upon their safety, but was not entitled to assume that they continued throughout the entire length of the road.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 538-540; Dec. Dig. § 214.\*]

Department 2. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Bessie Currier Wurzbarger and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

husband against C. J. Nellis and others. From an order granting a new trial after a verdict and judgment in her favor, plaintiffs appeal. Affirmed.

Moore & Finkenstein, of Los Angeles, for appellants. Hartley Shaw, J. D. Fredericks, Dist. Atty., D. M. Hunsaker, and Hunsaker & Britt, all of Los Angeles, for respondents.

MELVIN, J. Plaintiff Bessie Currier Wurzburger was injured by a fall into a gully or wash which traversed a portion of a public road in Los Angeles county. The accident occurred in the evening after 8 o'clock, while Mrs. Wurzburger was proceeding along the road. Mrs. Wurzburger testified that she walked along the sidewalk to a point where it ended abruptly. She stepped down a few inches to the ground, and, thinking that she was traversing a cross street, proceeded three or four steps, when her foot struck the edge of one of the boards by which, as she expressed it, "the wash was banked up," and thereupon she plunged headlong into the gully. As a result there were fractures of the femur and the coccyx, lacerations of the shoulder, and scars and bruises upon her face. She suffered great pain, was confined to her bed for several months, and, because of the fracture to the femur, one leg is shorter than the other by more than half an inch. The court instructed the jury to render a verdict in favor of all of the defendants, except R. W. Pridham, who was the member of the board of supervisors having charge of the roads in the district in which the accident occurred. A verdict against him for \$11,500 was returned by the jury, and judgment was entered accordingly; but upon motion a new trial was granted. This appeal is by the plaintiffs prosecuted from the order granting said motion.

[1] The grounds of the motion were: (1) Insufficiency of the evidence to justify the verdict; (2) that the verdict was against law; (3) that material errors of law, to which respondent excepted, occurred at the trial; and (4) that the damages were excessive, appearing to have been given under the influence of passion and prejudice. There were many specifications of alleged insufficiency of evidence to support the verdict. The order granting the motion was in general terms. Counsel for the plaintiffs concede that, if the order is capable of rational support upon any of the grounds mentioned in the motion, it should stand, but they contend that all of the alleged reasons for granting the motion were without merit. In their brief, counsel say the court informed them that the motion for a new trial was granted because of errors of law in admitting and rejecting testimony. This, however, does not appear from the record; and, even if the court had by a written opinion given reasons for the action taken in making the order for a new trial, we would be compelled to

sustain the order, if it could have been granted with propriety upon any of the grounds assigned. *Morgan v. Robinson Co.*, 157 Cal. 351, 107 Pac. 695.

There was a conflict of testimony upon the matter of notice to defendant Pridham. The duties of a road commissioner are defined by section 2645 of the Political Code, which is in part as follows: "Road commissioners, under the direction and supervision and pursuant to orders of the board of supervisors, must: (1) Take charge of the highways within their respective districts. (2) Keep them clear from obstructions, and in good repair. (3) Cause banks to be graded, bridges and causeways to be made when necessary, keep the same in good repair, and renew them when destroyed."

[2-5] Appellants insist that there was no substantial conflict because of the length of time in which the yawning waterway had existed. Brand boulevard, which is the road involved here, was accepted by the board of supervisors on November 22, 1909. Mrs. Wurzburger was injured about half a year later, on May 27, 1910. Mr. Pridham testified that at no time prior to the accident had he any knowledge or information regarding the unsafe condition of the sidewalk in question. He also testified that the Tropic road district, in which Brand boulevard lay, was territorially very large, and that there were about 75 miles of worked roads in said district. On his behalf counsel here maintain that he is not in the same position as a street superintendent in an incorporated city, and that therefore proof of the notice to him, either actual or imputed, of the condition of the street ought to be very clear. *Doeg v. Cook*, 126 Cal. 215, 58 Pac. 707, 77 Am. St. Rep. 171, is cited by appellants in support of the doctrine that, the existence of the imperfection in the road and the duty of the public officer to keep the highway in repair being shown, his responsibility for any injury caused by a fall of a pedestrian into the cavity in question follows as matter of course. It is to be remembered, however, that *Doeg v. Cook*, and also *Merritt v. McFarland*, 4 Cal. App. 391, 88 Pac. 369, were both cases in which the injuries that were the subject of litigation occurred within the limits of municipalities, and in both of those cases the negligence charged against the public officer was of a gross character. Mr. Justice McFarland, in his concurring opinion in the former of these cases, said that "a street commissioner or road overseer could be held to the exercise of only a reasonable degree of care." This is the true rule, and the question what constitutes "a reasonable degree of care" is primarily one for the jury, but it is also a question which the trial court may consider in passing upon a motion for a new trial. *Morgan v. Robinson Co.*, *supra*. The degree of care exacted from a road commissioner in a rural district is quite different



from that imposed upon a street superintendent in a city, and consequently the requirements respecting notice to persons charged with the repairing of rural roads are different from those governing the same subject-matter in relation to urban officers.

In Elliott on Roads (3d Ed.) § 497, the rule is thus expressed: "The difference in the extent of the servitude, in the authority of the local officers and in the nature and situation of rural roads, supplies strong reasons for discriminating actions against cities and towns from actions against counties and townships to recover damages for special injuries caused by negligence in constructing and maintaining roads and streets. In the case of a city, the territory is comparatively small, the streets are in almost constant use, the officers more numerous, the means of improving and repairing are at ready command, the necessity for vigilance and care is great, and the means of knowledge easily attainable, whereas in the case of a sparsely inhabited rural district it is essentially different. Negligence is seldom absolute, for whether an act is or is not negligent generally depends upon attendant facts and circumstances. What would be ordinary care in a country district, and in maintaining a secluded highway, may not be care of any reasonable degree in a populous city or in maintaining a much traveled street. In respect to the question of notice, which is often a conspicuous element in actions against public corporations to recover damages resulting from a special injury, the fact that the way is in a rural district and not in a city must often exert an important influence. Care is proportioned to the danger that may be reasonably apprehended, and duty is measured by the means, opportunities, and obligations supplied and imposed by the law upon the officers to whom is committed the care and control of the public ways of the state. It would be plainly unjust to measure the obligations and duties of officers in charge of rural highways by the rules which govern officers placed in charge of the streets of a town or city. What would be care and diligence on the part of the one class of officers may often be culpable negligence on the part of officers of the other class."

It is also to be remembered that as a rule the attention of the supervisor is not called to that part of the roads in his district near the property line. This fact is recognized by the Legislature because it is provided that the supervisors may, in their discretion, establish a "side path" on a public highway for pedestrians and bicyclists. Pol. Code, § 2643, subd. 12. We do not wish to be understood in the present case as holding that, as matter of law, the defendant Pridham was not charged with notice of the defect in the road. We are merely pointing out the conflict between his positive statement

that he knew nothing of the defect in Brand boulevard and the presumption which might arise from the long-continued existence of the gully crossing the line of the sidewalk that he should be charged with constructive notice of the danger to travelers on that highway. If the trial court, without abuse of discretion, might have resolved that conflict in favor of the defendant Pridham, on his motion for a new trial, then we are not at liberty to reverse its action. We do not find an abuse of discretion, and therefore we must affirm the order granting a new trial.

We might dispose of this appeal with the foregoing discussion; but, as the case will probably be tried again, it may be well to discuss some of the other questions presented in the briefs.

[6] Respondent Pridham contends that the evidence was insufficient to justify the verdict because it does not appear that he had been directed by the board of supervisors to repair the sidewalk. He insists that since, by section 2641 of the Political Code, each road commissioner shall see to it that all orders of the board of supervisors pertaining to roads in his district are properly executed, that because by section 2643 of the same Code the board of supervisors is given general supervision over the roads in the county, and that as by section 2645 the road commissioner, under the direction and supervision and pursuant to the orders of the board of supervisors, must keep the highways in good repair, therefore he is under no duty to act upon a needful repair, unless ordered so to do by the board. While it is true that the functions of a road commissioner are to be performed under the direction of the board of supervisors, yet he has certain positive duties to be executed of his own motion, and one of these is to keep the roads clear from obstructions and in good repair. He has at least the duty of reporting to the board cases requiring attention, and is culpable if he fails to do all that he may reasonably be expected to do toward providing for the repair of the dangerous places in the roads of his district. There is nothing in *Edwards v. Brockway*, 16 Cal. App. 627, 117 Pac. 787, in conflict with this view. That was a case arising under a freeholders' charter, by which the superintendent of streets was limited in his powers and could not even make repairs in a street without an order from the city council.

[7] There was no conflict in the instructions designated by appellants. By instruction No. 5 the jury was informed that plaintiffs had a right to assume that the sidewalk was not a dangerous place, but in a reasonably safe condition for her to pass over with the exercise of ordinary care. By instruction No. 17 the court told the jurors that the highway included both the roadway and the sidewalks. By instruction No. 12 they were

informed that: "The authorities having charge of highways outside of incorporated cities and towns are not bound to provide sidewalks on such highways, and have no power to do so, except under special circumstances not shown to exist in this case; and any one walking along such a highway has no legal right to assume, without investigation, that there is a sidewalk on any particular part thereof." It appears, without contradiction, that the county had accepted the boulevard with the sidewalks constructed along a portion of it. Where those sidewalks existed the traveler was as much entitled to depend upon their safety as if the board had by formal action set apart a strip of the road as a "side path." Instruction No. 12 merely informed the jurors that, because sidewalks existed along a portion of the road, that gave no basis for the belief on the part of the pedestrian that they continued throughout its entire length. No other alleged errors require notice.

The order from which this appeal is taken is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

(165 Cal. 70)

DAVIS v. PARSONS et al. (L. A. 2,998.)

(Supreme Court of California. March 6, 1913.)

**1. GIFTS (§ 49\*)—UNDUE INFLUENCE—EVIDENCE.**

In an action by a father for possession of policies of insurance assigned to him by his daughter as a gift, evidence held to warrant a finding that the assignment of the policies was not freely and voluntarily made.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95-100; Dec. Dig. § 49.\*]

**2. GIFTS (§ 38\*)—UNDUE INFLUENCE—MENTAL DEBILITY.**

In having a gift set aside for undue influence, it matters not, that the donor's life was not endangered, if, by reason of mental debility and nervousness following a protracted period of alcoholism, the donor believed it to be in danger, nor that hallucinations were not produced by the conduct of the donee, if the donor did entertain them; and if through fear, however groundless, the donor executed a deed of gift, it was not the voluntary act of a disposing mind.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 74; Dec. Dig. § 38.\*]

**3. GIFTS (§ 49\*)—RATIFICATION—EVIDENCE.**

In an action to enforce an assignment of insurance policies, evidence held to warrant a finding that defendant had not ratified the assignment.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95-100; Dec. Dig. § 49.\*]

**4. TRIAL (§ 89\*)—STRIKING VOLUNTARY EVIDENCE.**

It was not error to refuse to strike a voluntary statement of a witness from the evidence, where such evidence would have been proper if in answer to a question.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 228-234; Dec. Dig. § 89.\*]

**5. GIFTS (§ 48\*)—UNDUE INFLUENCE—EVIDENCE.**

In an action to enforce an assignment of insurance policies, where defendant claimed that the assignments were not freely made, evidence of quarrels between plaintiff's wife and defendant, wherein the wife threatened her harm if she did not do as plaintiff told her, although not having anything to do with the direct question of the assignment, were admissible to show threats and to show defendant's state of mind.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 87-94; Dec. Dig. § 48.\*]

**6. APPEAL AND ERROR (§ 882\*)—INVITED ERROR—EVIDENCE.**

Where the attorney for plaintiff told the court that plaintiff was perfectly willing if the court wished, to go into the question of the relation of plaintiff with his present wife before divorce of a former wife, he cannot complain of the admission of evidence on such point.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

**7. WITNESSES (§ 302\*)—PRIVILEGE OF WITNESS.**

A ruling of the court that, if answers to questions to a witness as to her mode of life and occupation in certain cities tended unnecessarily to humiliate her, she need not give them was proper.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1047, 1048; Dec. Dig. § 302.\*]

**8. TRIAL (§ 48\*)—EVIDENCE INADMISSIBLE IN PART.**

In an action to enforce an assignment of insurance policies, where it was asserted by defendant that she did not make it voluntarily, evidence of a servant of defendant as to defendant's distressed state of mind after going to plaintiff's house was not rendered inadmissible because she stated what defendant told her plaintiff has said to her.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 120; Dec. Dig. § 48.\*]

**9. EVIDENCE (§ 265\*)—ADMISSIONS—UNDUE INFLUENCE—LETTERS.**

In an action to enforce an assignment of insurance policies, where defendant attacks the assignments and all letters written by her upon the ground that they were the result of coercion and undue influence, she is not bound by declarations in a letter, and may testify to the contrary, although she admits that the writing and signature are hers.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1029-1050; Dec. Dig. § 265.\*]

**10. EVIDENCE (§ 256\*)—EXCLUSION OF IMPROPER EVIDENCE.**

Where a typewritten letter, purporting to be from defendant to others, was not signed nor sent to its addressee, and defendant testifies that it was not her voluntary act, the letter itself bearing internal evidence of that fact, some of the expressions being in plaintiff's language, the court properly refused to allow its admission in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1003, 1005; Dec. Dig. § 256.\*]

Department 2. Appeal from Superior Court, Los Angeles County; George H. Hut-ton, Judge.

Action by Carlyle C. Davis against Charles C. Parsons and others. Judgment for defendants, and plaintiff appeals. Affirmed.



John W. Kemp, John S. Mitchell, W. A. Alderson, and Kemp, Mitchell & Silberberg, all of Los Angeles, for appellant. Joseph Scott and James L. Irwin, both of Los Angeles, for respondents.

**HENSHAW, J.** This action was brought by Carlyle C. Davis, plaintiff, against his daughter, Nellie Madelein Davis, and against the trustees under the will of Martha Ellen Davis, mother of Nellie Madelein Davis, by which will certain property of the deceased was devised and bequeathed to the trustees for a period of years in trust for the use and benefit of defendant Nellie Madelein Davis. Summarized, the pleadings amount to this: Of the property and funds of the trust in the hands of the trustees were certain life insurance policies upon the life of plaintiff, which policies plaintiff had made over to his wife, Martha Ellen Davis, when, some years before, differences had arisen between them, culminating in a divorce. These policies were four in number, and were for the aggregate sum of \$17,500. Their surrender value was between \$8,000 and \$9,000. The plaintiff pleads that his daughter voluntarily and for a good and valuable consideration assigned and transferred these policies to him on the 3d day of November, 1906; that the policies were in the hands of the trustees; and that, before the delivery of the policies to him by the trustees, the defendant, Nellie Madelein Davis, attempted to revoke and repudiate her assignment and demanded of the trustees that they do not deliver the policies to the father. The trustees answered, in substance, asking the court to define their duties in the premises. The daughter pleads by answer and cross-complaint that her signatures to the purported written assignments were secured from her by the plaintiff through duress, violence, fraud, and undue influence. The court found, in accordance with the allegations of the cross-complaint, that Nellie Madelein Davis never freely or voluntarily executed the assignments; that they were not executed for a good and valuable consideration; that their execution was not of the free act and will of Nellie Madelein Davis; but that the execution was procured from her by plaintiff through the exercise of undue influence, coercion, and menace. Upon the judgment which followed, ordering the cancellation of the asserted assignments, and from the order denying his motion for a new trial, plaintiff appeals.

A review of the evidence is made necessary by reason of the fact that the principal contention upon appeal is that it does not support the findings of the court. The necessity of the review in this case is the more unfortunate, not only because of the relationship existing between the plaintiff and the principal defendant, but because as it appears, from the more or less veiled intimations of counsel, certain findings of the court

were drawn as inferences from the evidence, rather than from the positive statement of witnesses. This will be made the more apparent as the discussion proceeds.

[1] Plaintiff, his former wife, Martha Ellen Davis, and their one child, the defendant Nellie Madelein Davis, lived for many years in Colorado. The plaintiff was the proprietor of two daily newspapers in Leadville. At the time of the trial, the plaintiff was over 60 years of age and his daughter 36 years of age. The plaintiff had been in ill health for a number of years. Differences had arisen between himself and the mother of defendant, which led to their separation, and ultimately to their divorce. As an outgrowth of these differences and in the settlement of the property rights, plaintiff made over to his wife these insurance policies fully paid up. After the divorce the husband married again, and with his second wife came to California. In 1906 the divorced wife died, leaving, as has been said, her property to trustees in trust for her daughter. That the plaintiff had been a most kind and indulgent father to his daughter is abundantly established even from the lips of the daughter herself. She had been educated at home and abroad, studied for three years in an art school in Paris, spoke French and German, and upon her return from abroad entered a dramatic school in New York and went on the stage. In 1895, when her father was ill, she took charge of his two daily newspapers at Leadville, remaining there in charge until 1896, for a period of nearly a year. Then, upon \$5,000 being given her by her father, she returned to New York and engaged in the business of furnishing musical, literary, and other entertainment for social functions. But (this, however, appearing by inference and intimation rather than by direct proof) the daughter fell into evil ways and into dissolute habits. She led, or was willing to lead, an immoral life. She smoked and drank alcoholic liquors to excess. Thus, in a letter, one of the trustees, Mr. Parsons, wrote to her upon October 8, 1906, as follows: "You must realize that your life during the past eight years with its history of hospitals, sanitariums, etc., is anything but safe, secure, or dignified. It caused your mother unutterable woe. I have seen upon her face expressions of intense agony, of unutterable grief, when speaking of you. I have no doubt her death was hastened by the overwhelming sorrow that your career brought upon her. She was at times inclined to dispose of her property otherwise than by leaving it to you. Her mother's affection, however, prevailed, but it was her expressed desire that the estate should be preserved for a period of five years in the hope and expectation that during that time a greater sense of responsibility would develop in you. \* \* \* If you leave your father's house and pursue the life you have been leading during the past eight years, we will not respond to your

letters and telegrams asking for money beyond the amount we have fixed, no matter what occurs."

In 1906 plaintiff, with his present wife, Mrs. Mollie Davis, was living upon a tract of land which he had purchased near San Gabriel in Los Angeles county. While there they learned from her letter that defendant was in a sanitarium in San Diego. The wife of plaintiff went to San Diego and, upon the promise of the daughter to reform, to cease smoking, and the use of alcoholic stimulants, Mrs. Davis took her to her father's home. Thus, on the last of October or the 1st of November, 1906, the daughter was received into her father's household. Two or three days afterwards—that is to say, upon November 3d—the daughter executed, in consideration of love and affection, the assignments to her father of the insurance policies. Of the circumstances connected with and attending these assignments, the plaintiff declares that, though sick and enfeebled, he was by stress of poverty compelled to do manual labor on his home place; that he was so engaged in painting his barn when his daughter came to him, saying that it was too bad that he was forced to do such work at his age, and that she was going to transfer to him the insurance policies which he had given her mother, voicing the hope that he could realize enough money from these policies to make his old age more easy and comfortable. Plaintiff expressed his gratitude to his daughter, and told her that he was not physically able to do the work he was compelled to perform; that her proposition was most generous; and that, if she carried it out, it would enable him to pay his debts and employ some one to do the hard work on his little ranch. At no time did he or did his wife ever suggest to the daughter the assignment of the policies. On November 3d plaintiff had further conversation with his daughter. He was then preparing to go to Los Angeles to meet Mr. Parsons, one of the trustees of the defendant's estate. The daughter drove with him to the station about a mile away, and on the drive told him that she wished him to have the necessary papers prepared, while he was in Los Angeles, so that she could execute the assignment. Plaintiff told her that he would have this done and would probably bring a notary public with him on his return to take her acknowledgment. Plaintiff then, while in Los Angeles, did employ Mr. Carl A. Johnson, a practicing attorney, and a notary public, who prepared the assignments; he returned to his home accompanied by Mr. Johnson and also by Mr. Parsons, one of the trustees, whom plaintiff had known for many years. Upon arrival at his home, plaintiff testifies further that his daughter followed him into the bathroom and asked him if, after executing these assignments, she would be expected to pay for her board, to which

the father laughingly replied that he thought she "would be entitled to her keep at least." He gave the papers to his daughter, saying, "Here are the papers, Nellie, which you authorized me to have made out." She took them and asked if it was necessary to read them all, to which her father replied that it was not necessary as they were duplicates save in the name and description of the policies. The daughter sat down at a desk, read the papers, and then and there signed them, but, before signing them, he said to her that she must sign them of her free will and for no other reason than that she wanted him to have the money which the policies represented, otherwise that she must not sign them at all. She signed them, acknowledged them, and gave them to him with a kiss. The notary's recollection is that, before taking Miss Davis' acknowledgment, he asked her if she understood what the instruments meant, and that she replied that she did and that it was all right; that it was not true that Miss Davis was crying at the time, nor that, in answer to his question, "Do you do this of your own free will?" she replied that she did it because she had to and had no will of her own. After the execution of the papers, they all sat down to dinner and "had a general social conversation and pleasant evening." Mr. Parsons, the trustee, testifies that, upon arrival at the house, Miss Davis spoke to him relative to the making of the assignments, and asked him if it was all right, and he replied: "Nellie, I don't care to advise you in this matter. This is a matter entirely between you and your father, and besides I am the trustee of this estate, and I would rather you managed those things. I would rather you settled the matter between you and your father. I will say this to you, that, if you do sign the papers transferring these policies, you must do it knowing what you are doing, and it must be done voluntarily and free from any pressure or influence of your father or any one else. It must be your voluntary act, I said, otherwise the assignments would not be effective." She made no dissent. The witness never made any suggestion to Miss Davis that she transfer the policies, and never in the slightest attempted to influence her to do so. Fixing the surrender value of the policies at about \$8,000, there was \$10,000 more remaining in the trust estate, so that the gift was of a little less than half of the total trust estate. The trust estate, under prudent and economical management, yielded a net income of about \$50 a month.

The daughter's story is that she never saw her father painting a barn; that she never suggested giving him the policies; but that he said to her that he had paid all the money on the policies and that they really belonged to him. She never volunteered to make an assignment of them to her father, but, to the contrary, her father represented that "he



had so much property in Los Angeles and he had that beautiful ranch—I have forgotten how much it was worth—now many thousand dollars;" that upon the 3d of November, when her father was in Los Angeles, she had a serious quarrel with her stepmother, who threatened to have her confined as an insane person; that she tried to telephone to get an express wagon to remove her things out of the house, and her stepmother struck her and took the telephone from her. Then, in the afternoon when her father, Mr. Parsons, and Mr. Johnson arrived, her father took her in the bathroom and told her he was terribly in debt; that the place was mortgaged; that the insurance policies were of no value to her, and that, if she would make them over to him, he would leave her out of his estate as much money, or more, as their value to him; that, while he was much harassed by debts at present, in a few years his property would increase enormously in value. "Then we went out into the other room, or we went through the living room and out through the porch where the desk and table and everything was, and the papers were all ready for me to sign, and I signed them. I didn't know what they were. I didn't read them. They are very long papers. If I had read them they never would have got out. So I suppose I didn't ask for proof he would give me something. He is my father, and he always was truthful to me, and so I believed he would give me the value of those things, and still I wanted Mr. Parsons to take me to town, and when I signed these I went to Mr. Parsons. He was in the living room. I said, 'Mr. Parsons, are you going to witness this? Are you going to witness my giving up everything I own?' He said, 'No, Nellie, that would not do at all. I am trustee of the estate'—so there was nobody to stand up for me, and, you know, my room opened off the porch. Mrs. Davis slept right by my door, and I am afraid of Mrs. Davis. What more is there?" When Mr. Johnson, the notary, asked her if she signed the papers of her own will, she said, "I don't know if you can say I have a free will or right," and she was crying. Mrs. Davis also told her that she could never collect a cent on the policies, and, in case of her father's death they were of no value; that the policies were only good during her father's lifetime to borrow money on; that she begged Mr. Parsons, when he arrived at the house, to take her away as she was in fear of her life.

Mr. Parsons' testimony upon this is that it did not occur on November 3d, but upon the day preceding, when he was a visitor at the father's home; that Miss Davis then came out of the house crying and said, "Won't you take me away from here?" or something of that kind; and then said something about some trouble with her stepmother. "I said, 'Nellie, I have nothing to do with you per-

sonally,' and I said, 'You must not expect me to take you away from here,' and then I said, 'There is no use of any excitement about this or worry. I will inquire into it. We will adjust this matter in some way, perhaps, before I leave.' Soon after that we sat down and talked, and she got over her weeping, and everything was apparently very pleasant and cheerful the balance of the evening. On November 3d Miss Davis herself drove us to the house. She was not weeping that evening. I think she has confounded that with what occurred the night before."

The explanation given by Mrs. Davis of the difficulty between herself and her stepdaughter is that the stepdaughter in her craving for liquor sought in every way to indulge her appetite, and at times to escape from the parental roof, and that it was necessary for her to interfere when the daughter would phone to the grocery store for liquors, or when she was contemplating flight from her father's house. Thus her father and his wife both testified that upon at least one occasion the daughter, demanding money to return to New York, threatened to go to Los Angeles and earn it by an immoral life if it was not given to her. When Miss Davis testified to her fear that her stepmother would poison her, the stepmother insisted upon her taking certain pills, the explanation of the stepmother, herself formerly a trained nurse, is that the pills contained strychnine, were prescribed by a physician to be given to Miss Davis as a stimulant while recovering from her debauch, and to furnish aid in resisting her alcoholic craving.

[2] The appellant insists that the evidence of defendant is not inconsistent with the proofs offered by plaintiff, and that in many particulars it is so incoherent and inconsistent with itself that it is not entitled to such credit that a reviewing court will say that it raises a conflict. But here again, drawing the inferences from that evidence which the trial court must have drawn, and with the advantage which the trial court possessed of having the witnesses before it, it seems reasonable to say that these very inconsistencies and incoherencies give evidence of a mind, or of a state of mind, on the part of the defendant justifying the trial court in withholding its approval of the validity of the assignments. Thus it matters not if Miss Davis' life was not endangered, if, by reason of her mental debility and the nervousness following her protracted period of alcoholism, she believed it to be in danger; it matters not if she entertained hallucinations not produced by the conduct of her father or stepmother. If, in fact, she did entertain them, and through fear of them, however groundless, executed the assignments, it was not the free and voluntary act of a disposing mind. Such, we conclude, must have

been the view which the trial court took of this evidence, and in this view the question of the confidential relation between parent and child enters very little, if at all. By this is meant that such confidential relation need not be established as the foundation from which to attack the transaction. The case rests upon the salient facts that the dissolute daughter returning to the Davis roof after a protracted alcoholic debauch which ended in a sanitarium, endeavoring by the father's own testimony to escape from that roof, threatening to lead an immoral life to get money to escape, apparently desirous of returning to her former life, necessarily debilitated in health and with ragged nerves, gives to her father nearly one-half of her trust property, declaring that she did so under pressure from her father, in fear of her life, and to buy her peace. Again we repeat that, however improbable the narration is in fact, it may well to the mind of the court have seemed that Miss Davis believed the situation to be as she represented, a belief not supported by the conduct of her father, but a distorted belief springing from her own troubled brain. It is concluded, therefore, that a substantial conflict in the evidence is presented, and upon familiar principles this court will not disturb the conclusions found by the trial court.

[3] A subsequent ratification of the assignments is asserted by plaintiff. This ratification springs from the fact that the daughter resided with her father for some months after the execution, and repeatedly wrote to the trustees in terms confirming the assignments, in some instances the confirmation being outright, in others conditional; the conditions in one letter, for example, being that the trustees should continue to pay her \$50 a month and should turn over to her her mother's jewels. In another the confirmation was based upon the condition that her father and his wife should execute to her some sort of an agreement whereby she should receive the amount of the policies from their estates upon the death of the last survivor. But, as to these letters, it is shown that they were inspired by the father and in some instances wholly typewritten by him; the daughter doing nothing more than signing her name. True, the father says that the letters were the free act of the daughter, and were merely typewritten by him after consultation with her and confirmation by her of their substance. But the daughter's answer is still the same, that she was under her father's roof, under his absolute domination and control, that the trustees did not even pay her monthly \$50 to her, but paid it to her father so that she was penniless, and she simply signed whatever she was asked to sign until later in the year she wrote to the trustees herself repudiating the assignments, and consulted a lawyer in Los Angeles about the matter.

[4] Numerous exceptions were taken to the rulings of the court admitting and rejecting evidence. The first of these groups is the refusal of the court to strike out voluntary statements of the witness Nellie Davis. It has been said before that the testimony of Nellie Davis was rambling, in some respects contradictory, in others absolutely incoherent. Appellant asserts that the most glaring of these errors, and it will serve for a type of all, is the following: Shown a type-written letter signed by herself, the court asks, "What is the date of this letter?" Mr. Kemp, of counsel for appellant, replies, "June 21, 1907," when the witness interjects, "Your honor, I never composed that, and I doubt if I ever wrote it, and yet the signature is mine." The court refused to strike this out. True, it was voluntary. True, it was not in response to any question, but it was perfectly permissible evidence, if questions soliciting it had been asked; and the refusal of the court to strike out the volunteered matter was but a time-saving device, since unquestionably the same evidence would have been adduced under direct question and answer if it had been stricken out.

[5] The second group of exceptions is predicated upon the court's admission of the testimony of Nellie Davis concerning quarrels between herself and her stepmother, Mollie Davis. It may be well to quote this. Miss Davis is constantly asking the court if she may tell her story. Asked if Mrs. Davis ever said anything to her about the policies, she says, "May I tell what she said?" Q. No, not unless it is in reference to the assignment of the policies. A. May I say it? The Court: Yes, go on. A. She says, 'If you don't do what you are told to-night, Mr. Parsons will fix you, and if he don't I will.' And I said, 'You cannot do a thing to me, because I have never done anything that you could do anything for.' I was mad and I didn't need to talk like that— This was previous to the telephone incident. She said she had doctors that would swear things, and she said, 'If you land in an insane asylum in California, you will not get out of it,' and she said that Dr. Horn said there was nothing the matter with me physically, and I was not affected, and that I had not nervous prostration, but that I was mentally wrong. She told me that on the afternoon of the 3d, and she further said, 'If you get locked up in an insane asylum in California there was no chance.' I said, 'That is rubbish, because they cannot hold you. They have got to prove in court you are insane,' and she said "The testimony of two doctors is sufficient;" and I says, 'No, the testimony of two doctors is not sufficient, they cannot go into court and say you are insane,' and she says, 'They can in this state;' and I says, 'You cannot in New York,' and she says, 'They can in this state, and that is what they can do to you.' I believed it. But the first time



the policies were mentioned was when my father took me into the bathroom, and this was after the quarrel with my stepmother." Manifestly this evidence had nothing to do with the direct question of the assignments of the policies; but it is equally manifest that it gave evidence, first, of asserted threats upon the part of Mrs. Davis; and, second, of the condition of Miss Davis' mind. It was therefore admissible.

[6] The third alleged error is in admitting evidence offered by Miss Davis of occurrences in Leadville. The occurrences seemed to be the beginning of the marital differences between the plaintiff and his first wife and involved the stepmother, the present Mrs. Davis, who was at that time Mr. Davis' nurse. This evidence of itself amounted to nothing. It was simply a declaration by the daughter that the present wife exercised great control over the husband, and the conclusion of the witness that "Father would not have treated me that way if it had not been for her." That there had been differences was not in question, and the representation of Mr. Kemp, of counsel for appellant, was an invitation to the court to rule precisely as it did; he saying: "If the court wants to go into that proposition, we would be very glad to go into it. We have not a thing to conceal, as far as the relations of Mr. Davis' present wife are concerned." Here to insist that the admission of the evidence thus invited is prejudicial error is somewhat inconsistent.

[7] The next alleged errors were where the court permitted the witness Nellie Davis to refuse to answer certain questions. These questions were addressed to her mode of life and her occupation in the cities of Chicago and Boston. The ruling of the court was simply that, if the answers tended unnecessarily to humiliate the witness, she need not give them; and, resting upon this perfectly proper declaration of the court, she refused to answer. Code Civ. Proc. 2065.

[8] The next group of exceptions is addressed to the admission of the testimony of Maria McNally, given by deposition. Maria McNally had been a household servant of the Davises and came to California to live with Nellie Davis after the latter had left her father's roof. An example of these objections is the following: Nellie Davis was living in her own bungalow built for her by the trustees near to her father's place. The trustees were still paying the money for the support of Nellie Davis to her father, and not directly to her. She was obliged to visit her father's house upon her business affairs in the matter of her bills. The witness testifies to her frequent nervous and crying spells after returning from her father's house, and that the troubles of Nellie Davis seemed to have followed these visits. She is then asked: "Q. You never heard Nellie and her

father talking about the insurance policy? A. No, sir. I did not. Q. Had you never heard him make any complaint about the size of her bills? A. The grocery bills? Q. Yes. A. I certainly did. I did not hear him, because I was not there. I heard it from Nellie after she would come back. Q. All you know is what Nellie told you? A. All I know is what Nellie told me. Q. How frequently did she go over to her father's house? A. I do not think she ever went there except on business, and when she got her allowance she did not go over there at all. She went there when she had to go. Q. Did he give her the money, or pay her bills? A. No, he paid the bills. Q. He paid the tradesmen direct? A. Yes." The witness seems to have been a candid one. It was competent for her to testify concerning the condition of Nellie Davis upon her return from her father's home, that she was perturbed and in tears, and the fact that she frankly answers that she was not at Mr. Davis' house, did not hear the conversation, and so could not know the cause of Miss Davis' distress other than what Miss Davis herself told her, does not render her evidence inadmissible.

[9] A letter was introduced in the handwriting of Nellie Davis and signed by her. This letter is dated in June, 1907, is addressed to Mr. Walling, attorney for her trustees at Denver, and "begs leave to state" that the assignment of the insurance policies to her father was executed by the writer freely, and that her father never sought to influence or coerce her in the matter, "and, further, whatever promises he has made to me were made subsequent to the two acts mentioned, and not made as an inducement or condition;" the promises here referred to being promises to secure the defendant out of the estate of her father and his wife. The defendant is allowed to testify, over objection, touching the letter and its contents as follows: "That is not my English. My father composed that letter. I don't remember of ever seeing it, but it is my writing. I suppose it is one of those I signed when my father was in a hurry, when he went to town I had to sign often, because he was going—the postman was going. It was not necessary to read them over because he would tell me what was in the letter. I could not have been familiar with the contents of that letter when I signed it because I don't recognize it now. It is not my composition at all. The contents are new to me." It is asserted by appellant that, as respondent admits having written the letter and having signed it, she must have known the contents and is bound by the declarations therein contained. But in this appellant loses sight of the fact that the attack upon the assignments and upon all of this correspondence is that they were the result of coercion and

undue influence. As bearing upon these issues, the testimony of the witness was in point and admissible.

[10] The court refused admission in evidence of a long typewritten document purporting to be from Nellie Davis to her trustee, Mr. Parsons, the last page of which, however, was in her father's handwriting. This letter was neither signed by Nellie Davis nor sent. But appellant contends that it contains statements negating much of her testimony, and therefore should have been admitted. It was refused admission in evidence, first, for the reasons indicated, that the letter was not signed by Nellie Davis nor sent to its addressee, and, further, because she testifies—and the letter itself bears internal evidence of the fact—that it was not her free voluntary act, that only some of its expressions were hers, and others were those of her father. It was not error, therefore, for the court to refuse to receive this writing.

To sum up, therefore, it is sufficient to say that, while the direct evidence in the case strongly preponderates in favor of the fairness of the gift by the daughter to the father, yet, when consideration is paid to the character of the daughter, her habits of life, the restraint put upon her under her father's roof, her nervous condition, her apparent inability because of her habits to maintain herself, and the final fact that by this gift she is irrevocably parting with nearly half of her small property, it may not be said that the trial court was not justified in declaring that gift to have been one not freely and voluntarily made.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(164 Cal. 741)

CLAPP et al. v. CHURCHILL et al.  
(L. A. 2,994.)

(Supreme Court of California. Feb. 20, 1913.  
Rehearing Denied March 21, 1913.)

**1. BOUNDARIES (§ 46\*) — ESTABLISHMENT — AGREEMENT OF PARTIES—GROUNDS AND VALIDITY OF AGREEMENT.**

The rule as to an agreed boundary line and its binding effect upon coterminous owners rests upon the fact that there is an actual or believed uncertainty as to the true line, acquiescence being merely evidence of the agreement, and then only when a formal agreement will be binding; but a formal agreement to fix a boundary line is void if either party knows that the agreed line is not the true line.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 212-226, 249-251; Dec. Dig. § 46.\*]

**2. FRAUDS, STATUTE OF (§ 70\*)—CONVEYANCE OF LAND—ESTABLISHMENT OF BOUNDARIES—"TRANSFER OF TITLE."**

A valid formal agreement upon a boundary line is not a transfer of title within the statute of frauds; the theory of the law being that

there has been no conveyance of any land, but simply an agreement as to the land which the parties respectively own under circumstances estopping either from thereafter denying it.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 112; Dec. Dig. § 70.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7064-7070.]

**3. BOUNDARIES (§ 37\*) — ESTABLISHMENT — EVIDENCE OF UNCERTAINTY.**

In an action to determine the boundary line between adjoining owners, plaintiff showed that he did not know where the true boundary line was until he caused his land to be surveyed, when it was ascertained according to the calls in his deed, and also defendant's acquiescence in his exercise of dominion over the strip in controversy. *Held*, that his own uncertainty was not defendant's uncertainty, and that there was no evidence that defendant regarded the boundary line as uncertain.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 184-194; Dec. Dig. § 37.\*]

**4. EVIDENCE (§ 274\*) — DECLARATIONS — BOUNDARIES.**

In an action to determine a boundary line, plaintiff's testimony that he did not have a very distinct conversation as to the boundary line at the time he went into possession, and that it was indicated as the south side of adjoining property, and his testimony as to what he claimed as the boundary line during possession, was inadmissible, where it was not shown that such conversation was with defendant or that defendant knew of his claim.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1121-1134; Dec. Dig. § 274.\*]

**5. EVIDENCE (§ 471\*) — ESTABLISHMENT OF BOUNDARY — ADMISSIBILITY OF EVIDENCE—REPLICATION.**

In an action to establish a boundary line as marked by a hedge, testimony of a witness, who had sowed seeds for plaintiff on the disputed strip, that he supposed the hedge belonged to plaintiff, was inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\*]

Department 2. Appeal from Superior Court, Los Angeles County; George H. Hut-ton, Judge.

Action by Mary B. N. Clapp and husband against F. S. Churchill and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

W. I. Morrison, of Los Angeles, and F. G. Cruickshank, of Pasadena, for appellants. G. A. Gibbs, of Pasadena, and Richards & Carrier, of Santa Barbara, for respondents.

HENSHAW, J. This action was brought to determine the common boundary line between plaintiffs' land upon the north and defendants' land upon the south, and to restrain defendants from cutting down and destroying a row of pomegranate trees which plaintiffs assert are upon and define the boundary line. A nonsuit was granted, and from the judgment which followed plaintiffs appeal.

The land in controversy is a strip 4 or 5 feet wide and 590 feet long. There is no contention that there are any false calls in the deed to the plaintiffs, nor that there is any



discrepancy between the calls and visible and declared monuments. The deed of the plaintiffs, it is stipulated, is certain in its terms, and, running the courses and distances of this deed, the boundary line is fixed 4 or 5 feet north of the row of pomegranate trees. Nor is this a case where the litigants hold from a common grantor, or where one, the owner of the whole tract, is the grantor of the other who thus becomes the owner of a portion of the tract. The case is one where plaintiffs to prevail must establish an uncertain boundary line, an agreement between the coterminous owners to fix that boundary line, and the fixing of that line by agreement, or must establish their title by adverse possession. The motion for a nonsuit was addressed to the insufficiency of the evidence to show plaintiffs' ownership of the property by either method. Thus, as one of the grounds of the motion, it was urged that no adverse possession for the statutory period with payment of taxes had been proven, and upon the other it was urged "that the plaintiff has not been in possession with improvements of a substantial order for five years; and that there was no dispute shown or uncertainty to make an agreement as to what the boundary line should have been with anybody; and there is no estoppel; and no improvements have been made such as would make it equitable that the plaintiffs should recover."

Upon the matter of adverse possession there is no contention that it was proved by plaintiffs that any title was thus acquired. Whatever may have been plaintiffs' acts of dominion, ownership, and control over the disputed strip, it is unquestioned that they did not pay the taxes thereon. The whole case, therefore, rests upon the proposition first set forth.

The action was brought in February, 1911. Plaintiffs acquired title to their property in 1905, more than five years prior to the commencement of the action. Title to plaintiffs' property stood in the name of Mary B. N. Clapp. Dr. Clapp, her husband, joined with her as plaintiff, testifies, in substance, that in purchasing and entering into possession of the land he took it for granted that the southern boundary line was the row of pomegranate trees with a fence, or the remnants of a fence running through it. The fence was a wire fence supported partly by the pomegranate trees and partly by some two or three old posts. Only parts of the fence were there. He had a new fence put up to keep the boys out. There was a building, "a kind of barn and chicken corral, and a house at the southeast corner of lot 7; the south end was tight up against this hedge." He had it torn down. He always supposed that the pomegranate trees marked his southern line. He had openly occupied all the property up to the hedge. He trimmed the hedge on his side and planted nasturtiums

and other flowers upon the strip, but they did not grow well because of the hedge. He had built a garage at the southwest corner of the property. No part of the garage proper was upon the disputed strip. Its southern side corresponded exactly with the line of plaintiffs' property as called for in the deed. However, the original steps of the garage were built upon the disputed strip, and these original steps were afterwards torn down and replaced by new ones upon the same spot. No objection was made by any one to these acts of dominion and control. The witness did not know that the pomegranate hedge was not the true southern line until he had a survey made in accordance with the calls of his deed and found that his line was thus established four or five feet north of the line of pomegranate trees. He did not know that the boundary stakes were there along the true line until shortly before his testimony when he saw them uncovered. This is substantially the testimony to support plaintiffs' case. It is silent upon several important matters. There is no word of testimony that the defendants, or any one of them, believed or declared their northern boundary line to be uncertain. There is no testimony about any agreement fixing the pomegranate hedge as the accepted boundary line because of such uncertainty, and the whole case of the plaintiffs resolves itself down to this: That plaintiffs did not know where the boundary line called for by their deed was, but supposed it to be the pomegranate hedge. There was no uncertainty even upon the face of their deed. The pomegranate hedge as the boundary line was a mere assumption upon their part. Plaintiffs exercised certain acts of dominion and control over the disputed strip. From the acquiescence by their silence of the coterminous owners to the south it is argued that this acquiescence, having continued for a period equal to that required by the statute of limitations, gives rise to the conclusive presumption of previous agreement, or, if not, to the conclusive presumption, at least to a presumption which has not been rebutted by any evidence.

[1] But the doctrine of an agreed boundary line and its binding effects upon the coterminous owners rests fundamentally upon the fact that there is, or is believed by all parties to be, an uncertainty as to the location of the true line. When that uncertainty exists, or is believed by them to exist, they may amongst themselves by agreement fix the boundary line, and that agreement will bind all the consenting parties. Acquiescence is merely evidence of the agreement and can properly be considered as evidence of an agreement only when a formal agreement would itself have made a binding contract. But a formal agreement to fix a boundary line is not valid, indeed is void, if the parties know, or one of them knows, that the agreed line is not the true line, or, in other words,

if there be not an actual or believed uncertainty as to the true line.

[2] This is so because under our law title to real property can be transferred only by descent, devise, conveyance inter vivos, or by adverse holding, and to allow parties where their common boundary line was not uncertain or in dispute by a mere agreement to give one title which belongs in another would be the recognition of a mode of transferring title not countenanced by law. *Lewis v. Ogram*, 149 Cal. 506, 87 Pac. 60, 10 L. R. A. (N. S.) 610, 117 Am. St. Rep. 151; *Mann v. Mann*, 152 Cal. 23, 91 Pac. 994; *Young v. Blakeman*, 153 Cal. 477, 95 Pac. 888; *Loustalet v. McKeel*, 157 Cal. 634, 108 Pac. 707. When such an agreement has been deliberately entered into, it is not the theory of the law that there has been a conveyance of any land from the one coterminous owner to the other, but it is simply that they have agreed between themselves as to the land which they respectively own under circumstances which estop either of them thereafter from denying it. This does not mean that the inference of an agreement arising from acquiescence does not support the added inference that the inferred agreement was based on a questioned boundary. The primary inference is of a valid pre-existing agreement, and to be valid that agreement must have been based on a doubtful boundary line. But what is meant is that this inference of a doubtful boundary will not prevail against the proved fact to the contrary, namely, that there was no question or doubt or dispute between both parties over the boundary.

[3] In the case under consideration plaintiff's evidence completely breaks down in its failure to show an uncertainty touching the boundary line which would support such an agreement for, as is said in *Lewis v. Ogram*, supra, "such an agreement necessarily is not valid for any other purpose than that of settling an uncertainty in regard to common boundary." Plaintiff shows that he did not know where the true boundary line was until he caused his land to be surveyed, when it was easily determined. But his uncertainty was not the defendants' uncertainty, and there is not the slightest evidence that they considered that their northern boundary line was uncertain in its location. Therefore the acquiescence of the defendants in the acts of the plaintiffs in their exercise of dominion over the strip might make against them for their failure to assert their right, if title were claimed by adverse possession, a claim which has heretofore been said could not, in this instance, be sustained. But it is without meaning or potency under the contention of an agreed boundary line because, as has been said and shown, an agreement fixing a common boundary line can only have efficacy where the true boundary is either

uncertain in fact or is believed by the contracting parties to be uncertain.

[4] The witness Dr. Clapp was asked the question, "Will you state what conversation you had with reference to the south boundary line of your property at the time you went into possession there?" He answered, "I did not have a very distinct conversation in the matter, but the boundary line was indicated to me as the south side of that property, and I had no survey made of it." A motion to strike out the answer touching the conversation was made unless it was shown to have been a conversation with the defendants, and the motion was granted. The ruling was proper. The witness does not declare that this conversation was had with the defendants or any of them; he does not declare that the row of pomegranate trees was indicated to him as his boundary line. He had sufficiently indicated his own ignorance of his true boundary line, and this evidence would not in the slightest tend to show that the defendants or any of them were in like ignorance.

Again the witness was asked, "State what you claimed as the south boundary line of your property during the time you were in possession." While an objection to the question was made upon the ground that the evidence was inadmissible unless these claims were shown to have been brought to the knowledge of the defendants, and while the objection was sustained, nevertheless the witness was permitted to answer, and did answer freely: "We occupied all of the property up to the hedge openly. \* \* \* Since we came into possession we have occupied it."

[5] A witness testified that he had sowed seeds for Dr. Clapp along the disputed strip, concluding his answer by saying, "and I have supposed that the hedge belonged to Dr. Clapp." The quoted portion of his answer was stricken out on motion. It is asserted that this was error. Clearly the supposition of the witness, even if it be dignified as do appellants by calling it his "opinion" touching the title to the property, was not admissible in evidence.

No other points upon the reception and rejection of evidence are made, and, for the reasons given, the judgment and order appealed from are affirmed.

We concur: MELVIN, J.; LORIGAN, J.

21 Cal. App. 56

PEOPLE v. BERNARD. (Cr. 420.)

(District Court of Appeal, First District, California. Jan. 31, 1913.)

1. FORGERY (§ 44\*) — SUFFICIENCY OF EVIDENCE.

Evidence in a prosecution for forging a check held to sustain a finding that the alleged drawer was a fictitious person.

[Ed. Note.—For other cases, see *Forgery*, Cent. Dig. §§ 117-121; Dec. Dig. § 44.\*]



**2. CRIMINAL LAW (§ 808½\*)—INSTRUCTIONS.**

An instruction in a forgery prosecution, which merely repeated the provisions of Pen. Code, § 470, defining forgery, upon which the information was based, was not erroneous, though parts of the section read did not apply to the case made by the information or proof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1811; Dec. Dig. § 808½.\*]

**3. FORGERY (§ 37\*)—ADMISSION OF EVIDENCE.**

In a prosecution for forging the name of "Manuel Babbist" to a check, in which it appeared that no one by that identical name existed, evidence was admissible by one named "Manuel J. Baptist," a depositor, that the signature to the check was not his, and specimens of his handwriting were also admissible.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 105-107, 111; Dec. Dig. § 37.\*]

**4. CRIMINAL LAW (§ 982\*)—SENTENCE—SUSPENSION—HEARING MOTION FOR NEW TRIAL.**

The fact that a motion for new trial was made and filed before accused was formally arraigned for sentence did not affect its status as a motion for new trial, so as to prevent the court from continuing the hearing thereof, as is authorized by Pen. Code, § 1191, especially where the continuance was requested by accused, so that jurisdiction to impose sentence was not lost by the delay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.\*]

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

J. E. Bernard was convicted of forgery, and appeals. From judgment of conviction and order denying a motion for a new trial, defendant appeals. Affirmed.

T. L. Christianson, of Oakland, for appellant. U. S. Webb, Atty. Gen., for the People.

HALL, J. Defendant was convicted of the crime of forgery, and upon judgment being pronounced appealed to this court from the judgment and order denying his motion for a new trial.

In apt and sufficient language defendant was charged both with falsely making, and knowing the same to be false and forged, uttering, and passing as genuine and true a certain check, which is set out in the information. Both the making and uttering are charged in the information as having been done with intent to defraud one John Ratti, to whom it is alleged the check was passed as true and genuine by defendant. The check, as set out in the information and as proved, was drawn upon the First National Bank of Oakland, Cal., for the sum of \$18, payable to "Frank H. Silva or bearer," and purported to be signed "Manuel Babbist" as drawer thereof. It also purported to be indorsed on the back thereof "Frank H. Silva."

The evidence showed that defendant passed the check to John Ratti as true and genuine, and obtained thereon from John Ratti the sum of \$18. Upon presentation at the bank upon which it was drawn, it was not paid, for the reason that no Manuel Babbist had or ever had had an account at such bank. A brother of defendant, however, learning of

the matter, subsequently paid the amount of the check to Ratti. Evidence was given by an expert in handwriting that the written portion of the check, including the name "Manuel Babbist" and the indorsement, "Frank H. Silva," were written by the same person who wrote certain exemplars used for comparison. The writer of these exemplars was proven to be the defendant. Evidence was given by a police officer that after diligent inquiry, including an examination of the directory of all the cities and towns of Alameda county, he could find no such person as Manuel Babbist. In addition there was the testimony of the cashier and the bookkeeper of the bank that no such person had or ever had had an account with the bank.

[1] This testimony was ample to support the theory that Manuel Babbist was a fictitious person. *People v. Eppinger*, 105 Cal. 36, 38 Pac. 538. On the other hand, it was shown that one Manuel J. Baptist had an account with the bank upon which the check was drawn, but he testified that he did not draw the check, nor authorize any one to draw it or sign his name thereto.

Under these circumstances the court gave an instruction which permitted a conviction notwithstanding either or both Manuel Babbist or Frank H. Silva were fictitious persons. In so doing appellant claims that the court erred, for the reason, as he claims, that a prosecution for making a fictitious check should be under section 476 of the Penal Code, and not under section 470, under which this case was prosecuted, citing in support thereof *People v. Elliott*, 90 Cal. 586, 27 Pac. 433, and *People v. Eppinger*, 105 Cal. 36, 38 Pac. 538. Since those cases were decided, however, section 470 has been amended to avoid the rule laid down in those cases, and so as to cover the case made by the proof in this action, and covered by the instruction given by the court and now challenged by appellant. *Stats. 1905, p. 673*. The instruction complained of is a correct statement of the law as it has existed since the amendment to section 470 of the Penal Code of 1905.

[2] Appellant also complains of an instruction in which the court simply read from the section (section 470, Pen. Code) defining forgery under which the information was framed. In this the court did not err, although some portions of the section as read do not apply to the case made by the information or the proof. It was simply read as a definition of forgery.

[3] The court did not err in allowing Manuel J. Baptist to testify that the signature to the check in question was not his, nor in submitting to the jury specimens of the handwriting of Manuel J. Baptist. Although the name "Manuel J. Baptist" differs somewhat from the name "Manuel Babbist," the circumstances of the case were such as to jus-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tify the introduction of the evidence to preclude any inference or presumption that the signature "Manuel Baptist" was either made or authorized by Baptist, who did have an account with the bank upon which the check was drawn.

Appellant attacks the reliability of the testimony given by the expert upon handwriting; but the jury likewise had before them the disputed check and proven exemplars of the handwriting of defendant, and from the entire evidence found the defendant guilty. After an examination of the entire record including the evidence, we see no reason to disturb the finding of the jury.

Lastly it is contended that the court lost jurisdiction to pronounce judgment, because sentence was not pronounced within five days after verdict. The verdict was rendered September 24, 1912. The cause was then continued to September 28, 1912, upon which day the record discloses that "defendant now makes and files a motion for a new trial, and the cause is by the court ordered and hereby is continued to October 3, 1912, at 9:30 a. m. for hearing upon the motion for a new trial and sentence at the request of the defendant," upon which day judgment was pronounced after hearing and denying the motion for a new trial.

[4] The continuance for the purpose of hearing the motion for a new trial was authorized by the law. Section 1191, Pen. Code. The fact that the motion was made and filed before defendant was formally arraigned for sentence does not rob it of the force and effect of a motion for a new trial so as to preclude the court from continuing the hearing thereof as allowed by section 1191 of the Penal Code. Especially must this be so where the continuance is at the request of defendant.

The judgment and order are affirmed.

We concur: **LENNON, P. J.**; **MURPHEY, J.**, pro tem.

(21 Cal. App. 59)

**WHINNERY v. WHINNERY.** (Civ. 1,061.)

(District Court of Appeal, Third District, California. Jan. 31, 1913. Rehearing Denied by Supreme Court March 24, 1913.)

**1. DIVORCE (§ 130\*)—ACTION—SUFFICIENCY OF EVIDENCE—CRUELTY.**

Evidence in divorce *held* to support a finding that the husband treated the wife in a cruel manner so as to authorize a divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 442-445; Dec. Dig. § 130.\*]

**2. DIVORCE (§ 49\*)—CONDONATION.**

Under Civ. Code, § 118, providing that where a cause for divorce consists of cruelty, where the offense is made up of a series of acts, conjugal kindness, etc., shall not be evidence of condonation, unless accompanied by an express agreement to condone, an express agreement to condone cruelty is essential.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 171-179; Dec. Dig. § 49.\*]

Appeal from the Superior Court, Alameda County; A. J. Buckles, Judge.

Action by Kate Whinnery against James E. Whinnery. From a judgment for plaintiff and an order denying a motion for new trial, defendant appeals. Affirmed.

J. K. Johnson, of San Francisco, for appellant. Edward R. Eliassen, of Oakland, for respondent.

**BURNETT, J.** The action was for divorce on the grounds of intemperance and cruelty. The judgment was in favor of plaintiff, awarding her a divorce on the ground of cruel treatment. Findings were waived. The court recited in its judgment that the "interlocutory decree is hereby made on account of defendant's extreme cruelty towards the said plaintiff." Certain property was also adjudged to be the separate property of plaintiff, and a portion of the community property was awarded to her and the balance to defendant.

The points made on the appeal are that the evidence is insufficient to support the judgment; that there was condonation on the part of plaintiff; and that the court erred in determining that said property was the separate property of plaintiff.

[1] As to the evidence, there can be no doubt as to its sufficiency to support the conclusion of the trial court. The plaintiff testified: "I am not living with defendant at this time. We have been separated a year. The reason of the separation was his intemperance and his cruelty. He was intemperate, drinking to excess. He started to drink almost immediately after we were married, and continued to drink while we were living together. He was drunk frequently. The last year that he lived at home he was drunk almost continuously. He first commenced to be cruel to me about four or five years ago. He tried to choke me on one occasion. He repeatedly told me that I was not better than a prostitute; also told me that I had not a dollar when he married me; every cent he had, everything he was possessed of, was his; I had nothing. On one occasion he said that I occupied a different bed because I had all the men there that I wanted, the butcher boys and grocer boys. He would stand over me in a threatening attitude and say those things about the butcher boys and grocer boys. That was a year ago, in February or March, a month or two preceding before I insisted on his leaving home. He would make those statements almost daily. During the last six months that he was home, we quarreled almost weekly over money matters."

The daughter, Rose Whinnery, testified that her father "was very quarrelsome and abusive, to my mother especially. When he had been drinking, when he was at home during the last year, he was quarreling with mother almost every day. I remember when



my father tried to choke my mother. I must have come into the room while they were quarreling. My father had his hands around my mother's neck. I don't remember that he said anything. My mother was screaming. My father had been drinking; his face was flushed; he looked angry."

Marjory Whinnery, another daughter, testified that her father drank to excess, and that he quarreled with her mother several times each week; that he accused her of stripping him of everything he had, and she corroborated her mother and her sister as to her father choking her mother.

Comment is unnecessary as to the foregoing testimony, as it is obviously sufficient to support the conclusion that the defendant treated the plaintiff in a cruel manner, and that sufficient corroboration appears. That it inflicted grievous mental suffering and great bodily injury upon the plaintiff appears also from the testimony in the case, which we deem unnecessary to cite further upon this point.

As to the claimed condonation, it may be said, in the first place, that it was not pleaded by defendant; and, in the second place, that there is no evidence to show condonation, as defined by the provisions of the Civil Code in cases of this character. Section 117 of said Code is as follows: "Condonation implies a condition subsequent; that the forgiving party must be treated with conjugal kindness." And section 118: "Where the cause of divorce consists of a course of offensive conduct, or arises, in cases of cruelty, from excessive acts of ill treatment, which may, aggregately, constitute the offense, cohabitation, or passive endurance, or conjugal kindness shall not be evidence of condonation of any one of the acts constituting such cause unless accompanied by an express agreement to condone."

[2] It is apparent from the record that the cause of divorce grew out of the excessive acts of ill treatment of plaintiff on the part of defendant, and there is no evidence disclosed that there was any express agreement on the part of plaintiff to condone the offense of defendant; hence condonation was not made out, within the contemplation of the statute. *Morton v. Morton*, 117 Cal. 443, 49 Pac. 557; *Smith v. Smith*, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; *Hunter v. Hunter*, 132 Cal. 473, 64 Pac. 772.

Concerning the property referred to, there is evidence in the record that defendant had transferred it to plaintiff, and the court was entirely justified in the conclusion, from the testimony, that he intended to invest, and thereby did invest, said property in plaintiff as her separate estate. The conclusion of the court was therefore justified by the evidence. But even if it were not her separate, but community property, the court was warranted in setting it aside to her, since the divorce was granted on the ground of cruelty.

Section 146 of the Civil Code provides: "In case of the dissolution of the marriage by the decree of a court of competent jurisdiction, the community property and the homestead shall be assigned as follows: 1. If the decree be rendered on the ground of adultery or extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case and the condition of the parties, may deem just."

In the present instance there was no decree for alimony or costs or counsel fees in favor of plaintiff, and quite a portion of the community property was awarded to defendant. Under the circumstances, the plaintiff being a woman of some years and having two daughters to educate and maintain, and without any other source of income, so far as appears from the record, the disposition made of the property by the court appears fair and just. At least, there does not appear to have been any abuse of discretion on the part of the court in that respect.

After an examination of the record, we feel constrained to say that there appears to be no ground for interfering with the judgment of the lower court and the order denying a new trial, and each is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

21 Cal. App. 39

DEALEY v. EAST SAN MATEO LAND CO.  
(Civ. 1,054.)

(District Court of Appeal, First District, California. Jan. 23, 1913. Rehearing Denied by Supreme Court March 24, 1913.)

1. CONTRACTS (§ 130\*)—ILLEGALITY—BY-BIDDERS—PUBLIC POLICY—"FRAUD."

In view of Civ. Code, § 1797, providing that the employment by a seller of any person to bid at an auction sale without any intention on the part of the bidder to buy or on the part of the seller to enforce the bid is a fraud entitling a buyer to rescind, a contract for compensation for securing by-bidders at auction is against public policy, as working a "fraud" on the public, though the section is intended only to protect bona fide buyers.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 654-658; Dec. Dig. § 130.\*

For other definitions, see *Words and Phrases*, vol. 3, pp. 2943-2954; vol. 8, p. 7666.]

2. CONTRACTS (§ 137\*)—PARTIAL INVALIDITY—EFFECT.

Where a contract for the employment of plaintiff as an auctioneer also provided for compensation for procuring by-bidders, the entire contract is tainted by the illegality of the last provision and cannot be enforced even though the compensation for procuring by-bidders has been paid.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 701-712; Dec. Dig. § 137.\*]

3. CONTRACTS (§ 138\*)—ILLEGALITY—NECESSITY OF PLEADING.

A contract for procuring by-bidders at an auction being against public policy, no recovery can be had thereon, though the answer did not set up the illegality.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 681-700; Dec. Dig. § 138.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from Superior Court, City and County of San Francisco; George H. Canbiss, Judge.

Action by George L. Dealey against the East San Mateo Land Company. From a judgment for plaintiff, defendant appeals. Reversed.

Archibald Barnard, of San Francisco (H. W. Philbrook, of San Francisco, of counsel), for appellant. Vogelsang & Brown, of San Francisco, for respondent.

LENNON, P. J. This is an appeal by defendant from a judgment in favor of plaintiff. Plaintiff sued upon a written contract for commissions alleged to be due him from defendant upon the amount of the selling price of lands belonging to defendant and sold at public auction, plaintiff acting for defendant as the auctioneer at such sales. The written contract provided that the sum of \$30 on each sale was to be allowed the auctioneer, the plaintiff herein, to be used by him "as for assistance." The plaintiff testified that the purpose of the assistance was to "swell the crowd and speak well of the property"; that they occasionally "bid at the sale"; that these assistants, variously called by respondent "puffers" and "by-bidders," were "employed through him by the defendant"; that "plaintiff hired them"; "that quite a number of them were at each of the sales." The testimony of other witnesses was to the effect that, with the knowledge and consent of and through a prior arrangement between the parties, these so-called "assistants" were present at each sale for the purpose of boosting the bids, it being understood between the parties that in the event of the property being knocked down to any one of these "puffers" or "by-bidders" no attempt would be made to enforce the bid.

[1] Defendant claims that the contract was one to defraud the public, is against public policy, and by reason thereof the court cannot accord relief to either party. We think this contention must be sustained. The practice of by-bidding is referred to in section 1797 of the Civil Code. It is therein provided as follows: "The employment by a seller of any person to bid at a sale by auction, without the knowledge of the buyer, without an intention on the part of such bidder to buy, and on the part of the seller to enforce his bid, is a fraud upon the buyer, which entitles him to rescind his purchase." This Code section is a definite statement of the public policy toward such practices. At common law a similar rule prevailed, and our Code section is but an enactment in statutory form of the rule laid down by a long line of authorities positively declaring the practice of by-bidding against public policy. *Moncrieff v. Goldsborough*, 4 Har. & McH. (Md.) 281, 1 Am. Dec. 407; *Curtis v. Aspinwall*, 114 Mass. 187, 191, 19 Am. Rep. 332; *National Bank Metropolis v. Sprague*, 20 N.

J. Eq. (5 C. E. Green) 159, 165; *Peck v. List*, 23 W. Va. 338, 48 Am. Rep. 398. Plaintiff contends, however, that the contract of sale with the purchaser was voidable only at the election of the purchaser, and, inasmuch as no purchaser has undertaken to rescind his purchase because of the use of by-bidders at the sale, the fraud has been condoned. Plaintiff's right to recover depends primarily, however, not upon the contract of sale to purchasers, but upon his contract of employment with the defendant. The section above quoted is intended for the benefit of the innocent purchaser and him alone. The use of by-bidders at the sale without the knowledge of the buyer and under the circumstances mentioned in the Code section is a "fraud"—true a fraud upon the buyer, but nevertheless a fraud—and the fraudulent character of such a practice is not in any manner or to any extent changed by the failure of the buyer to exercise his right of rescission. The contract between these parties, and upon which this action rests, is entirely separate and distinct from the contract of sale given to the purchasers. It must be judged by itself, standing alone, and not in the light of what may or may not be done by purchasers at the sale. The use of by-bidders is declared in so many words by the Code section to be a fraud, and, inasmuch as the contract between the parties to this action contemplates resorting to such a practice, we must hold that the contract from its inception was to perpetrate a fraud upon the public and can form the basis of a recovery to neither of the parties thereto. It makes no difference how or when the fact was brought to the attention of the court that the contract sued upon is against public policy. Neither does it matter whether or not one of the parties raises the question of its illegality upon that account, but courts of law and of equity, as the true character of such a contract is disclosed, refuse to permit themselves to be used in settling a controversy arising out of such a contract.

In *Union Collection Co. v. Buckman*, 150 Cal. 159, 164, 88 Pac. 708, 710 (9 L. R. A. [N. S.] 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609), the Supreme Court said: "There is no better settled rule of law than the one to the effect that the courts will not entertain any action in affirmance of an illegal contract."

In *Ball v. Putnam*, 123 Cal. 134, 140, 55 Pac. 773, 775, the same court, in reversing the judgment, called to the attention of the trial court the fact that there was "evidence in the record tending to show that the contract which lay at the bottom of all the transactions between these parties was a contract void as against public policy," and suggested a rigid inquiry by the trial judge, adding, "If, after such inquiry, the evidence elicited leads him to believe that such is the fact, he will withhold all relief in this ac-



tion, for a contract which is against public policy, good morals, or the express mandate of the law cannot be made the basis of any action, legal or equitable. Neither the silence nor the consent of the parties to it justifies the court in retaining jurisdiction of such an action." *Wight v. Rindskopf*, 43 Wis. 344, 348. We take it that this doctrine is so well established that the citation of other authorities to sustain it is unnecessary.

[2] There is no merit in plaintiff's contention that the portion of the contract providing for an allowance for the hiring of assistants to act as puffers or by-bidders may be severed from, and thus effect given to remaining provisions of the contract, otherwise unobjectionable, and in this connection plaintiff directs the court's attention to the fact that the money due plaintiff on account of the employment of these so-called assistants had actually been paid over to him and therefore claims discussion of its allowance is no longer an element in the case. We cannot agree with this contention. We are not concerned with the right of defendant to receive moneys so paid, even were such a claim made. The fact remains that these "assistants" were intended to be and were actually employed as by-bidders, which was a fraud upon the public, and the entire contract between the parties became thereby tainted.

[3] Plaintiff further sets up the claim that defendant's answer did not properly raise any issue of the illegality of the contract. There might be some merit in the contention if the defendant was seeking to avoid payment on the ground of plaintiff's alleged fraud against it, i. e., that the defendant was the victim of plaintiff's alleged fraud. Here the fraud is not against the defendant, but against the public. Pleading such a fraud is not a condition precedent to the court's taking cognizance of it. As soon as it is disclosed to the court, whether alleged in the pleadings or not, that the contract between the parties contemplates a fraud upon the public, it must sua sponte refuse to grant any relief to either party based on such contract. *Union Collection Co. v. Buckman*, 150 Cal. 159, 164, 165, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609; *Camp v. Bruce*, 96 Va. 521, 524, 31 S. E. 901, 43 L. R. A. 146, 70 Am. St. Rep. 873 (1898); *Ball v. Putnam*, 123 Cal. 134, 55 Pac. 773; *Morrill v. Nightingale*, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. Rep. 207; *Kremer v. Earl*, 91 Cal. 112, 27 Pac. 735; *Prost v. More*, 40 Cal. 347; *Drexler v. Tyrrell*, 15 Nev. 115, 134; *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539; *Coppel v. Hall*, 7 Wall. (74 U. S.) 542, 558, 19 L. Ed. 244; *Dunham v. Presby*, 120 Mass. 285, 289.

It is the duty of courts to protect the public at all times against fraud, and one way of doing so is by closing the doors to would-be or actual perpetrators of such fraud who

would fain make use of the court to divide the spoils between them.

Alleged errors of the court in its rulings on matters of evidence and for failure to make a finding on certain alleged material issues are discussed by defendant; but inasmuch as in our opinion the illegality of the contract, because against public policy, prevents any recovery upon the contract by either of the parties thereto, it will be unnecessary here to discuss these alleged errors.

For the reasons given the judgment is reversed.

We concur: HALL, J.; KERRIGAN, J.

21 Cal. App. 72

BALDWIN v. TRAHERN. (Civ. 1,077.)

(District Court of Appeal, Third District, California. Jan. 31, 1913.)

DEEDS (§ 211\*)—MENTAL CAPACITY—EVIDENCE.

In an action to set aside a deed, evidence held to warrant a finding that the grantor had mental capacity.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 637-647, 649; *Dec. Dig.* § 211; \**Cancellation of Instruments*, Cent. Dig. § 102.]

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by Zuleika J. Baldwin against Henriette B. Trahern. Judgment for defendant, and plaintiff appeals. Affirmed.

Albert Jacoby and Louis Ferrari, both of San Francisco, for appellant. A. H. Ashley, of Stockton, for respondent.

BURNETT, J. This is an action brought to set aside a deed on the ground of undue influence and the incompetency of the grantor. The deed was made by George W. Trahern to his wife, Henriette B. Trahern, on August 17, 1909, 28 days before the death of the grantor on September 14, 1909. The deed recites a consideration of love and affection, and was duly acknowledged, delivered, and recorded on the day of its execution. Plaintiff claimed to be the daughter of the grantor, and, in her alleged capacity as heir, brought the action to set aside said deed. The answer denied that appellant was his daughter, and also denied his unsoundness of mind and the exercise of any undue influence.

The court found that plaintiff was the illegitimate daughter of the grantor, but that she was never legitimated by any act or acknowledgment of said grantor. The court also found that no undue influence was exercised on the said grantor by any person, and that "on the 15th day of August, 1909, and up to the time of his death, said George W. Trahern was continuously of sound mind, and during all of said time was mentally able to and did understand, realize, and comprehend the nature, result, and effect of his

act or acts in the signing and affixing his signature to and acknowledging and delivering a document, bill of sale, or other instrument, and to and did understand and realize and comprehend the nature, result, and effect of his act or acts in making and entering into a contract."

No evidence whatever was offered by plaintiff to sustain the allegation of undue influence; and, since it is entirely clear from the record that the finding of the court, in reference to the mental condition of said grantor and his execution and delivery of said deed, is abundantly supported by the evidence, it is perfectly clear that the other finding that plaintiff was never recognized by said grantor as his daughter need not be considered, as it is not necessary to support the judgment.

In reference to the mental condition of said grantor at the time of the execution of said deed, it may be said that there is really no conflict in the evidence, as the testimony of all the witnesses upon that point substantially agrees that he was entirely competent to transact business, understood thoroughly the nature of the transaction, and that it was his purpose and desire to vest the title of said property entirely in his said wife, the grantee, and that the deed was properly signed, acknowledged, and delivered by him to said grantee at the time alleged. To show how fully the finding of the court is supported, it will be necessary to quote only from the testimony of two witnesses.

George F. McNoble, who prepared the deed and who took the acknowledgment of the grantor, testified, among other things: "I was an intimate acquaintance, confidential friend, and legal adviser of Mr. Trahern. In the summer of 1909 I spent my vacation near Lake Tahoe; I got home on August 14th, Saturday morning, at half past 9, and called at the Trahern house that evening, between half past 7 and 9 o'clock. I then saw Mr. Trahern upstairs, sitting on a settee. I had conversation with him. There were three or four persons present, Mrs. Trahern, Rachael, Dr. Hammond, the son's daughter, and possibly Mrs. Williams. Mr. Trahern called me by name and said he had been anxious for me to come home; that he wanted to fix up those papers. He had previously spoken to me about expenses about probating, making deeds, etc., in June or May, some time earlier. I asked him what disposition he wanted to make of his property and he said he wanted to deed all of his property to his wife, Ret, he called her. He asked me if I could draw up the papers, and I told him I could. He asked when, and I said, 'Your place is one of those old Mexican grants, I suppose; I will have to go to Wilhoit for a description before I can make a conveyance.' Mr. Trahern said he would like to have the matter fixed up, and consulted me about his bank book and account, personal property, live stock, and all that. I assured

him that I could make a present conveyance of all of his property by combined deed and bill of sale in the one deed. He asked me if it would be good; I told him it would. I explained to him that there must be a present delivery and so that he could exercise no control; that, if there was a present delivery to the grantee, title must then pass and the grantee have absolute control. I went over the matter very carefully with him, explaining to him that if he should recover from his illness, and go on the ranch again, he would not have control of his property. I asked him if he desired to deliver the deed in escrow, accompanied by a memorandum showing irrevocable delivery. He said he had delayed the transfer of his property to his wife somewhat longer than what he really should have done, and that he wanted the deed executed and delivered to his wife at once, and recorded at once." The witness, after stating that no one else participated in the conversation, declared that, after the deed was written, he went out with it by appointment, on August 17th between 12 and 1 o'clock, and continuing: "Mrs. Trahern, their son and their two daughters, and, I think, the granddaughter were there. I told Mr. Trahern I brought the papers out, and that they were now ready for his execution. I said to him that the first thing I would like to have him do was to read the instrument over and see if he was satisfied with its contents. He took the instrument and read it over and read about the personal property. He said, 'This includes the bank account, does it?' I said, 'Yes, it includes your bank account, any paper, everything you have got in the way of personal property.' He said, 'Very well.' I then read the deed aloud, including all the land description, and then asked him if it represented his intention. He said it did. A table and writing materials were brought in. The table was not well adjusted, and he wrote his name as it is signed to the deed. I then asked him if it was his act and deed, and he said it was. I asked him if he acknowledged the execution of the deed as his act and deed, and he said he did. I said to his son, 'Now, you and I will sign our names to this instrument as witnesses and to this act of your father;' and we did so. I then handed him back the deed, which was yet unfolded. He took it up in his hands, one of which from an old injury was not flexible, and folded the instrument rather clumsily and loosely, and handed it to his wife, saying, 'Here, Ret, this is for you.' His wife was pretty much nonplussed and confused, and she said, 'What shall I do with it?' He said, 'You take it and have it recorded.'" The witness afterward stated, "I know the man was of sound mind," and furthermore: "I never urged Mr. Trahern to do anything about his property. I had no interest in it in any way. I did not do anything in the way of corruptly or at all con-



trolling or intending to influence him or to prevail upon him or persuade him or importune him or overpower him in the execution of this deed, and I never heard his son or his wife, Henriette B. Trahern, say anything at all of that nature."

David D. Trahern, the son of the grantor, 37 years of age, detailed also the transaction, and, among other things, testified: "He was of as sound a mind as any man that I ever knew in my life, up to the time the deed was executed and after. This was so up to the morning of the day he died. Based upon my intimate acquaintance, my father was just as sound when the deed was signed, acknowledged, and delivered by him as he ever was in his life, as sound as any of us in the courtroom to-day; he was never incompetent at any time in his life. My reasons are that he was able to carry on and did carry on his business. Nothing was done or said by me to him at the time of the execution of this deed, or prior thereto, with reference to obtaining the execution of such deed; nor was anything done or said in that regard by either my mother or Mr. McNoble. My father was not mentally feeble on August 17, 1909; his mind was perfectly normal, always has been."

There is other evidence to the same effect, but it seems unnecessary to call particular attention to it. In fact, the reading of the transcript creates the impression that, as stated by the trial judge, "the preponderance in favor of the defendant is so overwhelming as to practically preclude all doubt in the matter."

There seems absolutely no merit in the appeal and the order denying the motion for a new trial is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

21 Cal. App. 76

ZUMBUSCH v. SUPERIOR COURT IN  
AND FOR COUNTY OF LOS AN-  
GELES et al. (Civ. 1,304.)

(District Court of Appeal, Second District, California. Jan. 31, 1913.)

1. PROCESS (§ 99\*)—SERVICE OF PUBLICATION.

Code Civ. Proc. § 412, provides that where the person on whom service is to be made resides out of the state and the fact appears by affidavit to the court's satisfaction it may order service by publication. Section 670 provides what shall constitute the judgment roll and directs the clerk, immediately after entering judgment, to attach together and file certain papers, including the affidavit for publication of summons. *Held*, that the court could order publication of summons, though the affidavit was not filed until the action was called for trial, and could not refuse to hear the action or docket the case for failure to sooner file the affidavit, though it might refuse to proceed with the trial until the affidavit was filed.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 125; Dec. Dig. § 99.\*]

2. PROCESS (§ 98\*)—SERVICE—PUBLICATION.

The court has power upon its own motion to vacate a void order for service of summons by publication, previously made in the case.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 121-124, 126; Dec. Dig. § 98.\*]

3. PROCESS (§ 98\*) — SERVICE — ORDER FOR PUBLICATION—VACATION.

If an order for publication of summons was not void, the court could only set it aside on motion within a reasonable time, or by action where all of the interested parties had an opportunity to be heard.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 121-124, 126; Dec. Dig. § 98.\*]

4. PROCESS (§ 98\*)—PUBLICATION—VOID ORDER.

Even though an original order for publication of summons was void, the court could not, on a motion to proceed with trial, compel the issuance of a new order; it only having the power to determine the validity of the original order.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 121-124, 126; Dec. Dig. § 98.\*]

5. CONTEMPT (§ 80\*)—JURISDICTION—DIVESTMENT—MISCONDUCT OF COUNSEL.

The court could not divest itself of jurisdiction previously acquired, on the ground of disrespectful conduct of counsel; Code Civ. Proc. § 1209, defining contempts of court and providing a manner for punishing them, furnishing the only remedy.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 261-266; Dec. Dig. § 80.\*]

Application for writ of mandate by Helen Zumbusch against the Superior Court of the State of California in and for the County of Los Angeles and others. Writ issued.

A. W. Sorenson, of Los Angeles, for petitioner. H. W. Hanson, of Los Angeles, for respondents.

ALLEN, P. J. In mandamus. The affidavit and return disclose the commencement of an action by petitioner in the superior court, and the presentation to a judge thereof of an affidavit sufficient in form and substance to warrant an order for publication of summons. Such order was made and followed by the publication and mailing as by said order directed. Defendant's default was regularly entered by the clerk and the cause set down for trial. Upon the day set for the trial it was discovered by the judge that the affidavit upon which the order for publication was made was not among the files, and thereupon the trial court, upon its own motion, struck the case from the calendar, ordered a new affidavit for publication, and directed a new order to be obtained. Counsel for plaintiff, being present, presented to the clerk the original affidavit, and the same was filed; and thereupon counsel moved the court to proceed with the trial, or to designate a day for the trial thereof. The trial judge refused to reinstate the case upon the trial calendar, and refused to hear the cause or to exercise jurisdiction in the premises, for the reason that the judge making the order for publication had no jurisdiction to

make such order until the affidavit presented in support thereof was filed.

[1] Petitioner in this proceeding seeks a writ of mandate requiring the trial judge to reinstate or place said cause upon the trial calendar and to proceed at its earliest convenience to hear and determine said cause. It is conceded that the sole question presented relates to the proper construction which should be given to sections 412 and 670 of the Code of Civil Procedure. The first-named section provides: "Where the person on whom service is to be made resides out of the state; \* \* \* and the fact appears by affidavit to the satisfaction of the court, or a judge thereof; \* \* \* such court or judge may make an order that the service be made by the publication of the summons." Section 670 determines what shall constitute the judgment roll and directs the clerk, immediately after entering the judgment, to attach together and file certain papers, among which is the affidavit for publication of summons. The evident theory of the learned trial judge was that section 670, when construed in connection with section 412, indicated a legislative intent to require the filing of the affidavit before presentation, without which filing the clerk could not attach the same to the judgment roll. We think this construction is answered by our Supreme Court in the case of *Parsons v. Weis*, 144 Cal. 415, 77 Pac. 1010, where it is said: "Where the person upon whom service is to be made resides out of the state, the jurisdiction of the court to order the service of the summons by publication is brought into exercise by the presentation of an affidavit stating this fact." This decision was rendered after the amendment of section 670 requiring the attaching of the affidavit to the judgment roll. It may be, and probably it is, true that such affidavit should be on file, or be before the court when the case is called for trial, that the court may determine the question of jurisdiction arising from service of process; for we take it that, even though a previous order was made directing service by publication, it could only be made upon a sufficient affidavit, and the trial court, if upon re-examining the affidavit it finds that statements of fact required to be incorporated therein were omitted, possesses the power upon its own motion to vacate the order previously made, or to decline to try the case, because jurisdiction of the person had not been properly and regularly acquired.

[2] The power of the court upon its own motion to vacate a void order previously made cannot be questioned. *People v. Davis*, 143 Cal. 675, 77 Pac. 651.

[3] Upon the other hand, if the order for publication was not void, the court has no power to set it aside, except upon motion made within a reasonable time, or by action where all interested parties have an opportunity to be heard. *People v. Temple*, 103 Cal. 453,

37 Pac. 414. We are of opinion then that, the affidavit presented before the issuance of the order being admittedly sufficient, the court possessed the right to make the order for publication, and that proof of compliance therewith conferred jurisdiction over the person of defendant, even though such affidavit was not placed on file until the day when the action was called for trial; that the court, having jurisdiction of the person and subject-matter, could not arbitrarily refuse to hear the action and deny a motion to place the cause upon the trial calendar, even though it might properly refuse to proceed with the trial until the affidavit was on file.

[4] We think it unnecessary to consider that portion of the order made by the trial court in refusing to hear the cause, through which it directed a new affidavit and the obtaining of a new order. Even if the original order was void, the court could not compel a new one, its function being confined purely to a determination of the character of the original order.

[5] The court having acquired complete jurisdiction, it could not divest itself of such jurisdiction, even though the conduct of counsel in presenting their cause was disrespectful. The statute provides a manner through which courts may punish for violations of section 1209 of the Code of Civil Procedure.

Let the writ issue, then, commanding respondent to place said cause upon the trial calendar at its earliest convenience, and to hear and determine said cause upon its merits.

We concur: JAMES, J.; SHAW, J.

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165 Cal. 95

EMPIRE STEAM LAUNDRY v. LOZIER.  
(L. A. 2,942.)

(Supreme Court of California. March 7, 1913.)

INJUNCTION (§ 56\*)—SUBJECTS OF PROTECTION  
—DISCLOSURE OF USE OF TRADE SECRETS—  
“TRADE SECRETS AND COMMUNICATIONS.”

Civ. Code, § 1985, provides that everything which an employé acquires by virtue of his employment, except his compensation, belongs to his employer. Plaintiff, a laundry company, employed defendant as a driver, and furnished him a list of customers thereon. It was his duty to revise the list by notice of changes of address and of the address of new customers, and to furnish plaintiff with a complete list of customers on that route, and agreed that he would not solicit work from any of plaintiff's customers, either for himself or as an employé of any

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\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

other person or corporation. Defendant left plaintiff's employment, and solicited laundry work from its customers along such route, and disclosed the list in his possession to his new employer, and took away the patronage of many of plaintiff's former customers. *Held*, that the list, though in part made by defendant, was plaintiff's absolute property; that defendant's agency was one of trust and confidence; that the knowledge he so acquired fell within the meaning of "trade secrets and communications"; and that, independent of the express contract, defendant's disclosure of such trade secrets and confidential communications would be enjoined.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 110; Dec. Dig. § 56.\*]

Department 2. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by the Empire Steam Laundry against Rudolphus Lozier. Judgment for plaintiff, and defendant appeals. Affirmed.

J. R. Wilder, of Los Angeles, for appellant. Hunsaker & Britt and Lucien J. Clarke, all of Los Angeles, for respondent.

HENSHAW, J. This is an appeal from the judgment of the superior court of Los Angeles county awarding plaintiff a perpetual injunction. The appeal is on the judgment roll.

The facts pleaded and found are that plaintiff is a corporation engaged in the laundry business in the city of Los Angeles, having a large number of regular customers and a valuable and growing business. This business to a large extent is conducted through its agents and the drivers of its wagons, who canvass from house to house soliciting orders for laundry work, collect and return the clothes. Each of these agents and drivers has a particular route. On this he is required to call for laundry work upon regular recurring days of each week. Thus the whole week is consumed by each driver in covering his route. The names and addresses of plaintiff's customers, together with the day of the week their laundry is to be called for, are kept in special prepared lists by plaintiff, and are used for plaintiff's business purposes by its drivers and agents. These lists have been compiled and are maintained at the expenditure of a large sum of money, and they enable the plaintiff to keep a check upon its business, and to increase and extend it where possible. They constitute a trade secret of great value to plaintiff. Upon September 1, 1909, defendant, who had previously been employed by plaintiff, became one of its agents and drivers, and was put in charge of a route known as route No. 6, covering a designated portion of the city of Los Angeles. Plaintiff at its own expense furnished defendant a team and a wagon which were used by the latter on plaintiff's business in connection with his route. The route superintendent of plaintiff accompanied defendant upon his earlier trips and introduced him to plaintiff's customers. Thereafter, from time

to time, other agents of plaintiff canvassed this section of the city, and secured additional customers for plaintiff. The laundry work of these additional customers was thereafter called for and delivered by defendant; the names of these additional customers being added to the list kept by plaintiff. On September 22, 1909, defendant voluntarily entered into a contract with plaintiff concerning the duties and liabilities of the employment. By its terms the plaintiff agreed to furnish a horse and wagon at its own expense. Defendant agreed to use the horse and wagon for the purpose of collecting the laundry in the manner indicated. The compensation of defendant was fixed upon a commission basis. Defendant agreed that at any time during his employment he would, on demand, furnish plaintiff and its successors a complete list of the correct names and places of residence of all its customers along any of its routes to which he might have been assigned, that he would immediately notify plaintiff of the name and address of any new customer, and report all changes of residence of old customers, so that upon the termination of his employment the laundry company should have a complete list of the correct names and places of residence of all its customers with whom it had dealt. Paragraph 7 of the contract is in the following language: "The said party of the second part further agrees that he will not solicit laundry work from any of the customers of the Empire Steam Laundry or its successors in said laundry business, either for himself or as employé of any other person or corporation, nor in any manner attempt to induce any of the customers of the Empire Steam Laundry to withdraw their custom from it or its successors, either during his employment, after his employment shall cease, or in contemplation of the cessation of his employment, and that if he threatens or attempts to solicit such laundry work from any of the customers of the said Empire Steam Laundry, or its successors in the laundry business, then in any suit that may be brought by the Empire Steam Laundry, or its successors, for the violation of this contract in that respect, the party of the second part agrees that an order may be made in such suit, enjoining him from violating any of the said provisions of this agreement, and an order to that effect may be made pending the litigation as well as upon the final determination thereof, and that such application for such writ of injunction shall be without prejudice to any other right of action which may accrue to the Empire Steam Laundry or its successors by reason of the breach of its contract on the part of the party of the second part."

A termination of this contract was made optional with each party to it upon 30 days' notice to the other. Defendant continued in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



this employment until February 12, 1910, when, in violation of the contract, and without cause or notice to plaintiff, he quit its employ and entered the employ of a rival competitor of the plaintiff, and thereafter commenced to canvass and continued to canvass and solicit laundry work from the customers of plaintiff along route No. 6. Defendant, when he quit the employment of the plaintiff, intended to divulge and make use of all the information he had acquired while employed by plaintiff as its driver and agent and to disclose this to his new employer, and he did so use his knowledge and information, including the lists of customers which he had in his possession, and which he refused to deliver to plaintiff. As a result defendant has been able to carry the patronage of many of plaintiff's former customers to the new employer, to the great business loss and injury of plaintiff. Upon these facts and the logical conclusions of law drawn therefrom, judgment was entered perpetually enjoining the defendant "from in any manner soliciting or receiving laundry work from any of the persons who were on February 12, 1910, customers of the plaintiff along the route assigned by plaintiff to defendant while the defendant was in the employment of plaintiff, and known and designated as route No. 6, which is embraced within that portion of the city of Los Angeles, county and state aforesaid." Here follows a description of the district covered by route No. 6.

The sole proposition advanced upon this appeal is that the contract between the parties was void under sections 1673, 1674, and 1675 of our Civil Code, as being a contract in restraint of trade, not countenanced by our law. Wherefore the injunction to enforce the terms of the contract is itself without warrant in law. It is true that the court finds that the contract between these parties was freely and voluntarily entered into and that it was not in restraint of trade, but into this question it is wholly unnecessary to enter. For the judgment of the court does not rest alone upon its findings as to the validity of the contract, but declares a violation of plaintiff's rights under circumstances cognizable in equity, without any express contract whatsoever upon the subject. Equity always protects against the unwarranted disclosure and unconscionable use of trade secrets and confidential business communications. So little does this equitable jurisdiction depend upon an express contract that it has been said by high authority that it exists in every contract of service "in the absence of a stipulation to the contrary." *Robb v. Green*, L. R. [1895] 2 Q. B. Div. 1, 10. Therefore the question of the contract between the parties becomes immaterial, except that its consideration plainly evinces the intent of the parties, the one to protect itself against the doing, the other to abstain from doing the very things which the court

finds that defendant upon the termination of his employment immediately proceeded to do.

There can be no question, under the findings here presented, but that defendant's agency was one of trust and confidence. His duties were to serve well the customers of plaintiff, to increase the business of the plaintiff, to solicit new business, and keep a complete and confidential list of all the customers. This list, even though in part prepared by him, was the absolute property of plaintiff, and was a valuable part of its property. *Civ. Code*, § 1985; *Gower v. Andrew*, 59 Cal. 119, 43 Am. Rep. 242; *Burns v. Clark*, 133 Cal. 634, 66 Pac. 12, 85 Am. St. Rep. 233. Thus in *Lamb v. Evans*, L. R. [1893] Ch. Div. 218, canvassers for a directory, after leaving the service of their former employer, used the data they had collected to assist a rival publication in procuring advertisements from the same parties. An injunction was granted, and the court said: "What right has any agent to use materials obtained by him in the course of his employment and for his employer against the interest of that employer? I am not aware that he has any such right. Such a use is contrary to the relation which exists between principal and agent. It is contrary to the good faith of the employment, and good faith underlies the whole of an agent's obligations to his principal. No case, unless it be the one which I will notice presently, can I believe be found which is contrary to the general principle upon which this injunction is framed, viz., that an agent has no right to employ as against his principal materials which that agent has obtained only for his principal and in the course of his agency. They are the property of the principal. The principal has, in my judgment, such an interest in them as entitles him to restrain the agent from the use of them except for the purpose for which they were got."

That equity will always protect against the unwarranted disclosure of trade secrets and confidential communications and the like is, of course, settled beyond peradventure. *Joyce on Injunction*, § 451; 1 *Story's Eq. Jur.* (10th Ed.) § 325; 1 *High on Injunction* (3d Ed.) § 19; *Vulcan Detinning Co. v. American Can Co.*, 72 N. J. Eq. 387, 67 Atl. 339, 12 L. R. A. (N. S.) 102; *Stevens & Co. v. Stiles*, 29 R. I. 399, 71 Atl. 802, 20 L. R. A. (N. S.) 933, 17 Ann. Cas. 140; *Witkop & Holmes Co. v. Boyce*, 61 Misc. Rep. 126, 112 N. Y. Supp. 874, affirmed 131 App. Div. 922, 115 N. Y. Supp. 1150; *Witkop & Holmes Co. v. Boyce*, 64 Misc. Rep. 374, 118 N. Y. Supp. 461; *Witkop & Holmes Co. v. Great Atlantic & Pacific Tea Co.*, 69 Misc. Rep. 90, 124 N. Y. Supp. 956; *Union Switch & Signal Co. v. Sperry (C. C.)* 169 Fed. 926; *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664; *Loven v. People*, 158 Ill. 159, 42 N. E. 82.

It would seem, therefore, that the only question left in the case is whether the knowledge so acquired by defendant and

which he was so using comes fairly within the meaning of trade secrets and communications. Upon this question neither reasoning nor authority can leave one in doubt. The English case, from which quotation has already been made, is well nigh parallel. In *Hackett v. A. L. & J. J. Reynolds Co.*, 30 Misc. Rep. 733, 62 N. Y. Supp. 1076, it was held that the knowledge acquired by the canvassing agent of a grocery company of the names and addresses of its customers is knowledge against the misuse of which equity will protect as being in the nature of a trade secret; the court there saying: "This knowledge was in the nature of a trade secret, and was imparted to the plaintiff at the time he was employed by defendant, solely to enable him to profitably and intelligently attend to the business of the defendant." And, finally, we can do no better than to quote from *Witkop & Holmes Co. v. Boyce*, 61 Misc. Rep. 126, 112 N. Y. Supp. 874. There it appeared that plaintiff was a corporation engaged in the general business in the city of Buffalo of dealing in teas, coffees, spices, etc. It maintained branch stores in other cities, and as an inducement to its customers it gave trading stamps, redeemable at any of its stores. A large part of its business was done through its agents and canvassers who were sent out by plaintiff and given a written list of the names and addresses of the customers. These canvassers were assigned to specific routes, and their work included the calling upon customers once a week and delivering to them the goods previously ordered. The plaintiff's contract with the defendant, as in this instance, contained an express provision by which defendant agreed that upon leaving plaintiff's employ he would not solicit for another business from plaintiff's customers. Defendant, as here, left plaintiff's employ, and entered the employ of a competitor of plaintiff and immediately commenced to solicit orders from plaintiff's customers. The court issued its injunction, saying: "The plaintiff further contends that, independent of the contract between the parties and by virtue of general principles of equity, the defendant should be enjoined from enticing away or dealing with such of the plaintiff's customers as had theretofore given orders to the plaintiff through the defendant. We think the plaintiff may well rest its case on the last ground alone, and that the injunction is well sustained on principle and well-considered authority. \* \* \*

The doctrine has been most frequently applied to cases where some secret process or formula of manufacture has been involved. \* \* \*

The principle of law, however, is not confined to secret processes of manufacture or methods of doing business, but has a much wider application, as stated by Mr. Justice Story. The names of the customers of a business concern whose trade and patronage have been secured by years of busi-

ness effort and advertising, and the expenditure of time and money, constituting a part of the good will of a business which enterprise and foresight have built up, should be deemed just as sacred and entitled to the same protection as a secret of compounding some article of manufacture and commerce. \* \* \*

In recent years there has been developed, by the adjudications of our courts and by legislation, a considerable body of law looking toward the protection of the business world against unfair competition; and, if we correctly interpret these decisions, a court of equity stands ready to restrain such acts. We therefore are of the opinion that, independent of any express contract between the parties, equity will restrain the acts of which the plaintiff complains, and which the defendant threatens and claims the right to do. This arises out of a violation of duty having its origin in the relation of employer and employed, and an implied contract that an employé will not divulge confidential knowledge gained in the course of his employment, or use such information to his employer's prejudice."

The judgment appealed from is therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

165 Cal. 103

FOLEY et al. v. NORTHERN CALIFORNIA POWER CO. (Sac. 1,967.)

(Supreme Court of California. March 8, 1913.)

1. APPEAL AND ERROR (§ 1195\*)—LAW OF THE CASE.

Notwithstanding the trial court's refusal to grant a new trial, the jury's finding of contributory negligence did not become the law of the case, even though the evidence as to contributory negligence, on the second trial by the court, a jury being waived, was the same as on the first; the new trial having been granted by the appellate court, with a statement that the testimony on such issue left room for candid difference of opinion, because of error in an instruction requiring of the injured person too high a degree of technical knowledge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.\*]

2. APPEAL AND ERROR (§ 1195\*)—LAW OF THE CASE.

As regards the question of application of the law of the case, additional evidence on the second trial, even though cumulative, is not to be disregarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.\*]

3. APPEAL AND ERROR (§ 1195\*)—LAW OF THE CASE.

Evidence on a new trial, in an action for death from contact with a live wire lying on the ground, is not merely cumulative to that on the first trial, as regards the law of the case on the question of contributory negligence; it for the first time attempting to show the position of the wire before the accident, authorizing a deduction that deceased from his position could not have seen it was attached to a pole,



and that it might have seemed to him a loose piece of wire lying on the ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.\*]

#### 4. INFANTS (§ 81\*)—ACTION—GUARDIAN AD LITEM.

Plaintiffs, in an action by infants by guardian ad litem, need not show that the guardian had filed a bond, or taken an oath, or had received letters of guardianship; the authority of such a guardian being evidenced only by the entry in the minutes of the court appointing him, and Code Civ. Proc. §§ 372, 373, providing for appointment of such a guardian, not requiring her to give any bond or subscribe any oath.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 222-229; Dec. Dig. § 81.\*]

#### 5. EVIDENCE (§ 358\*)—MAPS.

There being no suggestion that it is incorrect, a map of an addition to a town is properly admitted in evidence, being used merely to locate the premises and as a diagram of the scene of the accident.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1500-1508; Dec. Dig. § 358.\*]

#### 6. EVIDENCE (§ 528\*)—OPINIONS—CAUSE OF DEATH.

A physician, who has examined the body of deceased, may give his opinion on the cause of death.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2335-2337; Dec. Dig. § 528.\*]

#### 7. APPEAL AND ERROR (§ 1058\*)—HARMLESS ERROR.

Error in sustaining an objection to a question is harmless; witness having subsequently, without objection, testified fully on the subject.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.\*]

Department 2. Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Pauline F. Foley and others, by their guardian ad litem, against the Northern California Power Company. From an order denying a motion for new trial, defendant appeals. Affirmed.

See, also, 14 Cal. App. 401, 112 Pac. 467.

Reid & Dozier, of San Francisco, and James T. Matlock, Jr., of Red Bluff, for appellant. W. P. Johnson, of Red Bluff, and Frank Freeman, of Willow, for respondents.

MELVIN, J. Defendant appeals from an order denying its motion for a new trial.

Pauline F. Foley, on her own behalf and as guardian ad litem of her two minor children, brought this action against defendant for damages because of the death of James M. Foley, husband of said Pauline and father of the minor children. Foley was killed by an electric current passing through one of defendant's power wires which had been broken and allowed to hang down from the pole to the ground. The case was tried first by a jury and a verdict for defendant was rendered. The district court of appeal reversed the order denying the motion of plaintiffs for a new trial because of error in an

instruction. On the second trial a jury was waived, and by stipulation the case was submitted on the testimony and exhibits of the former trial, with some additional testimony of one John Berg. The court gave judgment for plaintiffs in the sum of \$4,000.

[1] Appellant takes the position that the added testimony of Berg neither aids nor detracts from the proof of the contributory negligence of the deceased Foley; that the existence of such contributory negligence, sufficient to excuse defendant, was found by the jury at the former trial; that the court thereafter denied a motion for a rehearing, thus indorsing the conclusion of the jury; that thereby defendant's freedom from liability became "the law of the case"; and that the court, upon the submission of the evidence at the second trial, could properly render only a judgment in favor of defendant.

It is not necessary to review the testimony given at the previous trial. It is sufficient, for the purposes of this opinion, to refer to the statement of facts in the opinion of the District Court of Appeal (14 Cal. App. 404, 112 Pac. 467). At the conclusion of that statement and a citation of applicable authorities, the court said: "We have therefore no hesitation in declaring that on the question of the negligence of defendant the conclusion should be in favor of plaintiffs." Upon the question whether or not Foley's contributory negligence was such as to preclude recovery by plaintiffs, the District Court of Appeal said that there was "more room for candid difference of opinion." The order denying a new trial was reversed, however, because the jury was instructed erroneously that: "A man of ordinary prudence and understanding, who has lived in a city, neighborhood, or community where electricity is conveyed by means of power and pole lines for purposes of heat, light, and power, and where electric power transmission lines are installed and maintained, and who has been around electric power lines, transmission lines, service lines, machinery, and appliances, is presumed to know the powers, dangers, and potentialities of electricity and electric power."

In view of this reversal and the reason for it, we cannot see that the jury's conclusion regarding the contributory negligence of Foley became "the law of the case," even though the trial court had refused to grant a new trial. The jury, under an instruction requiring too high a degree of technical knowledge on the part of Foley, found that he negligently contributed to his own death to such an extent as to prevent recovery of damages by his widow and children. The court, holding, of course, to the erroneous doctrine announced in the instruction, denied a motion for a new trial. It follows by no means that, under a proper view of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

law, the same facts would have led to the same conclusion either by a court or by a jury. Indeed, the reversal of the superior court's order by the District Court of Appeal indicates that, upon a proper view of the law, the record might have supported a verdict against the defendant. The judge at the second trial stood in exactly the same position which a new jury would have occupied if the case had been presented upon the same evidence as that adduced at the former trial, but considered under proper instructions with reference to the degree of knowledge and care imputable to Foley. Appellant cites several authorities upon "the law of the case," but none applies to the question before us. *Snyder v. Jack*, 140 Cal. 585, 74 Pac. 139, 355, is typical of these citations. In the former trials of that action, the undisputed facts had been practically the same as those developed at the latest hearing, and the law applicable to those facts had been definitely announced by this court. Conceding, but not deciding, that in the case before us the facts developed at the two trials were substantially the same, the rule of law followed at the second trial, in measuring the responsibility of Foley, was very different from that declared by the District Court of Appeal and indorsed by this court in the refusal to transfer the case here for hearing. It is obvious that a determination whether or not Foley was contributorily negligent would depend both upon the facts and the declared law. A change in either might change the verdict of the jury or the conclusion of the court in a case in which a jury had been waived. In this case, in which the testimony upon the issue of contributory negligence left room, as the District Court of Appeal expresses it, "for candid difference of opinion," the trial court's views might well be entirely modified after the declaration of the law by the District Court of Appeal.

[2, 3] Thus far we have discussed the case upon the theory that the evidence at the two trials was practically the same. We are of the opinion, however, that Berg's new testimony had a very important bearing upon the question of negligence. He described the condition of the broken wire on the day before Foley's death. Even if this evidence should be regarded as cumulative, it should not for that reason be disregarded. *Wallace v. Sisson*, 114 Cal. 49, 45 Pac. 1000. But it was not merely cumulative. By it, for the first time, Berg sought to show the position of the wire before the fatal accident. He placed it nearer the spot where the body was afterwards found than it was on the following day. Among other things he said: "I saw where the wire struck the ground and went along the ground and curled up and went down to the ground again. A regular curl in the end of the wire. The curl went right back to the

ground—the end of it—I suppose it was the end of it. I don't know. I didn't see the end of the wire. I saw there was a bend right in the wire, going down." There was snow on the ground, and the court might well have believed, from Berg's testimony at the second trial, that as Foley approached the wire while he was walking under the low trestle, and was obliged to stoop down, he could not see that it was attached to the pole. To him it may have appeared as a piece of loose wire lying in the snow. Evidence justifying such a deduction would, of course, have an important influence upon the mind of the court in deciding the question of contributory negligence. The doctrine of "law of the case" has its origin usually in the presupposition of error in announcing a rule of law. Here appellant makes no attack upon the law as declared by the Court of Appeal, and this case does not come within that very limited class in which the doctrine is applied to matters of evidence, as distinguished from rulings of law. The "law of the case" is therefore not here properly invoked. *Allen v. Bryant*, 155 Cal. 258, 100 Pac. 704; *Moore v. Trott*, 162 Cal. 273, 122 Pac. 462.

[4] Appellant asserts error in the failure of plaintiffs to prove that Pauline F. Foley had filed a bond as guardian ad litem; had taken an oath as such guardian; and had received letters of guardianship under seal of the court. It was sufficient for her to show, as she did, that she had filed a petition for appointment, and that the court had made an order appointing her. *Code Civ. Proc.* §§ 372, 373. The children were not of sufficient age to nominate a guardian. It has been held that the provision authorizing an appeal from a judgment or order revoking letters of guardianship does not include an order appointing a guardian ad litem; and the court said: "No letters of guardianship are issued to a guardian ad litem, but his authority is evidenced by the entry in the minutes of the court appointing him." *In re Hathaway*, 111 Cal. 271, 43 Pac. 755. The sections of the Code providing for appointment of guardians ad litem do not require such guardian to file any bond or to subscribe any oath.

[5] There was no error in admitting in evidence an amended map of the Clark addition to the town of Red Bluff. The map was used merely to locate the premises and as a diagram of the scene of the accident. It is proper for courts to admit illustrative charts, photographs, and maps. *People v. Loper*, 159 Cal. 21, 112 Pac. 720, *Ann. Cas.* 1912B, 1193. It is not even suggested that the map as offered was incorrect.

[6] Dr. John Fife was asked the following question: "What, in your judgment, was the cause of his [Foley's] death?" There was no error in propounding such a question. Dr. Fife had examined the body of deceased, and it has long been the rule



that a physician who has made such examination may not only give his opinion upon the cause of death, but may state his views regarding the instrumentality by which the fatal force was probably applied. *People v. Durrant*, 116 Cal. 210, 48 Pac. 75; *State v. Young Harris*, 63 N. C. 1; *State v. Porter*, 34 Iowa, 133; *Williams v. State*, 64 Md. 393, 1 Atl. 887; *Davis v. State*, 38 Md. 35; *Territory v. Egan*, 3 Dak. 119, 13 N. W. 570.

[7] The court sustained an objection to a question propounded to witness Hughes by defendant's counsel, "On the morning of the 17th of January, when you found the lines down, what did you do?" Hughes was the superintendent in the employ of defendant, and the question was proper as bearing upon the subject of his care in repairing the lines which had been injured by the storm; but the error was harmless because Mr. Hughes afterwards testified very fully, without objection, about the repairs to the broken lines and the precautions taken by him to avert accidents. No other alleged errors require notice.

The order is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

165 Cal. 112

BELLUS v. PETERS. (L. A. 2,797.)

(Supreme Court of California. March 12, 1913.)

1. PRINCIPAL AND AGENT (§ 72\*)—CONVERSION—CORPORATE STOCK.

Where defendant, who was plaintiff's agent in purchasing a gas plant, falsely stated the purchase price to be larger than the actual amount, and received stock in the new company in consideration of his agreeing to pay part of the consideration which he falsely represented to be due, he was guilty of a conversion of the stock received.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 148, 149; Dec. Dig. § 72.\* *Trover and Conversion*, Cent. Dig. § 70.]

2. EVIDENCE (§ 598\*)—WEIGHT—NUMBER OF WITNESSES.

The rule that juries are not bound to decide according to the greater number of witnesses declared by Code Civ. Proc. § 2061, subd. 2, is equally applicable to a trial to the court.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2450-2452; Dec. Dig. § 598.\*]

3. TROVER AND CONVERSION (§ 40\*)—ACTIONS—EVIDENCE.

In an action for the conversion of corporate stock, evidence held to show a conversion in that defendant through his fraudulent misrepresentations obtained it without consideration.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 232-244; Dec. Dig. § 40.\*]

4. APPEAL AND ERROR (§ 1011\*)—REVIEW—FINDINGS.

In case of trial to the court, the weight of conflicting testimony is for that tribunal, instead of the appellate court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

5. PRINCIPAL AND AGENT (§ 79\*)—CONVERSION OF STOCK—RIGHT OF ACTION.

Where defendant, who was plaintiffs' agent in the purchase of a gas plant, obtained stock in the new concern, through his misrepresentations, without payment of any consideration, plaintiffs' right of action for the conversion is not barred because of the sale of other stock of theirs in the company.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 178-193; Dec. Dig. § 79.\*]

6. TROVER AND CONVERSION (§ 69\*)—JUDGMENT.

Where the conversion of corporate stock and its value was admitted, an order for the return of the stock is not a condition precedent to the entry of a judgment for the value of the stock.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 308-313; Dec. Dig. § 69.\*]

7. EVIDENCE (§ 591\*) — STATEMENTS BY A PARTY'S WITNESS—CONCLUSIVENESS.

Statements by a witness called by plaintiff in an action for the conversion of corporate stock that defendant did pay a consideration will not preclude the court from finding to the contrary, on the theory that a party is bound by the testimony of his own witnesses.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2440-2443; Dec. Dig. § 591.\*]

8. CONTRACTS (§ 266\*)—RESCISSION.

Where plaintiffs, through defendant as their agent, arranged to purchase a gas plant, and because of defendant's misrepresentation as to the amount of the purchase price gave him stock in the company in consideration of his agreement to pay part of the consideration which was not really due, plaintiffs may rescind the contract without returning the stock they had received in the new company; it appearing defendant had paid nothing.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1186; Dec. Dig. § 266.\*]

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by M. L. Bellus against D. L. Peters. From a judgment for plaintiff and an order denying his motion for new trial, defendant appeals. Affirmed.

Tanner, Taft & Odell and Hunsaker & Britt, all of Los Angeles, for appellant. John S. Mitchell, M. B. Silberberg, and Kemp, Mitchell & Silberberg, all of Los Angeles, for respondent.

SHAW, J. "The action was one by Bellus in his own behalf and as assignee of John W. Kemp to recover the price and value of a certain 40,000 shares of stock in a corporation, alleged in the complaint to be the property of plaintiff, and by said defendant converted to his own use. The court found the allegations of the complaint to be true and the value of the stock to be \$10,000, and rendered judgment accordingly against defendant Peters. From this judgment, and from an order denying a new trial, defendant appeals.

"The allegations of the complaint, in substance, are these: That in January, 1909, one Willits was the owner of a gas plant

in Orange county; that Peters, Bellus, and Kemp entered into negotiations for its purchase; that Peters, representing Bellus and Kemp, conducted the negotiations and reported to his associates that Willits' price for the gas plant was \$28,500, \$6,000 of which was to be paid in cash, a mortgage thereon for \$10,380 to be assumed by the purchasers, and that the balance of the purchase price, to wit, \$12,120, should be secured by a second mortgage upon the property so to be purchased; that plaintiff and Kemp, believing these representations of Peters to be true, entered into a contract with Peters, whereby they mutually agreed that the three should purchase the plant at the price above named, and further agreed that, when purchased, the title thereto should be taken in the name of plaintiff, who was to hold the same in trust for himself and the other two parties; that of the cash payment Bellus was to contribute \$5,000, Peters \$1,000, and Kemp, an attorney, was to contribute his labor and skill in and about the incorporation of a new company to take over such property, and to pay all fees necessary to effect such organization; that, when said property was acquired, it should be conveyed by Bellus to the new corporation, so to be organized through Kemp's efforts, which corporation was to have a capital stock of 200,000 shares of the par value of \$1 each, and the stock of such new corporation was to be equally divided between the three parties; that, relying upon such representations, plaintiff contributed his \$5,000 and Kemp his skill and services as agreed, but Peters did not pay the \$1,000 agreed to be paid by him, and it is averred that Willits, upon receipt of the \$5,000 contributed by Bellus and the assumption of the mortgage and the execution of a second mortgage, made the conveyance as agreed. It is averred that the representations of Peters that the purchase price was \$28,500 were false; that as a fact the purchase price of said business was \$27,500, and the amount of cash to be paid was \$5,000; that the representation made by Peters that under the agreement he was to pay \$1,000 was untrue; that he never did pay the \$1,000, and never intended so to do; that the purchase by Bellus and Kemp was based upon their belief in the truth of the statements and representations of Peters. It is further averred that, after the gas plant was transferred by Bellus to the new corporation, of its capital stock 120,000 shares were issued, 40,000 to each of the three purchasers; that neither Bellus nor Kemp had knowledge of the falsity of Peters' representations until September following, upon learning which they served notice upon him of their rescission of the agreement existing between them with reference to the purchase, and they demanded of Peters that he surrender to them the 40,000 shares of the stock so issued to him as having been issued

without any consideration and which in equity and good conscience belonged to Bellus and Kemp, they having paid the whole consideration therefor; that Peters refused to comply and has not complied therewith, and has converted all of the stock so held by him to his own use; that the market value of the stock is \$10,000. The plaintiff by assignment has become the owner of Kemp's rights in the premises.

"The answer of Peters denies that \$27,500 was the consideration price to be paid; that, on the contrary, \$28,500 was the lowest price that Willits would receive. He alleges that the \$1,000 which he contributed was covered by \$1,100 commission earned by him, and which Willits agreed to pay and did pay for his services in effecting the sale. He denies that \$6,000 cash was not paid to Willits, but alleges that Bellus paid \$5,000, and he paid \$1,000 of the cash consideration. Defendant, by an amendment to his answer with reference to his statements as to the amount of commission received, places the amount at \$100, instead of \$1,100 originally alleged to have been received by him. However, there is no denial of the fact that defendant received the 40,000 shares of the stock and converted the same to his own use, and that such stock was of the value of \$10,000.

"The court found the allegations of the complaint to be true; found that the representations of Peters as to the amount of money necessary to purchase the plant were untrue; that in truth and in fact the purchase price of said gas business and property was \$27,500, and that the amount of the cash payment so to be made under the agreement was \$5,000; that Peters never paid his \$1,000, or any sum, and never intended so to do; that he made the representations as to his intention to pay and his payment with the intent to cheat and defraud plaintiff and said Kemp, his associates; that they relied upon these representations and believed them to be true, and in the absence of such representations would not have entered into the transaction. The court found that due demand was made upon Peters to surrender to Kemp and Bellus the amount of the stock by him held and received without consideration, which demand was refused, and the stock converted by defendant to his own use.

[1] "Appellant's first contention is that the complaint does not state facts sufficient to constitute a cause of action. We think this criticism cannot be maintained. From the allegations of the complaint it appears that a fiduciary relation existed between Peters and his associates by virtue of the agreement, and that Peters' negotiations with the owner of the gas plant were as agent of the association. The false and fraudulent statements alleged to have been made by such agent, and the obtaining of property in connection therewith in fraud of his associates, and without consideration, in our opinion, was a



statement of fact sufficient to entitle plaintiff to a judgment for the value of the stock issued to defendant without consideration and in fraud of plaintiff and by defendant converted to his own use.

[2-4] "The principal contention of appellant is that the finding that the agreement between Peters and Willits was that Willits should receive \$27,500 only for the property, \$5,000 of which was to be received as the cash payment and the residue by mortgage, has no support in the evidence. This contention is based upon the fact that Willits testified that, under the agreement with Peters, he was to forego the payment of \$1,000 by Peters in consideration of Peters causing to be issued to him the shares of stock to which Peters was entitled under the agreement with his associates; and, further, that Peters in his testimony states that, while he did not pay the \$1,000 in money, it was agreed that in lieu thereof certain of the stock was to be delivered to Willits, the amount of which is not stated, he not being clear upon that subject. It must be conceded that these men testified in substance as claimed, and the only evidence to the contrary arises from the facts and circumstances surrounding the parties, their conduct, and subsequent acts in relation to such stock claimed to have been the subject of their contract. The undisputed evidence is that as a fact Willits received only \$5,000 as the cash consideration for the sale. There is no dispute as to there having been executed and Willits having received a mortgage in the amount represented, and that the incumbrance existing was assumed by the purchasers without personal liability as by their agreement they were bound to do. The question, then, is, Was there any evidence before the court justifying its finding that \$5,000 was the total amount which Willits was to receive for the property, in addition to the mortgages given and assumed? Considering alone the evidence of Willits, if his statements were accepted by the court to be true, Willits received an equivalent of the \$1,000 which Peters had agreed to pay; and upon such assumption no injury is shown to have resulted to plaintiff, for if Peters in fact received no benefit by the transaction, and agreed that Willits should receive the one-third of the stock to be received by Peters in consideration of the payment of \$1,000, no reason suggests itself why Willits might not make a valid agreement with Peters to accept such stock in lieu of the \$1,000 in money, and through which agreement, if actually carried out, plaintiff and his assignor would have received all that they were entitled to receive, and, even though Peters did not in strict terms carry out his agreement, he, nevertheless, paid to Willits that which he was willing to receive in lieu of the \$1,000. Upon the other hand, were the court to have accepted as true the statement of Peters that a part only of the

stock was to be transferred, in that event Peters held the excess of what he actually agreed to transfer without consideration and in fraud of plaintiff's rights, and a finding of the amount of such excess would be necessary as establishing a basis for the judgment. The court, however, seems from its findings to have determined that the circumstances connected with the transaction were such as to cast discredit upon the statements of both Peters and Willits, and impliedly found that no stock transaction was involved as between said two last-named parties. The rule that juries are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds (subdivision 2, sec. 2061, Code Civ. Proc.), applies with equal force to instances where the case is tried by the court. As said by Mr. Justice Field, speaking for the Supreme Court of the United States in *Quock Ting v. United States*, 140 U. S. 417 [11 Sup. Ct. 733, 851, 35 L. Ed. 501], cited and followed in *County of Sonoma v. Stofen*, 125 Cal. 35 [57 Pac. 681]: 'Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his own account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying, may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statement, although there be no adverse verbal testimony adduced.' See, also, *Blankman v. Vallejo*, 15 Cal. 639; *People v. Milner*, 122 Cal. 171 [54 Pac. 833]; *People v. Mock Yick Gar*, 14 Cal. App. 336 [111 Pac. 1039]; *Sterling v. Cole*, 12 Cal. App. 93 [106 Pac. 602]. The question then presented is, Were the circumstances connected with this transaction such and was the conduct of the parties such as, under this rule, would justify the court in disregarding their positive evidence? In so far as the evidence of Peters is concerned, the court had the right to consider the allegations of his verified answer, which were totally at variance with his subsequent testimony. It possessed the right to consider, when considering the testimony of Willits, the amount and value of the stock which he claims was to be transferred to him; to consider the fact that no

memorandum of any kind was entered into in relation to such transfer; that nearly a year elapsed between the time of the transfer and the time when he gave his testimony, and yet he made no effort to obtain this stock which possessed a value of \$10,000. In other words, Willits was careful to see that he received the \$5,000 in money to be paid by Bellus, and yet was indifferent as to double the amount which he was to receive from his claimed contract with Peters. Even when he claims to have made a demand for the surrender of the stock, no sufficient excuse is presented for noncompliance. The circumstances of receiving Peters' checks under the guise of a cash payment and immediately retransferring the same to Peters, all without the knowledge of the other contracting parties, might well have indicated to the trial court that the claim of an agreement to transfer the stock by Peters to Willits was an afterthought. Certain it is that it was not present in the mind of Peters when he verified his answer, or the amendment thereto. Considering all of these circumstances and the conduct of the parties, as shown by the record, we do not feel warranted in saying that the learned trial judge made his finding complained of without any evidence in its support. There being some evidence which we think it was proper for the trial court to consider, its weight and effect is for that court to determine, and with the question of conflict we have nothing to do.

"Appellant calls attention to the fact that there was a contract offered in evidence which showed that at the time of its execution Peters held only 20,000 shares of the stock. This, however, is not material when we consider the allegations of the complaint and the admissions of the answer with reference to the amount of stock actually held by him at the time of the bringing of the action.

[5, 6] "Appellant also contends that, because Kemp sold his 40,000 shares originally issued to him and Bellus subsequently did the same, therefore neither was in a position to recover in this action, even if the fraud be established. We do not believe that the sale of any definite number of shares of the company's stock by plaintiff and by Kemp would have that effect. If, as a matter of fact, the 40,000 shares held by Peters was their stock, they having paid the whole consideration price therefor, the mere selling of other stock in the corporation by them would not affect their right to recover as to the 40,000 shares so held by Peters. There is no issue presented by the pleadings, nor any positive evidence in the testimony, showing any merger or reissue of any stock, or

a change in the relation of Peters to the gas company originally formed by himself and his associates. Nor do we believe that where the conversion of stock was admitted and its value conceded that any necessity existed for the court to order, through its judgment, the return of the stock by Peters as a condition precedent to the entry of the judgment.

[7, 8] "The rule invoked that plaintiff was bound by the statements of Willits, because he was a witness on behalf of plaintiff, does not go to the extent of requiring the court to believe and accept as true the statements of such witness. Nor do we see any force in the suggesting that Peters possessed rights by virtue of a lapsed option theretofore held by him on the property. Appellant contends that the notice of rescission of the agreement given by Bellus and Kemp to Peters was ineffectual because no tender or offer was made to restore that which had been received by plaintiff and Kemp under the agreement. If, as found by the court, Peters never paid and never intended to pay any part of the consideration price for the gas plant, his possession of the shares of stock was obtained by fraud; he never acquired any interest therein, nor was he interested in the management or control thereof, or of the salaries paid to its employes. Having no interest in the property, there was nothing he was entitled to receive in order to place the parties in statu quo. The shares of stock so held by him belonged to the parties who had paid the consideration price therefor.

"Other questions are presented, but we do not think they require specific notice, as, in our opinion, the decision of the trial court in connection therewith did not in any way prejudice the rights of appellant. Assuming the accuracy of the chief finding, which related to the amount of the consideration actually paid and agreed to be paid, the judgment was a proper one, and should be affirmed."

The foregoing opinion, prepared by Mr. Justice Allen, was filed in the District Court of Appeal for the Second District, and thereupon the judgment of the superior court was affirmed. Afterwards, in due time, on petition of the appellant, the affirmance was vacated and the cause was transferred to this court for further hearing and decision. Upon a further consideration of the record we are satisfied that the opinion of the district court fairly states the case, and we approve the reasons there given for the affirmance.

The judgment and order are affirmed.

We concur: MELVIN, J.; HENSHAW, J.; LORIGAN, J.



165 Cal. 121

**TURNER v. HITCHCOCK et al.**

(Sac. 1,971.)

(Supreme Court of California. March 13, 1913.)

**1. VENDOR AND PURCHASER (§ 145\*)—CONVEYANCE—REFUSAL.**

Where defendants, after agreeing to purchase land from plaintiff, who agreed to execute escrow deeds, and after accepting a deposit from the purchaser from themselves, which they turned over to plaintiff, also sold the land to another, and attempted to use the deposit as a partial payment upon the second sale, they cannot complain that plaintiff, after having been informed of the first contract of sale, refused to deed the property to the second prospective purchaser procured without a release from the prior purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 276; Dec. Dig. § 145.\*]

**2. VENDOR AND PURCHASER (§ 145\*)—PERFORMANCE—TENDER OF PERFORMANCE—NECESSITY.**

If the owner of land refused to place deeds in escrow, as agreed by him, with persons to whom he sold it, under Civ. Code, § 1440, providing that, if a party to an obligation notifies another, before the latter is in default, that he will not perform the other may enforce the obligation without previously performing, the purchasers could have enforced the contract of sale without waiting for the deposit of the escrow deeds.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 276; Dec. Dig. § 145.\*]

**3. VENDOR AND PURCHASER (§ 145\*)—OBLIGATION TO CONVEY—AUTHORITY OF AGENT.**

Persons who had undertaken to sell land, which they contracted to purchase from plaintiff, could not use a check deposited with them by a purchaser from them as plaintiff's agents, for the purpose of making payment upon a subsequent sale by them to another without paying the first purchaser the amount of the deposit, so as to release plaintiff from liability therefor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 276; Dec. Dig. § 145.\*]

**4. QUIETING TITLE (§ 44\*)—ACTIONS—ADMISSION OF EVIDENCE.**

In an action to quiet title to land which plaintiff had agreed with defendant to sell, in which it appeared that defendant had sold the land to another and received \$2,000, which he paid to plaintiff when the contract with plaintiff was executed, evidence as to where defendant got the \$2,000 paid to plaintiff, as well as the contract under which such purchaser paid the \$2,000 to defendant, was admissible.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89-92; Dec. Dig. § 44.\*]

Department 2. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by James Turner against J. R. Hitchcock and another. From a judgment for plaintiff, defendants appeal. Affirmed.

C. L. Russell, of Tulare, for appellants. Bradley & Bradley, of Visalia, for respondent.

MELVIN, J. Plaintiff sued to quiet his title to certain real property in the county of Tulare. Defendants, by their answer, admitted that the title was in plaintiff; but they set up a certain contract of sale and

asked for a decree compelling plaintiff specifically to perform said contract. From a judgment in favor of plaintiff, the defendants appeal.

The agreement in question was made on the 22d of July, 1907, between James Turner and the defendants, who were operating under the name of Hitchcock & Co. By it Turner agreed to sell a tract of land described by metes and bounds, containing "500 acres more or less." The sum of \$2,000 was paid upon the execution of the contract, and the receipt thereof was acknowledged in said agreement. There were other covenants not material to this discussion. All rights under this agreement were to lapse if Hitchcock & Co. should fail to comply with the terms thereof. Turner was bound to place in escrow with the Bank of Tulare, at Tulare City, such deeds to the property as the other parties to the agreement should request, executed to such persons as they might designate. Time was made of the essence of the contract, and the balance of the purchase price, \$12,250, was made payable on or before the 1st day of November, 1907. The \$2,000 paid on this contract were represented by a check drawn by one Rehard, and it was understood that Hitchcock & Co. were to sell the land, or a portion of it, to him. On August 31, 1907, an amendment to the contract was executed, whereby it was agreed that, upon the payment of the purchase price, the east line of the property described would be run so that just 500 acres would be included in the tract sold; but the purchasers retained the right to buy the balance of the land contained in the original description for the price per acre at which they were entitled to purchase the 500 acres. Previous to the execution of the contract of July 22, 1907, Hitchcock & Co., who were agents for the sale of Turner's land, made a contract as such agents with Rehard, whereby the latter was obligated to pay \$15,000 for 300 acres of the land involved. This contract was dated July 20, 1907; the parties thereto were James Turner and Willis Rehard; the terms were \$2,000 paid upon the execution of the agreement and the balance on or before November 1st; and a member of the firm of Hitchcock & Co. executed it for said firm as the agents of Turner; yet it was not exhibited to Turner before the signing of the contract by which he agreed to sell 500 acres to defendants, and he did not know of the existence of the prior agreement, as he testified, until Rehard exhibited it to him on November 15, 1907. It was stated by Turner on the stand, and denied by Richardson in his testimony, that the latter had agreed, upon the 31st of August, to attend to the matter of getting an abstract of the property.

[1] Upon this conflict we must, of course, take the version which is in support of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

judgment. Turner testified also that he went to Tulare late in September, and also about October 20, 1907, ready on each date to carry out his part of the contract, but that on one occasion a postponement was caused by the fact that the abstract was not ready, and upon the other a delay was due to some objection to the title made by Rehard. There was sufficient evidence to justify the trial court in determining that the delay in preparing the deeds and placing them in the bank was due as much to defendants as to plaintiff. Finally deeds to the property, naming Rehard as grantee, were deposited with the Bank of Tulare on November 1, 1907. These deeds were accompanied by a letter of instructions, as provided in the contract. Regarding this matter, Turner testified that Richardson assisted in the preparation of the deeds, and they were deposited pursuant to an arrangement that more time should be granted defendants and Rehard to make the final payment. According to the testimony of Richardson, this extension was to be until the 15th of November, and the deeds were to remain in escrow until that time. While the transactions between Turner, Rehard, and defendants were in progress, Turner notified Hitchcock & Co. that he would accept only gold coin in payment of the balance on the contract of sale to them. This, according to Turner, occurred on October 29th; but Richardson said it was on November 1, 1907. Richardson also testified that the verbal agreement of November 1st, to extend the option to November 15th, was made for the purpose of giving his firm and Rehard an opportunity of raising the necessary amount of gold coin. On November 16, 1907, Turner wrote to Hitchcock & Co.: "I have decided not to extend the time for meeting the payments on the land deal." On November 30th he wrote them again, saying: "E. P. Foster writes me that you are making arrangements to meet the payments on the land transaction as soon as the so-called holidays are over, but that it will cost you considerable. Now, I feel it my duty to let you know that I do not intend to deliver a deed to you or any one else for the 220-acre tract on the south part of the land. If Mr. Rehard still wants the 300-acre tract and can arrange so as to pay for it in a reasonable time and you are satisfied with your percentage of \$750 for selling, we can settle the whole matter at once, otherwise it will be no sale." On November 15th the deeds had been withdrawn from the Bank of Tulare by plaintiff.

It is a fact that from October 31 to December 21, 1907, the Governor of California declared a series of holidays. December 22d was a Sunday, and on December 23, 1907, plaintiff redeposited deeds to the property in the Bank of Tulare, and notified Hitchcock & Co. of that fact. The deeds were left in escrow until midnight of December 23d, but

no offer of payment was made. In January, 1908, Turner repaid Rehard the \$2,000 theretofore paid by defendants, and was released by the latter from all obligations on the contract of July 20, 1907, which defendants had made as Turner's agents. On December 23d, before Turner redeposited the deeds, he was requested by Hitchcock & Co., in writing, to make a new deed of the land to one Giannini. This he refused to do, telling them that they had already bound him to Rehard.

Upon these facts, defendants contended, first, that their time to fulfill the contract of July 22d was extended by the holidays; second, that they could not be placed in default until after the required deeds had been put in escrow; third, that no tender of money was required until the deeds were thus in escrow; fourth, that Turner's letter of November 30th was a repudiation of the contract, which excused defendants from the duty of being ready to pay the balance due thereunder on the first day following the series of holidays; fifth, that, in any event, they have never been in default because of Turner's refusal to execute and place in escrow a deed to the property, naming Giannini as grantee.

If we concede the effect of the holidays to have been that for which appellants contend, we do not think they can properly maintain that plaintiff was in default on December 23, 1907. Part of the difficulty in determining their rights arises from their protean position, now as agents for Turner assuming to sell his land, and accepting a deposit on his behalf, and again using that deposit as an initial payment upon a contract whereby they were to acquire the same property and some other land for less than the amount for which, as Turner's agents, they had agreed to sell the 300 acres to Rehard. We do not mean to impute wrong motives to them. None are charged in the pleadings. Doubtless it was understood that they were to subdivide and sell the property at a profit to themselves. But, by concealing from their principal that they had bound him to the sale of 300 acres to Rehard, they placed him in the position of having promised to sell that tract to Rehard and to them. The only way in which they could possibly reconcile these transactions, if at all, was by requiring, under their contract of July 22d, that a deed to Rehard for the 300 acres should be put in escrow. This they did, and Turner prepared the deeds accordingly. They cannot complain, therefore, if Turner, having been informed of the contract with Rehard and of the acceptance in his behalf of \$2,000 as a payment thereon, refused again to complicate the situation by deeding the property to Giannini without a release from Rehard. He did all that he could be required to do when he placed the original deeds in escrow on the first business day following the holidays. Appellants may not complain if he in-



sisted upon construing the two contracts together. The had created that situation.

[2] But they say that by his letter of November 30th he had repudiated the contract of July 22d, and that they were therefore excused from being ready to perform on December 23d (citing section 1440, Civ. Code). We do not think his letter placed them in a position to sit idly by and wait for him to put deeds in escrow. The only effect of the cited section would have been to enable them to enforce the contract without waiting for him to deposit the deeds (*Remy v. Olds*, 88 Cal. 541, 26 Pac. 355); yet up to May 13, 1910, when this action was commenced, they had taken no steps to do so. They testified, however, that they were ready to perform on December 23d; yet they did not either accept the only deposit of deeds which, under the circumstances, they had the right to demand, nor seek to put Turner to the election of refusing or accepting the contract price. But, as a matter of fact, the evidence fails to show that they were ready to perform in case a deed was made to Giannini. According to the testimony of Mr. Hitchcock, they were ready to pay but \$12,250.

[3] Surely they had no right to the credit of \$2,000 unless they could assure Turner that Rehard had been compensated for his payment of that amount, and had relieved Turner from all liability under the contract with him. They could not utilize the check from Rehard to bind the bargain of July 20th, and also as a payment on the sale to Giannini. In other words, they could not obtain an advantage as vendees by ignoring their obligations as agents. The trial court correctly concluded that defendants were not entitled to a decree of specific performance of their contract.

[4] It was proper to ask defendant Richardson, on cross-examination, where he got the \$2,000 which he paid plaintiff when the contract of July 22, 1907, was executed. The court was entitled to know all of the circumstances connected with and surrounding that transaction. For the same reason, the contract of July 20th, under which Rehard paid the \$2,000, was admissible.

The judgment appealed from is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

21 Cal. App. 80

PEOPLE v. METZLER. (Cr. 416.)

(District Court of Appeal, First District, California. Feb. 4, 1913. Rehearing Denied by Supreme Court April 4, 1913.)

1. PERJURY (§ 25\*)—INDICTMENT—SUFFICIENCY.

Averment in an information for perjury of the materiality of the claimed false testimony is sufficient, unless it appear from the accusation as a whole that the testimony was immaterial.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 82-89; Dec. Dig. § 25.\*]

2. PERJURY (§ 27\*)—INFORMATION—SUFFICIENCY—MATERIALITY OF TESTIMONY.

An information for subornation of perjury was not demurrable as failing to show the materiality of the claimed suborned testimony where it averred the materiality of such testimony and recited the substance thereof, with other facts tending to show its materiality to the issues involved in the action in which the perjury was committed.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 95; Dec. Dig. § 27.\*]

3. PERJURY (§ 11\*)—MATERIALITY OF TESTIMONY—IMPEACHING EVIDENCE.

Testimony affecting the credibility of a witness is material to the issues in the sense that it will afford a basis for perjury or subornation of perjury.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 38-54; Dec. Dig. § 11.\*]

4. CRIMINAL LAW (§ 1159\*)—PROVINCE OF JURY—CONFLICTING TESTIMONY.

A conviction is not vitiated by a conflict between the testimony of two witnesses for the prosecution; it being the province of the jury to accept the testimony of the witness who seems to them to be most credible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

5. PERJURY (§ 34\*)—SUBORNATION OF PERJURY—ACCOMPLICE.

A conviction of subornation of perjury is not affected on the theory that the suborned witness, who testified for the prosecution, was an accomplice, if his testimony is corroborated by other witnesses not accomplices, admissions by accused, and independent facts and circumstances tending to connect accused with the offense.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 125-132; Dec. Dig. § 34.\*]

6. CRIMINAL LAW (§ 830\*)—INSTRUCTIONS—REFUSAL—PARTLY INCORRECT INSTRUCTIONS.

An instruction which erroneously states the law in part is properly rejected as a whole.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2012, 2017; Dec. Dig. § 830.\*]

7. CRIMINAL LAW (§ 829\*)—INSTRUCTIONS—REFUSAL—MATTER COVERED.

An instruction substantially covered by those given is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

8. CRIMINAL LAW (§ 1037\*)—IMPROPER ARGUMENT—WAIVER OF OBJECTION.

Objection to argument of the prosecuting attorney, first presented on appeal, will not be considered; objection to the argument at the time it was made and a request that the trial court admonish the jury to disregard the remarks claimed to be improper being essential to preserve the objection.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645; Dec. Dig. § 1037.\*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

C. Metzler was convicted of subornation of perjury, and he appeals. Affirmed.

Traber & South, of Fresno, for appellant. Attorney General Webb, for the People.

LENNON, P. J. The defendant in this case was convicted in the superior court of the county of Fresno of the crime of subor-

nation of perjury. He has appealed from the judgment entered against him and from an order denying a new trial.

[1, 2] The defendant insists that the demurrer to the information should have been allowed upon the ground that the information fails to show the materiality of the alleged suborned testimony. The information charges in substance that on February 27, 1912, the defendant procured one J. P. Helmuth to commit perjury in a certain civil action then pending in the superior court of Fresno county entitled "Metzler v. Spomer," wherein the defendant here was the plaintiff. In addition to the allegations usually employed in charging the crime of subornation of perjury, the information expressly avers the materiality of the alleged suborned testimony. The information then proceeds to recite the substance of such testimony in conjunction with other alleged facts, all of which tends clearly enough to show the materiality of the alleged suborned testimony to the issues involved in the civil action in which it was alleged the defendant induced the witness Helmuth to give such testimony.

It is a settled rule in this state that, where an indictment or information expressly alleges the materiality of perjured testimony, such indictment or information is sufficient, unless it affirmatively appear from the indictment or information as a whole that such testimony was immaterial. *People v. Brilliant*, 58 Cal. 214; *People v. Ross*, 103 Cal. 425, 37 Pac. 379. In the present case the allegations of the information upon the subject of materiality are as a whole clear, concise, and consistent, and therefore the defendant's demurrer was properly disallowed.

[3] The sufficiency of the evidence to support the verdict of the jury is assailed upon the ground that it was not shown in evidence as a part of the people's case that the alleged suborned testimony was in fact material to the issues raised by the pleadings in the civil action. This contention is based upon the fact that the witness Helmuth was called and procured by the defendant to testify in the civil action to matters and things which affected only the credibility of Spomer, the defendant in that action. In other words, it is the defendant's contention that because the testimony of the witness Helmuth was offered and received in evidence in the civil action for purposes of impeachment, rather than as tending to prove the precise fact in dispute, such testimony was not material to the extent that it could be made the foundation for a charge of perjury.

This contention is untenable. Upon a trial evidence may be given, not only of the precise fact in dispute, but such other facts as serve to show the credibility of a witness may be offered and received in evidence. Code Civ. Proc. § 1870. Evidence affecting the credibility of a witness usually tends to strengthen the case of a party to an action

or to weaken the defense of his adversary, and therefore such evidence is material. *People v. Brilliant*, 58 Cal. 214; *People v. Barry*, 63 Cal. 62; *People v. Von Tiedeman*, 120 Cal. 128, 52 Pac. 155; *People v. Prather*, 134 Cal. 436, 66 Pac. 589, 863.

[4] Counsel for the defendant contends that the testimony of the two principal witnesses for the people in the present case is contradictory and irreconcilable upon material matters; and because of this it is insisted that the testimony of neither witness should be credited in support of the verdict. This is but an argument directed against the credibility of the witnesses, which doubtless was presented to the jury, and by them given the consideration which it deserved. Whatever contradiction there may have been in the testimony of these witnesses created at best but a conflict in the evidence, which left the jury free to accept the testimony of whichever witness seemed to be the most credible and worthy of belief.

[5] Conceding, as counsel for the defendant says, that the suborned witness Helmuth was an accomplice of the defendant, nevertheless the evidence upon the whole case sufficiently supports the verdict, because the testimony of Helmuth as to the fact of the perjury and its subornation was amply corroborated by the testimony of other witnesses not accomplices, the admissions of the defendant, and independent facts and circumstances which tended to connect the defendant with the commission of the offense charged against him.

[6] Complaint is made of the refusal of the trial court to give several instructions requested upon behalf of the defendant. Upon an examination of the record we find that some of the requested instructions did not in their entirety correctly state the law; and, when a requested instruction is erroneous in part in its statement of the law, it may be rejected as a whole. *People v. Davis*, 64 Cal. 440, 1 Pac. 889; *People v. Walters*, 98 Cal. 138, 32 Pac. 864.

[7] With reference to the remaining requested instructions the record shows that the subject-matters thereof were substantially and correctly covered by the charge of the court, and therefore the refusal of the trial court to charge in the exact language of the requested instructions was without prejudice to the defendant. In brief, the record shows that, in so far as the requested instructions were correct in their statement of the law applicable to the case, they were incorporated in and made a part of the charge of the court, and that is all that the defendant was entitled to. *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *People v. Holmes*, 126 Cal. 462, 58 Pac. 917; *People v. Wardrip*, 141 Cal. 229, 74 Pac. 744.

[8] Certain portions of the argument of the district attorney to the jury are assigned here for the first time as prejudicial miscon-



duct. The portions complained of, however, appear to be fair deductions from the evidence adduced upon the whole case, and were therefore legitimate argument; but, even if this were not so, no objection was made in the lower court to such portions of the district attorney's argument, and in the absence of an objection, coupled with a request that the trial court admonish the jury to disregard the alleged improper remarks, their possible effect upon the jury will not be considered for the first time on appeal. *People v. Beaver*, 83 Cal. 419, 23 Pac. 321; *People v. Shears*, 133 Cal. 154, 65 Pac. 295; *People v. Amer*, 8 Cal. App. 137, 96 Pac. 401; *People v. Crosby*, 17 Cal. App. 518, 120 Pac. 441; *People v. Bradbury*, 151 Cal. 675, 91 Pac. 497.

The judgment and order appealed from are affirmed.

We concur: MURPHEY, Judge pro tem.; HALL, J.

21 Cal. App. 92

KINARD v. WARD et al. (Civ. 1,122.)

(District Court of Appeal, First District, California. Feb. 5, 1913.)

**1. MINES AND MINERALS (§ 104\*)—MINING CORPORATIONS — DIRECTORS — REMOVAL — BREACH OF STATUTORY DUTY.**

In an action by a stockholder under Civ. Code, § 590, to remove the directors of a mining corporation for failure to make and post, in the office of the company, the current accounts of the corporation, as required by section 588, it was unnecessary to allege or show that plaintiff suffered any actual damage.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 228; Dec. Dig. § 104.\*]

**2. MINES AND MINERALS (§ 104\*)—MINING CORPORATIONS — DIRECTORS — REMOVAL — BREACH OF STATUTORY DUTY.**

In an action by a stockholder under Civ. Code, § 590, to remove the directors of a mining corporation for failure to make and post the current accounts of the corporation, as required by section 588, the complaint did not show that the default occurred during a yearly term of office which expired before the action was commenced, where it alleged that defendants "have failed and refused to cause to be made, for any month or at any time," an itemized account, etc.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 228; Dec. Dig. § 104.\*]

**3. CORPORATIONS (§ 289\*)—DE FACTO DIRECTORS—HOLDING OVER—DUTIES.**

Directors of a corporation, who hold over, must perform the duties enjoined by law with the same fidelity as regularly elected officers, and are subject to the same statutory liability for any failure of duty occurring during the term for which they may be holding over.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1240-1245; Dec. Dig. § 289.\*]

**4. APPEAL AND ERROR (§ 907\*)—REVIEW—PRESUMPTIONS.**

In the absence of a bill of exceptions or a statement of the case, it must be assumed that

the evidence adduced upon the trial supports the findings of fact as made by the trial court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2899, 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.\*]

**5. PLEADING (§ 129\*)—ANSWER—ADMISSIONS.**

Allegations of a complaint, not denied by the answer, are deemed to be admitted.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 270-275; Dec. Dig. § 129.\*]

Appeal from Superior Court, City and County of San Francisco; *James M. Troutt*, Judge.

Action by C. E. Kinard against *James W. Ward* and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Crittenden Thornton, of San Francisco, for appellants. C. E. Kinard, in pro. per.

LENNON, P. J. The plaintiff in this action, as a stockholder in the Socrates Consolidated Mining Company, Incorporated, sought and secured a judgment removing the defendants, as directors of the corporation, for the alleged violation of the provisions of section 588 of the Civil Code. That section declares it to be the duty of the directors of every corporation, foreign or domestic, formed for the purpose of mining in California, to cause to be made, on the second Monday of each and every month, "an itemized account or balance sheet for the previous month, embracing a full and complete statement of all disbursements and receipts, showing from what sources such receipts were derived, and to whom and for what object or purposes such disbursements or payments were made; also all indebtedness or liabilities incurred or existing at the time, and for what the same were incurred, and the balance of money, if any, on hand. Such account or balance sheet must be verified under oath by the president and secretary and posted in some conspicuous place in the office of the company." Section 590 of the same Code provides: "If the directors fail to have the reports and accounts current made and posted as required by section 588 they are liable, either severally or jointly, to an action by a stockholder complaining thereof, and on proof of such refusal or failure he may recover judgment for actual damages sustained by him with costs of suit. Each of the defaulting directors is also liable to removal for such neglect."

The plaintiff's complaint, among other things, alleges that the defendants were, at all times since the year 1909, the directors of the Socrates Consolidated Mining Company; that the defendants, as such directors, have failed and refused to cause to be made and posted in the office of the company, as required by the Code sections previously quoted, an itemized account and balance sheet for any month or for any time at all during the period of their incumbency as directors. Plaintiff's prayer for relief was pri-

marily for the removal of the defendants from office as directors of the mining company.

Without denying, or attempting to deny, any of the allegations of plaintiff's complaint, the defendants answered merely that they " \* \* \* were chosen to be the directors of said company at the regular annual meeting of said company, \* \* \* held in the city and county of San Francisco on the 21st day of September, 1909; that such election was for one year; and that the same expired on the 21st day of September, 1910. Wherefore these defendants and each of them say that neither they nor any of them have been such directors under said election since the 21st day of September, 1910." Upon these pleadings the case was tried; and, from the evidence which was offered and received upon the trial, the lower court made its findings of fact substantially in accord with the material allegations of the complaint, from which was deduced the conclusion of law that the plaintiff was entitled to a judgment of ouster against each and all of the defendants. Judgment was entered accordingly, from which the defendants have appealed upon the judgment roll alone.

[1] The defendants insist that the complaint does not state a cause of action in this: That it is not alleged therein that the plaintiff suffered any actual damage by the failure and refusal of the defendants to make and post the current accounts of the corporation, as required by section 588 of the Civil Code. This contention is based upon the assumption that section 590 of the Civil Code, which provides the penalty for the failure here complained of, contemplates that the removal of the directors of a mining company cannot be decreed for such neglect unless, in addition thereto, it be alleged that the plaintiff has suffered actual damage by reason thereof. No authority has been cited to us in support of this construction of the statute; and, inasmuch as the direct language of the statute is plainly repugnant to the contention of the defendants, the point need not be further discussed.

[2] The defendants further contend, for a reversal of the judgment, upon the assumption that the plaintiff's complaint charges that the default of the defendants occurred during the year for which they were first elected as directors of the mining company. With this assumption as a basis, the defendants argue that they can be rightfully removed from office only for the term during which the default complained of occurred; and that, inasmuch as that particular term had expired before the action was commenced, the complaint does not and cannot be made to state a cause of action. There would be much force in this contention if the

assumption upon which it is founded were correct. That this assumption is erroneous is manifest even from a casual reading of the plaintiff's complaint, which expressly alleges that the defendants, "as a board of directors, \* \* \* have failed and refused to cause to be made for any month or at any time or at all an itemized statement of account or balance sheet or any statement of account, \* \* \* as required by law." While this allegation of the complaint might have been assailed upon demurrer for uncertainty, it cannot be fairly said, as counsel for the defendants contends, that it limits the occurrence of the defendants' default to a time within the term for which they were first elected as directors.

The directors of a corporation must be elected annually (Civ. Code, § 303); and as a matter of law, once elected, they continue in office until they resign or until their successors have been elected and qualified. While it does not affirmatively appear, either from the allegations of the plaintiff's complaint or from the trial court's findings of fact, that the defendants were regularly or otherwise elected as directors of the mining company upon the expiration of the year for which they were originally elected, nevertheless the answer of the defendants makes it clear that they continued in office after their elective term had expired as de facto directors, and therefore it may be said to be an admitted fact in the case that the defendants were, during all of the time specified in the plaintiff's complaint, either de jure or de facto directors.

[3-5] The directors of a corporation, who hold over, must perform the duties enjoined by law with the same fidelity as regularly elected officers, and they are likewise subject to the same statutory liability for any failure of duty occurring during the term for which they may be holding over. 2 Cook on Corporations, 624. In the absence of a bill of exceptions or a statement of the case, it must be assumed that the evidence adduced upon the trial supports the findings of fact as made by the trial court. Moreover, the answer of the defendants does not purport or pretend to deny the allegations of the plaintiff's complaint, and therefore those allegations must be deemed to be admitted.

The findings of fact are in accord generally with the admitted allegations of the plaintiff's complaint and the admitted facts of the defendants' answer, all of which support the findings of the trial court, and they in turn support the judgment.

The judgment appealed from is therefore affirmed.

We concur: MURPHEY, J., pro tem.; HALL, J.



21 Cal. App. 85

**KINARD v. WARD. (Civ. 1,121.)**

(District Court of Appeal, First District, California. Feb. 4, 1913.)

**1. MINES AND MINERALS (§ 104\*)—RIGHTS OF STOCKHOLDERS—ACTION—COMPLAINT.**

Under Civ. Code, §§ 589, 590, providing that a stockholder of a mining corporation shall be entitled to an order of the president directing the superintendent to exhibit the mine property, and declaring that, for the president's refusal, the stockholder may recover the sum of \$1,000 and costs from such president, a complaint to recover the penalty was not defective for failure to allege specific damage.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 228; Dec. Dig. § 104.\*]

**2. MINES AND MINERALS (§ 104\*)—MINING PROPERTY—EXAMINATION BY STOCKHOLDER—DEMAND—"THOSE IN CHARGE."**

Under Civ. Code, §§ 589, 590, requiring the president of a mining corporation to give to a stockholder, on application, an order on the superintendent commanding him to exhibit the mining property to the stockholder, and imposing a penalty for refusal to do so, an application for an order on "those in charge" of the mining property of the corporation named was not fatally defective because it did not demand an order on the superintendent; the superintendent being, as a matter of definition, the person or officer "in charge."

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 228; Dec. Dig. § 104.\*]

**3. MINES AND MINERALS (§ 104\*)—REGULATION—EXAMINATION BY STOCKHOLDERS—STATUTES—WRITTEN DEMAND.**

Civ. Code, § 589, providing that any stockholder of a mining corporation is entitled to visit, accompanied by his expert, and examine the mines owned by the corporation, and that, when such stockholder applies to the president, he must immediately cause the secretary to deliver to the applicant an order to the superintendent commanding him to show such parts of the mines as the party named in the order may desire to examine. *Held*, that the president of a mining corporation could not decline to issue an order granting a right of a stockholder to inspect the mine because the form of order submitted with the application provided for "visiting and examining the mining property and its affairs," since the president could have properly ignored the form presented and granted the application in any form which would have accomplished its purpose.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 228; Dec. Dig. § 104.\*]

**4. MINES AND MINERALS (§ 104\*)—MINING CORPORATION—STOCKHOLDERS' RIGHTS—VISITATION.**

Civ. Code, § 589, giving the stockholders of mining corporations the right to visit and examine the company's mines with an expert, on an order to be issued to the mine superintendent by the secretary of the corporation at the instance of the president, does not require either that the application for the order or the order from the president to the secretary shall be in writing, or that either comply with any fixed standard of sufficiency.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 228; Dec. Dig. § 104.\*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by C. E. Kinard against James W.

Ward. Judgment for plaintiff, and defendant appeals. Affirmed.

Crittenden Thornton and Nowlin & Fassett, all of San Francisco, for appellant. James H. Boyer, of San Francisco, and C. E. Kinard, in pro. per., for respondent.

MURPHEY, Judge pro tem. The action was prosecuted under sections 589 and 590 of the Civil Code. These sections, in so far as they relate to the subject-matter of this litigation, are as follows:

"Sec. 589. Any stockholder of a corporation formed under the laws of this state for the purpose of mining is entitled to visit, accompanied by his expert, and examine the mine or mines owned by such corporation and every part thereof, at any time he may see fit; and when such stockholder applies to the president of such corporation he must immediately cause the secretary thereof to issue and deliver to such applicant an order, under the seal of the corporation, directed to the superintendent, commanding him to show and exhibit such parts of said mine or mines as the party named in said order may desire to visit and examine.

"Sec. 590. In case of the refusal or neglect of the president to cause to be issued by the secretary the order mentioned in section 589, such stockholder is entitled to recover against said president the sum of one thousand dollars and costs as provided in the last section."

[1] Defendant questions the sufficiency of the complaint on the ground that it contains no specific allegation of damage. The failure and refusal of the defendant to comply with the statutory requirements above set out is aptly pleaded. The prayer asks for the \$1,000 penalty named in the statute. This is manifestly sufficient. No case has been called to our attention wherein the exact point has been discussed for the reason, in all probability, that the point is so evidently untenable that it has not heretofore been called to the attention of the appellate tribunal.

[2] Plaintiff, as a stockholder, made formal written demand upon the defendant, as president of the Socrates Consolidated Mining Company, for an order on the secretary requiring him to issue the necessary permit and order on "those in charge of the mining property of the Socrates Consolidated Mining Company," to permit him to visit and examine the mines and mining claims, etc. Defendant contends that the use of the words "those in charge," rather than the word "superintendent," as used in the statute, is fatally defective. To sustain this extremely technical contention would be to make the statute a plaything in the hands of designing officials of mining corporations. A complete evasion of the statute could be effected by substituting some other title, such

as "manager" or "foreman," for that of superintendent, as applied to the chief executive officer in charge of the property or works of a corporation. The superintendent is, as a matter of definition, according to standard authority, the person or officer "in charge."

[3] Complaint is also made that the written form of order submitted with the application directed the secretary to issue an order or permit for "visiting and examining the mining property and its affairs" was improper and beyond anything contemplated by the statute. The answer to this is that no such form of order was required, and that the president could, with propriety, have ignored this form and granted the application in any verbiage satisfactory to himself that would have accomplished its purpose.

[4] There is nothing in the statute requiring either that the application for the order or the order from the president to the secretary shall be in writing, or that either shall measure up to any fixed standard of sufficiency. We are entirely satisfied that the application in this case was sufficient, and that the president's refusal to comply therewith subjected him to the penalty prescribed by the statute.

No other points are made for a reversal. The findings are responsive to all the issues raised, and fully support the judgment.

The judgment is affirmed.

We concur: LENNON, P. J.; HALL, J.

(21 Cal. App. 112)

# ENGEL v. EHRET.

ENGEL v. EHRET et al. (Civ. 1,126.)

(District Court of Appeal, First District, California. Feb. 6, 1913.)

## 1. APPEAL AND ERROR (§ 82\*)—ORDERS APPEALABLE—ORDER TAXING COSTS AFTER ENTRY OF JUDGMENT.

An order taxing costs, made after entry of judgment, is a special judgment from which an appeal will lie.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 379-385, 414, 416, 478, 479, 482, 483, 517-522; Dec. Dig. § 82.\*]

## 2. WITNESSES (§ 24\*)—FEES—MILEAGE.

The right of a witness to mileage and other fees in civil cases is solely of statutory creation.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 44-49; Dec. Dig. § 24.\*]

## 3. WITNESSES (§ 29\*)—FEES—MILEAGE—STATUTES.

Under Pol. Code, § 4300g, allowing as witnesses' fees mileage actually traveled one way only, there is no justification for the practice of the local courts of refusing mileage to witnesses residing in San Francisco; that being a matter entirely within the legislative control, and over which the court can exercise no discretion.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 67-69; Dec. Dig. § 29.\*]

## 4. COSTS (§ 154\*)—ITEMS OF DEPOSITION NOT USED.

While the allowance of costs for depositions is governed by the Code, the disallowance of costs for taking the depositions of witnesses,

who testified at the trial, was not an abuse of the trial court's discretion.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 596-604; Dec. Dig. § 154;\* Depositions, Cent. Dig. §§ 340-342.]

## 5. CONSTITUTIONAL LAW (§ 248\*)—LIBEL AND SLANDER (§ 129\*)—EQUAL PROTECTION OF LAW — ATTORNEY'S FEES IN ACTIONS FOR LIBEL AND SLANDER.

St. 1871-72, p. 533, providing that, in actions for libel and slander, the party recovering judgment shall be allowed \$100 costs to cover counsel fees, does not conflict with the constitutional guaranty of equal protection of the laws, since all litigants in such cases are placed upon an equal footing.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 703; Dec. Dig. § 248;\* Libel and Slander, Cent. Dig. § 379; Dec. Dig. § 129.\*]

Appeals from Superior Court, City and County of San Francisco; John Hunt, Judge.

Actions by Albert M. Engel against John C. Ehret and against Dora Ehret and John C. Ehret, her husband. Verdict for defendants, and from orders striking out items of their cost bills for mileage, for taking a deposition, and for an attorney fee, defendants appeal. Orders as to items of mileage and attorney fee reversed, and order as to deposition affirmed.

Fabius T. Finch, Paul F. Fratessa, and William M. Gibson, all of San Francisco, for appellants. Carl E. Lindsay and Emil Liess, both of San Francisco, for respondent.

MURPHEY, Judge pro tem. Plaintiff brought an action against John C. Ehret for slander, claiming that Ehret had told one Tonna that he (Engel) burnt his house down to get the insurance. Plaintiff also brought another action against Mrs. Ehret, wife of the defendant in the first action, in which the husband was joined as defendant, claiming that Mrs. Ehret had made similar statements to a Mrs. Roehrer. The actions were consolidated and tried together before the same jury, resulting in a verdict for the defendant in each case.

A cost bill was filed by defendant in each of the cases, and the appeals are from the orders taxing costs. Objection is made to the orders of the trial court striking out three several items in each of the cost bills as follows: (1) The court struck out all items of mileage paid to defendant's witnesses "upon the ground that it was the practice of said court not to allow mileage when the witnesses reside in San Francisco, notwithstanding the fact that said witnesses traveled the distance charged for in said cost bill." (2) Item for taking deposition of John Tonna, the person to whom the slanderous statement is alleged to have been made, "upon the ground that said deposition was not used at the trial, and because said John Tonna appeared at said trial and testified in person." (3) Item of attorney fee allowed by statute, "upon the ground that the act allowing said attorney's fee is unconstitutional, for the reason set forth in Builders' Supply Depot v. O'Con-



nor, 150 Cal. 265 [88 Pac. 982, 119 Am. St. Rep. 193, 11 Ann. Cas. 712]."

[1] We will first dispose of the respondent's contention that the order is not an appealable order, not being classified, as counsel assert, as a "special order made after final judgment"; and they invoke *Quitow v. Perrin*, 120 Cal. 255, 52 Pac. 632, to support their position. In that case the real question determined was as to the allowance of costs, where the amount recovered is less than \$300. The court, however, basing its conclusions on *Fairbanks v. Lampkin*, 99 Cal. 429, 34 Pac. 101, uses this language: "Having allowed costs in the first instance in the judgment [without fixing the amount], the subsequent proceedings, it seems to us, have relations to the original or final judgment, and became part of it, and the error may be corrected on the appeal from it." That case is expressly overruled in *Harron v. Harron*, 123 Cal. 508, 56 Pac. 334. In that case the superior court made an order requiring defendant to pay plaintiff \$140 for counsel fees and \$40 costs in order to enable plaintiff to prosecute an appeal to the Supreme Court from the judgment in favor of defendant. The court says: "The order appealed from is a special order made after final judgment, but is none the less an order made in a case in equity, and is equally within the appellate jurisdiction of this court as the judgment itself"—citing Const. art. 6, § 4: "The Supreme Court shall have appellate jurisdiction in all cases in equity, except such as arise in justices' courts; also in all cases at law \* \* \* in which the demand \* \* \* amounts to \$300." "Under this provision of the Constitution," continues the court, "this court has appellate jurisdiction in all cases in equity, irrespective of the value of the property in controversy." The court then says: "The correctness of the decision of *Fairbanks v. Lampkin*, supra, was never brought before the court in bank; and, as it establishes no rule of conduct or of property, we have less hesitation in holding that, to the extent that it is inconsistent with the views here expressed, it is not to be regarded as an authority."

*Caffey v. Mann*, 3 Cal. App. 124, 84 Pac. 424, was a direct appeal from an order of court striking out items of a cost bill. The respondent objected that the court had no jurisdiction, as the amount of costs claimed did not amount to \$300. The court disposes of this contention by citing *Harron v. Harron*, supra, to the effect that that case overrules earlier cases holding that the amount of the cost bill governs jurisdiction.

The direct point in controversy here was passed upon in *Elledge v. Superior Court*, 131 Cal. 279, 63 Pac. 360. The respondent superior court made an order cutting down the amount of the cost bill of the prevailing party. Petitioner obtained a writ of review to annul the order on the ground that the

court had no jurisdiction to make the order. The Supreme Court said: "The order sought to be annulled was a special order made after final judgment previously given. \* \* \* Although the cost bill is referred to as the basis of this action, the order of the court applies to the judgment and not to the cost bill. The order could have been reviewed *either upon an appeal taken directly therefrom*, independent of an appeal from the judgment, or its correctness could have been determined upon an appeal from the judgment as modified, in accordance with its terms. *Being an appealable order*, it cannot be reviewed upon a writ of *certiorari*" (the italics are ours)—and citing *Southern Cal. Ry. Co. v. Superior Court*, 127 Cal. 417, 59 Pac. 789, where the same rule was specifically declared. So that it may be safely asserted that it is the settled rule in this state that an order taxing costs made after entry of judgment, as the record discloses the situation to be in the case at bar, is a special order from which an appeal will lie.

[2, 3] The first point made for reversal is that the court struck out all items of mileage, as it was the practice of the court to refuse mileage of witnesses residing in San Francisco. The section of the Code, in so far as it is applicable to the subject-matter under discussion and is determinative of that point, is as follows: Political Code, § 4300g: "Witness fees except as in this title otherwise provided \* \* \* mileage actually traveled, one way only, per mile 10 cents."

"The right of a witness to mileage and other fees in civil cases is primarily and solely of statutory creation." *Naylor v. Adams*, 15 Cal. App. 353, 114 Pac. 997.

While this practice of the court is no doubt very gratifying to defeated litigants, it is correspondingly unfair to witnesses who, by the mandate of the court, are compelled to leave their personal pursuits and assist in determining controversies in which they have no individual interest or concern. There is no justification or warrant in the law for this "practice." A mere reading of this statute affords an unanswerable confirmation of this view. If the no mileage limitation may be carried by arbitrary construction of the court to the exterior boundaries of the city, why not to the exterior boundaries of the township or any other territorial subdivision of the county? There is as much reason and logic to sustain the one position as the other. These are matters entirely within the legislative control and over which the courts exercise no discretion.

[4] As regards the action of the trial court in striking out the item of costs expended in taking the depositions of witnesses who appeared and testified at the trial, we are unable to say from the record that there was an abuse of discretion.

Appellants cite *Jacobi v. Baur*, 55 Cal. 554,

as taking this class of cases out of the statutory rule as to costs; and Libel and Slander Act, Hennings' General Laws of Cal. § 7, p. 688, as stating that the prevailing party "shall recover his actual costs." Neither of these citations measures up to the claims of counsel. In *Jacobi v. Baur* the court says that the law "does not give plaintiff, recovering judgment, any costs beyond the amount allowed by general law as provided in the Code of Civil Procedure." The Libel and Slander Act provides that the prevailing party "shall be allowed one hundred dollars (\$100) to cover counsel fees in addition to the other costs." The question is manifestly covered and governed by the Code provisions, and the court was clearly acting within its discretionary powers in determining the matter adversely to appellants' contention.

[5] The last point discussed is with reference to the validity of the item of the \$100 attorney's fee. The trial court disallowed this item "upon the ground that the act allowing said attorney's fee is unconstitutional for the reasons set forth in *Builders' Supply Depot v. O'Connor*, 150 Cal. 265, 88 Pac. 982, 119 Am. St. Rep. 193, 11 Ann. Cas. 712. The reasoning of that case is not applicable to the case at bar, either as to the facts or the law. In holding the provision for an attorney's fee unconstitutional in *Builders' Supply Depot v. O'Connor*, supra, the Supreme Court said: "It is to be noticed that this section [referring to section 1195, Code Civ. Proc.] provides for an attorney's fee to the plaintiff, but not to the defendant, even though the latter be successful in the action; and that attorney's fees are allowed even to plaintiff only in actions under the *mechanics'* lien law [our italics]; the general rule being that the measure and amount of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties. Code Civ. Proc. 1021. This provision is in our opinion violative both of the federal and state Constitutions, of the fourteenth amendment of the former, which guarantees to every person the 'equal protection of the law,' and of the provisions of the state Constitution which provide that general laws shall be uniform, prohibit special laws. \* \* \* A statute which gives an attorney fee to one party in an action

and denies it to the other, and allows such fee in one kind of action and not in other kinds of actions where, as in the statute here in question, the distinction is not founded upon a constitutional or natural difference, is clearly violative of the constitutional provisions above noticed."

Section 7 of an act entitled, "An act concerning actions for libel and slander" (Stats. 1871-72, p. 533), provides: "In case plaintiff recovers judgment he shall be allowed as costs one hundred dollars (\$100) to cover counsel fees, in addition to the other costs. In case the action is dismissed or the defendant recovers judgment, he shall be allowed one hundred (\$100) dollars to cover counsel fees, in addition to the other costs, and judgment therefor shall be entered accordingly." It is manifest that this section is not subject to the "equal protection of the law" objection, as all litigants in this class of cases, whether plaintiff or defendant, are placed upon an equal footing. Had the section of the Code, providing for attorneys' fees in *mechanics'* lien cases, been drawn sufficiently broad to cover the entire class of lien actions, we think it would be a reasonable inference, from the language above quoted, to conclude that the objection as to want of uniformity would not have been made. However, it is unnecessary to discuss this matter further. The direct point in controversy was raised in this court (third district) in the case of *Carpenter v. Ashley*, 16 Cal. App. 302, 116 Pac. 983. It was there insisted, as here, that the statute allowing an attorney's fee is unconstitutional; and there, as here, the burden of sustaining the contention was thrown upon the case of *Bunders' Supply Depot v. O'Connor*, supra. The court held the statute constitutional, and affirmed the action of the superior court taxing the attorney fee as costs against the losing party. A petition to have the case heard in the Supreme Court was denied thus finally determining the matter in so far as this court is concerned.

The orders of the superior court, disallowing the items of mileage and attorney's fee in each case is reversed, and affirmed as to the item of costs for taking deposition.

We concur: LENNON, P. J.; HALL, J.

















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